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A Legislative Suggestion on an Heir's Qualified Acceptance of Succession, Separation of Inherited Property, and Bankruptcy Procedure for Inherited Property*

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Abstract

A legislative suggestion on an heir's qualified acceptance of succession, separation of inherited property, and bankruptcy procedure for inherited property. In this article, I review the legislation on an heir's qualified acceptance of succession, separation of inherited property, bankruptcy procedure for inherited property. The current Korean system has the following problems. (i) It is difficult for the heir to identify the inheritance debt before choosing whether to inherit and how to inherit. (ii) There are not so many options for an heir to exercise. (iii) The separation of the inherited property and the heir's property is not symmetrical and thorough. (iv) The liquidation of inherited property according to the heir's qualified acceptance of succession has several problems, in terms of both efficiency and equity. To solve these problems, I suggest the following amendments: First, a public inventory system should be created to help the heir identify the inheritance debt before choosing the inheritance form. This system can also increase the heir's options. Second, the heir's qualified acceptance of succession and separation of inherited property should be integrated to create a new liquidation system for inherited property, in which a third-party liquidator separates and liquidates only the inherited property when it is not over-indebted. Third, if the inherited property is over-indebted, the liquidation process should be unified into the bankruptcy procedure. Fourth, the deficiencies in the current bankruptcy procedure for inherited property should be improved by giving the creditors of the heir the right to file for bankruptcy, establishing a simple and inexpensive bankruptcy procedure, and recognizing the effect of separation of two properties (the inherited property and the heir's own property) fully and automatically. Fifth, during the period in which the heir can exercise his or her option for the inheritance, the inheritance creditors should be prohibited from acquiring the execution title against the heir, and the execution of the heir's creditors against the

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inherited property should also be prohibited. A preservative measure for inheritance creditors and the heir's creditors, however, should be allowed.

KEYWORDS: Heir's Qualified Acceptance of Succession, Separation of Inherited Property, Bankruptcy Procedure of Inherited Property, Heir's Bankruptcy Procedure, Symmetrical and Thorough Separation of Properties, Equitable and Efficient Liquidation of Inherited Property

I. Introduction

Under Korean law, the principle for succession of rights and obligations by inheritance is succession by operation of law and universal succession (Article 1005 of the Civil Code of the Republic of Korea; the citation of this Code is omitted hereinafter in parentheses). In other words, even when additional legal requirements for the assignment of rights (e.g., registration in the case of real estate, and notifying the debtor in the case of claim transfer) are not met, succession by inheritance (succession by operation of law) is recognized, and partial succession of inheritance property is not allowed (universal succession).[1] According to the principle of succession by operation of law and universal succession: (i) the heir's sole executable property consists of the inherited property combined with the heir's own property, (ii) the heir bears the burden of liability for inheritance creditors and heir's own creditors from his or her sole executable property, and (iii) inheritance creditors and heir's own creditors have the same level of repayment priority as ordinary creditors.

Nonetheless, these principles do not apply to a qualified acceptance of succession, separation of inherited property, or bankruptcy procedure for the inherited property. In a qualified acceptance of succession (Articles 1028 through 1040), "the heir bears limited liability to the inheritance creditors within the scope of the inherited property," while under separation of inherited property (Articles 1045 through 1052) or bankruptcy procedure of inherited property (the applicable provisions are scattered in the Debtor Rehabilitation and Bankruptcy Act, hereinafter, DRBA), the inherited

1) JINSU YUNE, CHINJOKSANGSOKBEOBGANGUI [FAMILY INHERITANCE LAW LECTURE] 301 (2nd ed. 2018) (In Korean).

property and the heir's own property are separated as two independent executable properties. There are many studies on the interpretation of current system for a qualified acceptance of succession. However, there is insufficient discussion on whether a current system of a qualified acceptance of succession needs to be improved from the perspective of a legislative suggestion. There are few studies on the separation of inherited property or the bankruptcy procedure of inherited property, since they are not often used in practice.

Qualified acceptance of succession, separation of inherited property, and bankruptcy procedure for inherited property have similar, overlapping, or closely-related functions. Hence, it is necessary to review them all together, instead of individually. This article discusses a legislative suggestion on an heir's qualified acceptance of succession, separation of inherited property, and bankruptcy procedure for inherited property. This article begins by reviewing the problems of the current system and their causes (II). Then, it makes suggestions on better designing the heir's qualified acceptance of succession, separation of inherited property, and bankruptcy procedure for inherited property (III).

II. Starting Point: Questioning the Current System

Once an inheritance procedure is initiated, three types of stakeholders (inheritance creditors/heir[2]/heir's own creditors) emerge around the inherited property and heir's own property. In principle, the option to accept the inheritance or choose the succession method lies with the heir. Nevertheless, the heir, inheritance creditors, and heir's own creditors will have different interests on whether to accept the inheritance, the succession method, and the inherited property liquidation method. Does the current law fairly mediate among such conflicting interests?

2) The legal relationship may vary when there is only one heir or multiple co-heirs. In this paragraph, it is assumed that there is only one heir for the sake of discussion.

1. Whether the Heir's Option is Guaranteed in Practice

The principle is that the heir assumes the universal succession of inherited property (positive property + negative property) by operation of law regardless of his or her desire to do so. However, the heir could choose to give up the inheritance or opting for a qualified acceptance of succession within 3 months of being made aware of the initiation of the inheritance procedure (Article 1019.1). If the heir gives up the inheritance, he or she is no longer the heir retroactively up until the initiation of the inheritance procedure (Article 1042), and if the heir chooses a qualified acceptance, then he or she assumes universal succession for the inheritance debt while his or her executable property for the inheritance debt is limited within the scope of the inherited property (Article 1028). In other words, the option to accept inheritance or choose the succession method is guaranteed to the heir by law so that he or she is not harmed by the inheritance.

For the heir to exercise his or her option properly, the heir must be fully informed about the positive property and negative property before exercising the option (Proposition 1). If the heir fills out the positive and negative property in detail on the application form for qualified acceptance of succession or the bankruptcy procedure of the inherited property based on sufficient information, it also helps move the liquidation procedure faster. It is not difficult for the heir to verify positive property, such as real estate, savings, and listed stock, because a public or financial institution can provide assistance (However the heir must on his or her own try to verify positive inheritance property, which exists in the form of a claim to an individual debtor). In contrast, it is difficult for the heir to verify negative property except for debt owed to financial institutions or tax debt. While Article 1019.2 states that the heir can investigate the inheritance property before accepting (absolute acceptance and qualified acceptance) or giving up inheritance, it does not say anything about any specific procedure or method. Meanwhile, the Civil Code is more specific about the public notice or notification for the inheritance creditors, repayment procedure, and heir's liability to not-notified creditors after the heir chooses qualified acceptance of succession (Articles 1032 through 1039). To guarantee the heir's option more practically, is it not necessary to

prepare the public notice or notification for inheritance creditors before the heir exercises his or her option to help the heir to find out the details of the inheritance debt?

Once the heir receives enough information about the inherited property, it is important to provide the heir with the different inheritance methods unless it harms third parties, such as inheritance creditors or the heir's creditors (Proposition 2). Regarding the inheritance methods, the heir can have different preferences, which must be respected unless it harms other stakeholders or causes any negative external effect for society as a whole (private autonomy in inheritance). Korean law allows three options: absolute acceptance, qualified acceptance, and giving up inheritance. Is it possible to add other inheritance methods to these three choices and guarantee the heir's option?

2. *Whether the Liquidation Method and the Form of Separation of Inherited Property are Desirable*

If the inherited property or the heir's own property is over-indebted, it is desirable to separate the two, and if not, the inherited property and the heir's property must be separated too as long as the heir desires so (Proposition 3). Once the separation of inherited property occurs, it is important to ensure that the inheritance creditors precede the heir's creditors in the claim for the inherited property, while the heir's creditors precede inheritance creditors in the claim for the heir's own property (Proposition 4). In addition, the liquidation of inherited property must be done quickly, efficiently, and fairly (Proposition 5). It is not desirable for the liquidation procedure to be costly. During liquidation, the interests of inheritance creditors must be protected as much as possible, and liquidation should not give any inheritance creditor an unfair advantage or disadvantage. Under the current law, while Propositions 3 and 4 are followed through to a large extent, there are limitations. Proposition 5 is not followed through well.

1) Bankruptcy Procedure for Inherited Property

In the event that the inherited property is over-indebted, any inheritance creditor, legacy recipient, heir, inherited property

administrator, or executor of a will may file for the bankruptcy procedure of the inherited property (Articles 299.1 and 307 of the DRBA). The inherited property administrator, executor of a will, and the heir after a qualified acceptance of succession or separation of inherited property have an obligation to file for the bankruptcy procedure of the inherited property (Article 299.2 of the DRBA). The heir's creditors have no authority to file for a bankruptcy procedure of inherited property; they can only file for a separation of inherited property (Article 1045). Once the bankruptcy procedure of inherited property is initiated, inheritance creditors may exercise their right to the inherited property (bankruptcy estate) as bankruptcy creditors but the heir's creditors cannot exercise any right to the inherited property (Article 438 of the DRBA). If bankruptcy is declared for the inherited property, the heir is principally assumed to have chosen a qualified acceptance of succession (Article 389.3 of the DRBA), and therefore, the heir does not assume liability for any inheritance claim with his or her own property though such creditors do not get full repayment from the liquidation of the inherited property. A symmetrical and thorough separation of properties is achieved, and Proposition 4 is fulfilled. However, if the bankruptcy procedure of inherited property has no effect as a qualified acceptance of succession and no bankruptcy is declared for the heir himself or herself, it places inheritance creditors and the heir's creditors on the same level of seniority for the heir's own property (reverse interpretation of Article 445 of the DRBA). In such cases, a symmetrical and thorough separation of properties is not fulfilled. To put it another way, bankruptcy declaration for the heir is additionally required for a thorough separation. As such, it is needed to review whether it is reasonable to additionally require bankruptcy declaration for the heir or whether it is desirable to acknowledge heir's creditors' priority for the heir's own property—without bankruptcy declaration for the heir—like the separation of inherited property (Article 1052.2) once the bankruptcy procedure of inherited property begins.

If the heir's property is over-indebted, the bankruptcy procedure for the heir may be initiated as filed by the heir or the heir's creditors (Article 294.1 of the DRBA). If bankruptcy is declared for the heir, a symmetrical and thorough separation of properties can be achieved. This is because if bankruptcy is filed for the heir within the bankruptcy filing period for

inherited property (as defined in Article 300 of the DRBA), the heir's creditors' claims take precedence in the heir's own property while inheritance creditors and legacy recipients' claims take precedence in the inherited property (Article 444 of the DRBA). If the heir's own property is over-indebted, inheritance creditors do not have the authority to file for bankruptcy regarding the heir but can file for a separation of inherited property (Article 1045).

2) Separation of Inherited Property

Where the inheritance is not given up, or there is no qualified acceptance of succession, nor bankruptcy procedure on the inherited property even though it is over-indebted, the heir's creditors have no choice but to separate the inherited property. Furthermore, if no bankruptcy has been declared for the heir even when the heir has more debt, it leaves inheritance creditors with no choice but to separate the inherited property. Separation of inherited property provides practical benefits in both the above cases. If there is separation of inherited property, the heir's creditors cannot claim the inherited property as executable property (if the inherited property is real estate, registration is required to argue for the effect of separation; Article 1049). Furthermore, inheritance creditors and persons receiving the legacy can receive repayment only from the heir's own property if they cannot be fully repaid from the inherited property (Article 1052.1). In such cases, the heir's creditors have the right to receive repayment from the heir's own property before other creditors (Article 1052.2). Hence, under separation of inherited property, Proposition 4 is fulfilled anyway. However, separation of inherited property also has some problems. Article 1052 does not apply to inheritance creditors or legacy creditors not reported in the report period that the heir is not aware of. As they do not have any priority in the inherited property, some suggest that they are on the same level as the heir's creditors for the heir's own property.[3)] When viewed from this perspective, however, separation of inherited property is not effective for the heir's creditors. Since the heir after the separation has the obligation to file for the bankruptcy procedure of the inherited property (Article 299.2 of the DRBA) and the heir's creditors have priority in the heir's own property after bankruptcy is declared, the heir's creditors can recoup their losses through equal repayments from the heir

who has not filed for bankruptcy procedure of the inherited property, thus breached his or her duty. Despite this, the heir could also be insolvent, and it may not be reasonable to seek such an impractical remedy. It is worth considering how to fulfil Proposition 4 in the above scenario.

3) Qualified Acceptance of Succession

Regardless of whether the inherited property is over-indebted, the heir could limit his executable property for inheritance creditors through a qualified acceptance of succession (Proposition 3). The executable property for inheritance creditors is limited to the inherited property, and the heir's own property is executable property only for the heir's creditors. Under qualified acceptance of succession, however, the separation of inherited property is not entirely fulfilled. The creditors of the heir who chooses qualified acceptance cannot push ahead with a compulsory execution for inherited property as executable property for their claim, when the claim of inheritance creditors have not been satisfied from the inherited property, which places inheritance creditors ahead of the heir's creditors.[4] This is a desirable outcome from Proposition 3. But the heir who chooses qualified acceptance may validly set security right (collateral) for the heir's creditors to the inherited property,[5] even if the heir's creditors are aware of the qualified acceptance or the fact that their fixed collateral may harm inheritance creditors.[6] In other words, the heir's own disposition can put the heir's creditors ahead of inheritance creditors for the inherited property, which subsequently does not lead to a symmetrical and thorough separation of properties. This is inevitable under the current legal interpretation. There is no provision that limits the heir's disposition for the inherited property after a qualified acceptance of succession, which is not made public on the register of the inherited real estate. It is not balanced to view the transfer of inherited property by a person choosing qualified

3) S. Lee, *Sangsokjaesaneui Bulli [Separation of Inherited Property]*, 78 Jaepanjaryo [Ct. Documentation] 171 (1998) (In Korean).

4) Supreme Court [S. Ct.], 2015Da25074, May 24, 2016 (S. Kor.).

5) Supreme Court [S. Ct.], 2007Da77781, Mar. 18, 2010 (S. Kor.).

6) However, inheritance creditors may file a lawsuit to avoid such fraudulent acts against the heir's creditors for whom a fixed collateral is set.

acceptance of succession as valid, while considering setting fixed collateral for the inherited property to be invalid.

However, from a legislation point of view, such conclusions are not desirable because it puts inheritance creditors at a disadvantage and does not treat inheritance creditors and heir's creditors fairly. The current system fails to protect inheritance creditors from the risk that allows the heir to dispose of the inherited property at his or her discretion.

In reality, it is rare that proportional repayment is made under the procedure of qualified acceptance of succession, and the procedure is often used to limit the executable property of the heir. Article 1037 requires an auction procedure under the Civil Execution Act if the heir wants to monetize the inherited property during the procedure of qualified acceptance, but it could cost much more than selling the property at the heir's discretion outside court procedure. Moreover, as some inheritance creditors could seek individual execution for the inherited property during the procedure of qualified acceptance, it does not guarantee a fair repayment between inheritance creditors.[7] Even though Article 1038 (Liability Arising from Unfair Repayment, etc.) holds the heir liable for compensating for damages to inheritance creditors, it cannot be sufficient to correct unfair repayment, because creditors may not be fully compensated for damages due to their own comparative negligences, or the heir himself or herself may be insolvent. Fundamentally, it calls into question whether it is reasonable to put the heir in charge of liquidation. Considering the expertise, fairness, and experience of a person choosing qualified acceptance of succession, it is difficult to expect that person to complete the liquidation procedure legitimately, and there is no incentive either because it is unlikely that the inherited property still remains after proportional repayment. There is no system that publicly notifies a qualified acceptance of succession and it cannot be indicated on the register. Accordingly, a third party that does not know that the property is inherited could face unforeseen harm. Unlike the bankruptcy procedure, there is no system that considers avoidance power or limiting the set-off for the procedure of

7) If the liquidation procedure arising from qualified acceptance of succession coexists with individual execution procedures from inheritance creditors, it causes a complex problem of "mediating" between both types of procedures.

qualified acceptance. In other words, qualified acceptance of succession is an incomplete liquidation system in terms of efficiency and fairness. In terms of ensuring a fair liquidation, the bankruptcy procedure for the inherited property is better than a qualified acceptance of succession. In reality, however, the bankruptcy procedure is not used very often. While the heir after a qualified acceptance bears the obligation to file for bankruptcy on the inherited property (Article 299.2 of the DRBA), those obligations are not fulfilled properly in practice.[8)]

3. Sub-Conclusions

To explore a desirable legislative suggestion for qualified acceptance of succession, separation of inherited property, and bankruptcy procedure of inherited property, it is needed to consider: (i) whether to prepare a system that helps acquire information on inheritance debt in advance to guarantee the heir's option (Proposition 1), (ii) whether to give another choice to the heir in addition to absolute acceptance, qualified acceptance, and giving up inheritance (Proposition 2), (iii) how to achieve a symmetrical and thorough separation of properties (Propositions 3 and 4), and (iv) how to design an efficient and fair inherited property liquidation system (Proposition 5).

III. Proposed Legislative Suggestion

1. Making Qualified Acceptance of Succession as a Default Principle?

Some argue that it is desirable to make qualified acceptance of

8) Since July 2017, the Seoul Family Court sends instructions on the bankruptcy procedure on inherited property to heirs when it adjudicates on the reporting of qualified acceptance of succession, and the Seoul Bankruptcy Court gives directions on how to file for bankruptcy procedure on inherited property on its website and New Start Consultation Center. Since then, the number of applications for bankruptcy procedure on inherited property filed with the Seoul Bankruptcy Court has increased quite substantially. *See* Ju-mi Kim, *Sangsokjaesanpasaneui Silmusang Jaengjeom Yeongu — Pasanjaedangwa Jayujaesan, Sangsokbiyonggwa Jaedanchaegwon, Minsasosonggwaeui Gwangye Deungeul Jungsimeulo [A Study on the Practical Issues of Bankruptcy of Inherited Estate]*, 733 Kor. Lawyers Assn. J. 310 (2019) (In Korean).

succession as a default principle once inheritance is initiated, although there is no qualified acceptance being reported by the heir or a separation of inherited property filed by inheritance creditors or heir's creditors.[9] Others also argue that it is necessary to legislate qualified acceptance of succession as a default principle when the heir is a minor.[10] For instance, Taiwan amended its Civil Code in 2009 to recognize qualified acceptance of succession as a principal form of inheritance (Article 1148.2 of the Civil Code of Taiwan), and this amendment was made to address many cases where the minor heir acquired a large amount of inheritance debt as they could not choose qualified acceptance of succession or giving up inheritance.[11]

However, the procedure for a qualified acceptance, which accompanies the investigation of positive and negative properties and the separation and liquidation of executable property, entails a lot of time and cost unlike in case of absolute acceptance. Even though the heir chooses absolute acceptance in most of the inheritance situations, requiring all inheritance cases to go through the procedure of qualified acceptance results in unnecessary transaction cost. It increases the burden for not just the heir but also the country. Hence, it is not necessary to change the current law, which regards absolute acceptance as a default form of inheritance. Still, it is needed to protect minor heir(s). It would be reasonable to prepare legal requirements (Article 507-1.1 of the Civil Code of France, Article 638.2 of the Civil Code of Quebec, Canada) to (i) require a minor's legal representative to obtain approval from the family court before approving on behalf of or representing a minor for his or her absolute acceptance or (ii) allow a minor's legal representative to only choose qualified acceptance of succession.

Even though qualified acceptance of succession is not viewed as a

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9) Yun-jik Gwak, Sangsokbeob [Inheritance Law] 183-185 (2001) (In Korean); Dong-sup Park, Chinjoksangsokbeob [Family Inheritance Act] 606-607 (4th ed. 2013) (In Korean).

10) H. Song. *Sangskoe Isseoseo Miseongnyeonja Boho [Protecting Minor Heirs in Inheritance]*, 24(3) Korean J. of Family L. 180-186 (2010).

11) Syouzihoumukennkyuukai [Commercial Law Research Association], *Kakkokunosouzok uhouseinikannsurutyousakennkyuugyoumuhoukokusyo [Survey and Research Report on the Legal System of Various Countries]*, 234, http://www.moj.go.jp/content/001128517.pdf (2014) (In Japanese).

default principle, it is a fair liquidation method when inheritance creditors and legacy creditors get repaid first from the inherited property, while the heir's creditors receive repayment first from the heir's own property (Proposition 4). Hence, when interested parties prefer such a liquidation method and there is a reasonable reason for such a preference, it would be justifiable to deviate from a strict adherence to absolute acceptance as a default principle, allowing the separation and liquidation of each executable property (Proposition 3).

2. *From Qualified Acceptance of Succession to Inherited Property Inventory System*

It is important to allow the heir to ascertain the size of the inheritance debt before exercising his or her option for inheritance, that is, deciding whether to give up the inheritance (Proposition 1). It is possible to counterargue this proposition by saying that the heir's option is not infringed upon under the current system since the heir who does not know the exact size of the inheritance debt can choose qualified acceptance of succession. According to this counterargument, however, the heir is deprived of the opportunity to give up the inheritance. Although it is discovered that inheritance debt exceeds the positive inheritance property during the procedure of qualified acceptance, the heir has already chosen qualified acceptance and can no longer give up the inheritance.[12] There is no logical reason to put in place a system that identifies inheritance creditors before allowing the heir to give up his or her inheritance. However, the heir would usually prefer to ascertain the inheritance debt earlier than later. Therefore, it would be desirable to allow for preparing an

12) As long as the heir can choose qualified acceptance, it is not likely that the heir suffers a disadvantage even though he or she can no longer give up the inheritance. However, since current court ruling states that the person choosing qualified acceptance must bear the obligation to pay acquisition tax for the inherited real estate (Supreme Court [S. Ct.], 2015Da9491, Apr. 12, 2007 (S. Kor.)), there is a risk that the heir may be harmed—compared to giving up inheritance—if a large amount of debt is discovered after he or she chooses qualified acceptance expecting that the positive inheritance property exceeds the inheritance debt and thus can cover acquisition tax. More fundamentally, the problem is in imposing acquisition tax obligations on the heir choosing qualified acceptance.

inventory of the inherited property before the heir exercises his or her option (Proposition 1). I propose combining the separation of inherited property under the current qualified acceptance of succession with the separation of inherited property and changing the qualified acceptance of succession into an inherited property inventory system.

In this regard, Switzerland's public inventory (Article 580 of the Civil Code of Switzerland) can serve as a reference. It allows the heir to file for preparation of an inventory for a certain period till the time when he or she can give up the inheritance and to choose between absolute acceptance, giving up inheritance, acceptance under public inventory, or inherited property liquidation (including the bankruptcy procedure on the inherited property) based on the information identified from the inventory. (4 choices)[13] It provides the heir with an additional option of acceptance under public inventory (Proposition 2). A shorter filing period for inventory preparation (in Switzerland, 1 month from the time the heir can give up the inheritance; Article 580.2 of the Civil Code of Switzerland) can evade a problem where an uncertain legal state is left unattended for a long time.

If an inventory system is to be introduced, it is necessary to additionally review how to handle the inheritance creditors who have not reported their claim, that is, how to constitute a legal effect of acceptance under public inventory. Two methods can be taken into account: (i) limiting the heir's executable property within the extent of the inherited property for inheritance creditors who have not been reported (Method 1) and (ii) removing the rights of non-reported and negligent inheritance creditors in substantive law while requiring the heir to bear an 'amount-limited' liability for non-negligent inheritance creditors to the extent he or she profits from the inherited property (Method 2).

Method 2 is harsh on negligent inheritance creditors and could cause a legal dispute around the negligence of inheritance creditors. Furthermore,

13) An inventory is not prepared mandatorily just because an inheritance is initiated, and the heir can still choose between absolute acceptance, giving up inheritance, and property liquidation (including bankruptcy procedure) without going through the inventory procedure (three choices).

amount limited liability carries a risk of complicating a legal relationship.[14] Therefore, Method 1 is more reasonable. It is a mixture of absolute acceptance and qualified acceptance, which applies the effect of qualified acceptance of succession to only some creditors. While the heir chooses universal succession for all inherited property and takes liability for reported inheritance claims with not only the inherited property but also with his or her own property, he or she bears only limited liability for non-reported inheritance claims to the extent of the inherited property as a executable property. When absolute acceptance becomes effective, the heir's creditors can freely seek a compulsory execution on inherited property, and the non-reported inheritance creditors and heir's creditors would be on the same level of priority for the inherited property. In such cases, it will be not be a problem if there is no symmetrical and thorough separation of properties (regarding Propositions 3 and 4). It is not against fairness to unfairly treat non-reported inheritance creditors.

3. *Integrating Qualified Acceptance of Succession and Separation of Inherited Property, and Creating a New System of Usual Inherited Property Liquidation*

1) Liquidation Centered on the Bankruptcy Procedure for Inherited Property

If the debt owed to inheritance creditors and legacy recipient cannot be fully repaid with the inherited property,[15] it is possible to file for bankruptcy procedure on the inherited property (Article 307 of the DRBA). The bankruptcy applicant can be an inheritance creditor, legacy creditor,

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14) If there are multiple non-negligent inheritance creditors who have not reported their claim and the positive property is insufficient to cover their claims, it could complicate the problem of estimating the amount to distribute among inheritance creditors in the compulsory execution procedure against the heir.

15) In the academic community, it is understood as *over-indebted*, where the negative inheritance property exceeds the positive inheritance property, and is distinguished from *inability to repay*, a common cause for bankruptcy filing (Article 305 of the DRBA). *See* Hyeong-woo Yang, *Sangsokjaesaneui Pasane Gwanhan Gochal [A Study on the Bankruptcy of Inherited Property]*, 13(1) J. Comp. Priv. L. 454-455 (2006) (In Korean). Inability to repay refers to "an objective state where the debtor is incapable of repaying immediate debt generally and continuously due to a lack of his or her ability to pay back." *See* Supreme Court [S. Ct.], 99Ma2084, Aug. 16, 1999 (S. Kor.).

heir, inherited property administrator, or executor of a will (Article 299.1 of the DRBA), and an inherited property administrator, executor of a will, or heir choosing qualified acceptance of succession or separation of inherited property bears the obligation to file for bankruptcy (Article 299.2 of the DRBA). It is not necessary to explain the fact causing bankruptcy when the inheritance creditor or legacy creditor files for the bankruptcy procedure, though it is necessary to do so when the heir, inherited property administrator, or executor of a will files for bankruptcy (Article 299.3 of the DRBA). It is possible to file for bankruptcy within 3 months of the initiation of inheritance, and in the event that the heir has not accepted or given up the inheritance after 3 months, it is still possible to file for bankruptcy procedure (Article 300.1 of the DRBA and Article 1045). In the event of a qualified acceptance or separation of inherited property during the above filing period, it is possible to file for bankruptcy even after the filing period as long as repayment has not been finished for inheritance creditors and legacy creditors (Article 300.2 of the DRBA). The heir who has not decided whether to accept the inheritance may file for inherited property bankruptcy. Even after the inheritance is accepted, it is possible to file for bankruptcy within 3 months of the initiation of inheritance. Under the current law, it is not necessarily required to go through the bankruptcy procedure just because the inherited property is over-indebted, but it is required if qualified acceptance of succession or separation of inherited property is initiated.

Some argue that it is reasonable to delete the provision in the DRBA that imposes obligations to file for inherited property bankruptcy, since the procedure of qualified acceptance allows the heir to handle the relationship with inheritance creditors.[16] While Japan's former Bankruptcy Act used to impose bankruptcy filing obligations on the inherited property administrator and others like Korea, the amended Bankruptcy Act of 2004 deleted this provision by considering that: (i) the qualified acceptance of succession or separation of inherited property can ensure a fair liquidation as the positive or negative property is small in size and the legal relationship of interested parties are not complicated in cases involving the

16) Byeong-seo Jeon, Dosanbeob [Bankruptcy Law] 52 (2017).

bankruptcy procedure of inherited property and (ii) the right to file for bankruptcy is recognized for inheritance creditors. In the procedure of qualified acceptance, however, a symmetrical and thorough separation of properties does not occur, and the current qualified acceptance of succession is an incomplete liquidation procedure in terms of efficiency or fairness. While a simpler and less costly liquidation procedure is needed, it is more reasonable to place a simplified procedure inside the bankruptcy procedure than outside the bankruptcy procedure since Korean law already specifies the detailed bankruptcy procedure for inherited property. For this reason, I agree with the view of the current DRBA, which imposes bankruptcy filing obligations on the heir and others. It is the right path to consolidate the inherited property liquidation into the bankruptcy procedure if the inherited property is over-indebted, and use simultaneous discontinuation of bankruptcy procedure (Article 317 of the DRBA) to allow the heir to enjoy the effect of limited executable property if the positive property is not enough to pay for the procedure cost, which makes it difficult to proceed with the liquidation.

Meanwhile, imposing bankruptcy filing obligations on even the heir who chooses absolute acceptance like in Germany (Articles 1980.1 and 1980.2 of the Civil Code of Germany) could excessively limit the heir's freedom to decide by his or her own will to protect inheritance creditors which is, therefore, unreasonable. In this regard, the inheritance creditors might be protected sufficiently by granting them the right to file for bankruptcy of the inherited property.

2) Inherited Property Liquidation in the Absence of a Cause for Bankruptcy Procedure of Inherited Property

Even though it is not possible to file for bankruptcy as the inherited property is not over-indebted, the heir, inheritance creditors, and heir's creditors may want to liquidate the inherited property and the heir's own property separately. Hence, I propose integrating the current qualified acceptance of succession and separation of inherited property in a new system of usual inherited property liquidation and including this new system into the heir's choices (official liquidation in Switzerland–Article 593 of the Civil Code of Switzerland). Below, I summarize what this new system of usual liquidation would look like.

(1) Applicants and Reasons for Filing

The heir[17] and inheritance creditors (including legacy creditors) usually have justifiable interests to file for an inherited property liquidation. The heir may want to repay the inheritance debt only with the inherited property, separately from his or her own property, while the inheritance creditors may want to separate and liquidate only the inherited property if the heir is over-indebted. If the heir wants a separate liquidation of inherited property, this can be a reason for filing in and of itself. In other words, the heir may file for usual liquidation and then opt to proceed with the bankruptcy procedure if the inherited property is found to be over-indebted during usual liquidation. Filing by inheritance creditors must be recognized only if the heir is over-indebted because inheritance creditors cannot deprive the heir of the right to dispose of the inherited property without justifiable reason. Furthermore, while the heir may no longer file for usual inherited property liquidation if he or she chooses absolute acceptance or gives up the inheritance, inheritance creditors' right to file for usual liquidation cannot be denied just because the heir chooses absolute acceptance. If the inheritance creditors' do not exceed the filing period and the separation of inherited property is still possible after the division of the inherited property is completed, inheritance creditors' right to file for usual liquidation must also be acknowledged.

Should one heir's sole right to file be recognized in a co-inheritance? It may be controversial, but it is reasonable to not permit it. The liquidation of coheirs' shared inherited property presumes the liquidation of the shared property itself, not their shared stakes thereof. In short, once the liquidation procedure is initiated, the right to manage and dispose of the whole shared property must be transferred to the administrator. In principle, disposing of the shared property itself requires agreement from all coheirs (Article 264). In the scenario where the inherited property is over-indebted and should be liquidated through the bankruptcy procedure, omitting the agreement from

17) If bankruptcy is declared for the heir after inheritance is initiated, it is reasonable to consider that the liquidation for inherited property has been filed even though the heir chooses absolute acceptance or gives up inheritance (Articles 385 and 386 of the DRBA; the entire inherited property will be liquidated separately if there is bankruptcy declared for any of the coheirs).

all the coheirs to dispose of the shared property may be justified to protect inheritance creditors. However, if one heir is allowed to file for usual liquidation of shared inherited property without such a reason, the unilateral intention of that heir will infringe on the other heirs' right to dispose of the shared property.[18] The heir who wants to bear the inheritance debt only to the extent of positive property that he or she will finally acquire cannot have his or her way if the other coheirs do not agree to liquidate the entire inherited property. Usual liquidation only for the "individual" property that an heir will acquire after the division of the inherited property is completed, cannot be permitted because it is fair for the heirs to share the liability with their own property if the inheritance debt is split according to their legal stake in the inheritance.[19]

If usual inherited property liquidation is made when all coheirs agree on such liquidation, any remaining inherited property after liquidation will be divided among co-heirs. It is not possible to divide the inherited property by not only co-heirs' agreement but also a court decision during the liquidation procedure, because the right to manage and dispose of inherited property belongs exclusively to the administrator. If an administrator-centered liquidation procedure (including when the debtor is the administrator), instead of a debtor-centered liquidation procedure (like the qualified acceptance of succession) is designed, it naturally leads to the desirable outcome, "liquidation first, division later".

If the coheirs' own properties are over-indebted but all coheirs do not agree on liquidation, the inheritance creditors' right to file for usual liquidation can surely be recognized.[20] It is worth considering the example

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18) Even though one of the coheirs has a legal reason for absolute acceptance, it is believed that usual inherited property liquidation is possible if all heirs agree. It is because it is necessary to **respect agreement from all coheirs about shared property first and foremost**. Inheritance creditors can seek compulsory execution for outstanding amounts after liquidation additionally from the property of one coheir with a legal reason for absolute acceptance.

19) Just because the division of inherited property is completed does not mean it is not possible to file for inherited property bankruptcy, and it can be filed if requirements including the filing period are met. In such cases, the *whole* inherited property must be liquidated separately from co-heirs' own properties. See Hyeong-woo Yang, *supra* note 15, at 457.

20) It is necessary to recognize inheritance creditors' right to file to protect themselves if one of the coheirs is over-indebted.

of France, which imposes a symmetrical separation until there is a division of inherited property in case of co-inheritance (Articles 815–17 of the Civil Code of France; while inheritance creditors may get satisfaction from the inherited property before the division, the heir's creditors cannot seize the inherited property before division and can only file for a division of the inherited property). This method would be most appropriate to protect the inheritance creditors and heir's creditors thoroughly in a co-inheritance.

(2) Effect of a Liquidation Order

The legal relationship after the court issues an inherited property liquidation order is basically identical to the legal relationship after bankruptcy is declared for the inherited property. After a liquidation order is issued, inherited property and heir's own property are completely separated from each other (symmetrical and thorough separation of properties). A liquidation order takes effect upon issuance just like a bankruptcy takes effect upon declaration (Article 311 of the DRBA)—deprivation of the debtor's right to manage and dispose of a bankruptcy estate, and invalidation of inheritance creditors' compulsory execution and preservative measure for property in a bankruptcy estate (Article 348 of the DRBA). Under the current separation of inherited property, if the inherited property is real estate, the separation of property takes effect only after it is registered (Article 1049). In the bankruptcy procedure, however, the debtor loses his or her right to dispose of real estate in the bankruptcy estate after bankruptcy is declared even if the bankruptcy declaration is not registered, and trust of the person who believes in the register and buys real estate from the debtor after bankruptcy is declared will not be protected (Article 329 of the DRBA). If it is applicable to the proviso of Article 331.1 of the DRBA, trust of the other party in good faith may be protected as an exception. The same is true when a usual inherited property liquidation is initiated by the court's liquidation order. The court must appoint an administrator while issuing a liquidation order (Article 312.1 of the DRBA). The administrator has the right to manage and dispose of inherited property, and obligations to perform a fair liquidation of the inherited property. If the inherited property is found to be over-indebted during the liquidation procedure, the administrator must file for bankruptcy without delay (Article 93.1 and Article 299.2 of the DRBA). The problem of a

takeover of a pending lawsuit for inherited property before a liquidation order is issued can be determined in reference to Article 347 of the DRBA (Takeover of Lawsuit Involving Properties Belonging to Bankruptcy Estate).

If the heir's creditors initiate compulsory execution for inherited property after a liquidation order becomes effective, such compulsory execution has no effect. The same goes for the bankruptcy procedure of the inherited property.[21)]

Even if the liquidation procedure is initiated, the liability for any delayed repayment of inheritance debt cannot be stopped or waived off (but there may be some room to view it differently for the bankruptcy procedure of the inherited property). In other words, already occurred liability for delayed repayment continues, and if the repayment deadline comes after the liquidation procedure is initiated, such liability for delay occurs from the next day.

(3) Liquidation Procedure and Method

The public notice or notification for inheritance creditors, proportional repayment procedure, and repayment order may be designed in reference to the current qualified acceptance of succession, its interpretation, and applicable provisions in the DRBA. Inheritance creditors have repayment priority before legacy creditors, and inheritance creditors excluded from the distribution procedure for not reporting may be repaid only from the remaining inherited property (Article 1039).[22)] If the liquidation procedure has not ended yet, the effect of separation of inherited property remains, which does not allow the heir's creditors to pursue compulsory execution for the remaining inherited property, and therefore, non-reported

21) What if the inheritance creditors attempt compulsory execution against the heir's own property? Even before a liquidation order is issued, it is desirable to not allow inheritance creditors to have the right to pursue such execution against the heir during the period in which the heir can exercise his or her option. Since the administrator takes over the lawsuit proceedings for the heir after a liquidation order is issued, it is hard to assume a situation where inheritance creditors initiate compulsory execution against the heir's own property with the title of execution for the *heir* after a liquidation order.

22) As a legislative suggestion, it might be worth considering waiving off non-reported claims and turning them into natural obligations. However, it is too harsh to not have their claims satisfied for not reporting even though inherited property still remains.

inheritance creditors also take precedence over the heir's creditors.[23)]

How should a case where inheritance creditors claim their right after the administrator hands over the remaining inherited property to the heir after the end of the liquidation procedure be handled? Non-reported inheritance creditors and heir's creditors are placed on the same level of priority for the inherited property, and non-reported inheritance creditors cannot take the heir's own property as executable property. It is simple to consider that inheritance creditors can no longer exercise their right if they appear after the inherited property and the heir's own property are mixed.[24)]

What if new inherited property is found after the end of the liquidation procedure? Some may argue that since the liquidation procedure has ended, the separation of inherited property cannot remain effective, placing inheritance creditors and heir's creditors on the same level of priority for the inherited property and the heir's own property, and the heir or inheritance creditors wanting to separate the inherited property need to file for a fresh, usual liquidation of property (Argument 1). Alternatively, there can be a view that since the separation of inherited property remains effective, the inheritance creditors who have reported and can thus receive distribution in the previous procedure may precede the heir's creditors for the repayment of the applicable inherited property even though no separate property liquidation procedure is initiated (Argument 2). As long as the liquidation procedure has ended in due process, Argument 1 seems reasonable. My position, however, is that the priority status of the heir's creditors for the heir's own property must be maintained even if the liquidation procedure has ended (symmetrical and thorough separation of properties), and that it is balanced to allow the priority of inheritance creditors for the inherited property to remain. I agree with Argument 2, which also needs to be specified in law.

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23) In the usual inherited property liquidation procedure, the heir's creditors cannot participate in the distribution procedure as a lower priority creditor. They can only seek compulsory execution for "the heir's right for the remaining amount."

24) For a similar view on qualified acceptance of succession, *see* G. Park, *Sangsokeui Hanjeongseungin [Qualified Acceptance in Inheritance]*, 78 JAEPANJARYO [CT. DOCUMENTATION] 61 (1998) (In Korean).

4. Supplementing the Current Bankruptcy Procedure of Inherited Property

1) Whether to Recognize the Heir's Creditors for Their Right to File

It is hard to find a legislative example anywhere in the world that gives the heir's creditors the right to file for bankruptcy procedure of inherited property. Strangely enough, however, the Civil Code of Korea[25] recognizes the heir's creditors for their right to file for separation of inherited property. It gives the heir's creditors the means to prevent the heir's executable property from becoming over-indebted or worsening if the heir chooses absolute acceptance. This legislative view is acceptable. Although absolute acceptance is viewed as a principle form of inheritance, it is reasonable to design the succession system in a way that easily separates and liquidates the inherited property and the heir's own property when either is over-indebted (Proposition 3). It may be possible to counter-argue by saying that the change in debtor's executable property by the heir's free decision is a risk that the heir's creditors must take. However, the debtor's freedom in legal action cannot be recognized indefinitely and may be limited to protecting the interests of ordinary creditors (e.g., creditors' avoiding power). In a similar context, I believe that the heir's giving up of inheritance must be subject to creditors' avoiding power.[26] If the current law, which recognizes the heir's creditors for their right to file for separation of inherited property, is found to be reasonable, it makes sense to integrate qualified acceptance of succession and separation of inherited property to prepare a new system of usual inherited property liquidation, while recognizing the heir's creditors right to file for bankruptcy procedure.[27] If

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25) Japan (Article 950 of the Civil Code of Japan) and France (Article 878.2 of the Civil Code of France) allow the heir's creditors to file for separation of property. However, France does not recognize the right to file for the total separation of inherited property and heir's own property as a whole, but only acknowledges repayment *priority* to the extent necessary to protect the interests of certain heir's creditors for the heir's individual property.

26) However, Korean court ruling denies this. Supreme Court [S. Ct.], 2011Da29307, June 8, 2011 (S. Kor.).

27) Under the current separation of inherited property, creditors for any of the coheirs can file for separation, and therefore, such creditors are considered to be able to file for the bankruptcy procedure for the whole inherited property.

the inherited property is over-indebted, an opportunity should be given to the heir's creditors to enjoy the effect of separation of property. Some authors argue that since the effect of separation of inherited property is achieved when bankruptcy is declared for the heir under Article 444 of the DRBA, it is unnecessary to additionally recognize the heir's creditors for their right to file for separation of property under the Civil Code.[28] Nonetheless, to declare bankruptcy for the heir, the heir must be over-indebted at the time of bankruptcy declaration. If the heir is not yet over-indebted, bankruptcy cannot be declared just because of the possibility that the heir would be rendered over-indebted if he or she chooses absolute acceptance for seriously over-indebted inherited property in the future. In such cases, any bankruptcy filed by the heir's creditors for the heir will be dismissed. To fill this gap, it is beneficial to give the heir's creditors the right to file for bankruptcy on the inherited property.

Still, it is balanced to give the heir the right to block the filing for separation of inherited property with repayment or collateral through his or her own property, instead of giving the heir's creditors the right to interfere with the heir's executable property.[29]

2) Necessity of a Simplified Bankruptcy Procedure

If the liquidation of over-indebted inherited property is consolidated into the bankruptcy procedure of inherited property, it is necessary to prepare a bankruptcy procedure to quickly, simply, and affordably handle small amount cases (where the value of positive property is not high and the relationship of rights is not complicated), which are expected to account for most of the inherited property bankruptcy cases (Proposition 5). While the current DRBA has a simplified bankruptcy system in place for estates worth less than 500 million won (Articles 549 through 555 of the DRBA), this system is not tailored for bankruptcy procedure of inherited property. As with costs in other procedures, efforts should be made to minimize the expenses of the bankruptcy procedure of inherited property. The reasons are: (i) minimizing the costs in the liquidation procedure is beneficial for the country as inherited property liquidation should also be performed by the

28) S. Lee, *supra* note 3, at 147.

29) Article 949 of the Civil Code of Japan.

country when the heir is absent (Article 1056) and the—if any—remaining inherited property after liquidation belongs to the country (Article 1058),[30] and (ii) advance payment is required when filing for bankruptcy to pay for costs, and if such an advance payment is too high, the heir who pays that with his or her own property may not recoup the money during the bankruptcy procedure. In such situations, most heirs would give up their inheritance instead of filing for bankruptcy procedure of inherited property, and if the heirs give up inheritance, the property will be liquidated by the country due to the absence of an heir. Nevertheless, the Civil Code (Articles 1053 through 1059) does not allow for an exception that permits the country to skip the liquidation procedure on the grounds that the costs of the procedure cannot be fully paid with the liquidation of inheritance property. Hence, there needs to be a low-cost and efficient inherited property liquidation procedure for the country.

What would a simplified procedure look like? To begin with, the heir can be appointed as the bankruptcy trustee (Article 785 of the Civil Code of Quebec, Canada). This is not impossible under the current law. However, there is not much of an incentive for the heir to work hard for the benefit of the inheritance creditors. As it is not appropriate to appoint the debtor as the bankruptcy trustee in an individual or corporation bankruptcy procedure, it is inappropriate to appoint the heir as the bankruptcy trustee in the bankruptcy procedure of inherited property. It would be reasonable to use an online or electronic lawsuit to reduce the cost and time of the procedure and simplify the inherited property sale and distribution.

Is it worth allowing the heir to enjoy the effect of separation of inherited property by recognizing Dürftigkeitseinrede (Articles 1990 and 1991 of the Civil Code of Germany) like in Germany when it is difficult to pay for the costs of the bankruptcy procedure with the liquidation of inheritance property? However, Dürftigkeitseinrede recognizes the effect of separation

30) With an increasing number of one-person households, the number of cases where inherited property is brought to the country's coffers due to the absence of an heir is expected to rise. In Japan, the value of inherited property belonging to the national coffers due to the absence of an heir was 50 billion yen (542.4 billion won) in 2017. See *News1, "'Sangsokhal Saram Eobda...' Il, Gukgoro Gan Yusan 'Ocheonsabaekisibsaeokwon'" ["Absence of an Heir"… Japan, 542.4 Billion Won Worth of Inherited Property Goes to the National Coffers]*, The Dong-A Ilbo (Jan. 8, 2019, 01:35 PM), http://news.donga.com/Main/3/all/20190108/93600666/1.

of executable property when there is no public notice, and it is not necessary to introduce it in Korean law. If Dürftigkeitseinrede is recognized, it would be easy to open a loophole for qualified acceptance of succession, which should be abolished for its problems. It is reasonable to (1) prepare a simplified bankruptcy procedure that minimizes costs and (2) actively utilizes a provisional payment of expenses for bankruptcy procedures under Article 304 of the DRBA,[31] which allows provisional payment from the country's coffers to pay for costs of the bankruptcy procedure if the bankruptcy applicant is not a creditor, and (3) simultaneous discontinuation of bankruptcy procedure (Article 317 of the DRBA).

If simultaneous discontinuation (Article 317 of the DRBA) or asynchronous discontinuation (Article 545 of the DRBA) of the bankruptcy procedure is done due to an inability to pay for the costs, what would happen to the effect of separation of the inherited property resulting from a bankruptcy declaration? Although there is no written law about this, it would be reasonable to view that if the bankruptcy procedure is discontinued due to a lack of money to pay for costs, the separation of inherited property remains effective.[32] In other words, in such cases, inheritance creditors and legacy creditors may seek compulsory execution only for the inherited property, while the heir's creditors cannot purse compulsory execution for the inherited property. Inheritance creditors must have a final and conclusive judgment about the heir to seek compulsory execution for the inherited property. It cannot be denied that the heir is the inheritance debtor since the heir does not give up the inheritance, and thus it is not possible to block a lawsuit filed against the heir. If a lawsuit by inheritance creditors is allowed against the heir, it is reasonable to view that the heir does not need to reveal and defend his or her bankruptcy declaration in the lawsuit, a ruling does not need to specify the heir's limited executable property, and inheritance creditors can seek compulsory

31) Since such inherited property can be liquidated by the country due to the absence of an heir, there is no reason for the country to be stringent about provisional payment to pay for the costs of the procedure.

32) It is desirable to prepare a written provision and take legislative action so that a public notice resulting from bankruptcy declaration is maintained continuously.

execution only for the inherited property based on a final and conclusive judgment about the heir.[33] Imposing a burden on the heir to accept a lawsuit even after the end of the bankruptcy procedure of inherited property might be too harsh for the heir and would not provide many practical benefits to inheritance creditors to acquire the title of execution unless any other inherited property is found. It may not be equally reasonable, however, to block inheritance creditors from filing a lawsuit to interrupt prescription in preparation for a situation where another inherited property is newly found. Thus, I believe that the view, which waives off the heir's debt for inheritance creditors after the end of the bankruptcy procedure, that is, preventing a lawsuit by inheritance creditors against the heir for the inheritance claims,[34] might not be reasonable.[35] That said, however, it might be possible to consider imposing lawsuit costs on the inheritance creditors who win such a lawsuit.

If new inherited property is found after the end of the bankruptcy procedure including the distribution procedure, it would be reasonable to

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33) If inheritance creditors seek compulsory execution for the heir's own property based on a final and conclusive judgment, it is reasonable to view that the heir can block such execution by filing a lawsuit of objection of third party to the execution. When bankruptcy is declared for the inherited property and a public notice is made resulting from such a bankruptcy declaration, it would be too much to require the heir to exercise the right to defend in the inheritance creditors' lawsuit demanding repayment of the inheritance claim, and allow compulsory execution for the heir's own property after a non-reserved ruling is given just because the heir did not defend in the previous lawsuit.

34) Ju-mi Kim, *supra* note 8, at 351-352.

35) An additional problem worth noting is whether to turn the rights of non-reported creditors in the bankruptcy procedure into natural obligations or remove them in substantive law (Article 792.2 of the Civil Code of France, and Article 590.1 of the Civil Code of Switzerland). Article 537 of the DRBA states that non-reported creditors may exercise their right for the remaining property after the end of distribution. Article 289 of Japan's former Bankruptcy Act used to have a similar provision, but it was deleted considering that non-reported bankruptcy creditors cannot exercise their right for the remaining property in other ordinary bankruptcy procedures. *See* I. YU ET. AL., JOHAEPASANBEOB [BANKRUPTCY LAW] 1476-1477 (2nd ed. 2016) (In Japanese). If we were to emphasize the stability of procedures, this view can be considered. Nevertheless, it is too harsh for inheritance creditors to get no satisfaction even though there is remaining inherited property. Isn't it enough to grant the disadvantage of putting non-reported inheritance creditors behind reported inheritance creditors in terms of priority? Would it not be enough if we ban non-reported inheritance creditors, who appear belatedly after the inherited property is mixed with the heir's own property, from exercising their right?

view that the separation of executable property still remains effective for such inherited property—without additional bankruptcy declaration (Article 1989 of the Civil Code of Germany, and Articles 823.1 and 823.2 of the Civil Code of Quebec, Canada). Hence, the reported creditors' remaining claims will be repaid before non-reported claims in the previous bankruptcy procedure.

3) When Unlimited Liability Imposed on the Heir for Inheritance Creditors

What does the legal relationship look like if statutory or voluntary absolute acceptance by the heir takes effect? It would be reasonable to see that the heir takes unlimited liability for inheritance creditors, while the inheritance creditors' repayment priority in the inherited property—the separation of executable property remains effective.

The problem is the relationship between inheritance creditors and the heir's creditors for the heir's own property. Under the current law's interpretation, the heir's creditors may take precedence for the heir's own property only when bankruptcy is declared for the heir (Article 445 of the DRBA), otherwise, inheritance creditors and heir's creditors are on the same level of priority. Nonetheless, it would be simpler to specify that the repayment priority of the heir's creditors for the heir's own property is ensured simply because the liquidation procedure proceeds as bankruptcy is declared for the inherited property even though no bankruptcy is declared for the heir (Proposition 4, and Article 782.2 of the Civil Code of Quebec, Canada). There is no reason the heir's creditors should have a disadvantage just because the heir chooses absolute acceptance. Article 385 of the DRBA states that if an inheritance is initiated for the debtor before bankruptcy is declared for the debtor, absolute acceptance chosen by the debtor after bankruptcy declaration has the effect of qualified acceptance of succession for the debtor's bankruptcy estate. This automatically recognizes the effect of separation of inherited property for the benefits of the heir's creditors even though no bankruptcy procedure of inherited property is initiated. In terms of bankruptcy declared for the heir, if the separation of inherited property becomes effective automatically as above, it would be balanced to apply the same view to the bankruptcy procedure of inherited property.

4) Other Matters to be Improved

(1) Expanding the Reasons for Filing

Under the DRBA, common reason for bankruptcy filing is the debtor's inability to repay (Article 305.1 of the DRBA). In addition, when the debtor is a corporate body, filing for bankruptcy is also allowed if it is over-indebted (Article 306.1 of the DRBA). Like Japan's Bankruptcy Act, however, Korea's DRBA considers only over-indebtedness as a reason to file for inherited property bankruptcy. Nevertheless, for inherited property bankruptcy, both over-indebtedness and inability to repay must be regarded as reasons to file for bankruptcy because there can be a situation of inability to repay if the entire inherited property constitutes a decedent's business. In this regard, this needs to be stated explicitly in the DRBA (Article 320.1 of the Insolvency Act of Germany, and Articles 66.1 and 67.1 of the Insolvency Act of Austria).

(2) Extending the Filing Period

The current DRBA states that "with respect to an inherited estate, the petition for bankruptcy may be filed only within the period during which a claim can be filed for separating the properties pursuant to the provisions of Article 1045 of the Civil Code" (Article 300 of the DRBA). Given this and Article 1045.2, the bankruptcy filing period is 3 months after being made aware of the initiation of inheritance for the heir. Compared to other countries,[36] however, South Korea has a very short period to file for inherited property bankruptcy. It is worth considering extending the period for all the heirs, inheritance creditors, and heir's creditors (e.g., for the heir, until the inherited property and the heir's own property are mixed, and for inheritance creditors or heir's creditors, until 3 months after being made aware of the initiation of inheritance for the heir, or until the inherited property and the heir's own property are mixed).

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36) For more, *see* Joon-kyu Choi, *Hanjeongseungin, Jaesanbulli, Sangsokjaesanui Pasane Gwanhan Ibbeoblon—Bigyobeobui Gwanjeomeseo [A Legislative Suggestion on the Heir's Qualified Acceptance of Succession, Separation of Inherited Property, Bankruptcy Procedure of Inherited Property]*, 60(2) Seoul L. J. 198 (2019) (In Korean).

(3) When Bankruptcy Declared for the Heir

If the decedent dies after the bankruptcy procedure is initiated for the heir, can inheritance creditors exercise their right as bankruptcy creditors in the heir's bankruptcy procedure? Inheritance property is the heir's newly acquired property and, therefore, does not belong to the heir's bankruptcy estate. Inheritance claims cannot be regarded as bankruptcy claims in the bankruptcy procedure for the heir. In such cases, the separation of inherited property automatically takes effect, and inheritance creditors can seek compulsory execution only for the inherited property. If the decedent dies after an individual rehabilitation procedure is initiated for the heir, the property acquired by the individual debtor during the individual rehabilitation procedure belongs to the individual rehabilitation estate (Article 580.1.2 of the DRBA), and therefore, the inherited property belongs to the individual rehabilitation. If so, it would be balanced to make a new rehabilitation plan by regarding inheritance debt as individual rehabilitation debt, although it is acquired by the individual rehabilitation debtor after the individual rehabilitation procedure is initiated. In this regard, it is necessary to put in place a written provision in the DRBA. In such cases, inheritance creditors may file for usual inherited property liquidation. Furthermore, it would be worth considering putting inheritance creditors before the heir's creditors while preparing a new rehabilitation plan.

5. Legal Problems with Lawsuit and Execution

1) Ban on Acquiring the Title of Execution and Seeking Compulsory Execution

If inherited property liquidation is performed in a usual or bankruptcy procedure, the inheritance creditors or heir's creditors are not allowed to seek individual execution for the inherited property. To ensure an equal and fair liquidation of the inherited property, it is worth thinking about: (i) limiting the inheritance creditors from acquiring the title of execution for the heir, and (ii) limiting the heir's creditors from seeking compulsory execution for inherited property, during the period in which the heir can exercise his or her option.

The current Civil Code also has a system with similar intentions.

According to Article 1051.1, the heir can reject repayment for inheritance creditors and legacy creditors during the period in which inheritance creditors or heir's creditors can file for separation of inherited property. However, the above provision has a limitation that it cannot prevent inheritance creditors from seeking compulsory execution unless the heir actively exercises his or her right to reject. Instead of giving the heir the right to reject, it would be more reasonable to ban (i) inheritance creditors from acquiring the title of execution for the heir (final and conclusive judgment for the heir or succession execution statement regarding final and conclusive judgment for the decedent) (Article 632.2 of the Civil Code of Quebec, Canada)[37] and (ii) heir's creditors from seeking compulsory execution on inherited property (but a preservative measure is allowed), during the period in which the heir can exercise his or her option.

2) Practical Benefits from a Ban on Acquiring the Title of Execution

According to a Supreme Court precedent, there is no limitation for inheritance creditors to get a final and conclusive judgment for the heir, and the court of lawsuit reflects the qualified acceptance of succession defended by the heir during the lawsuit and gives a reserved ruling that orders repayment while limiting the heir's executable property within the scope of the inherited property. Nonetheless, if inheritance creditors seek compulsory execution for the heir's own property, the heir can file a lawsuit of objection of third party to the execution, and exclude such execution.[38] Furthermore, if a non-reserved ruling is given as the heir does not argue for a qualified acceptance of succession, which already takes effect, and inheritance creditors seek compulsory execution for the heir's own property on the basis of such non-reserved ruling, the heir can file an objection suit against execution (two-tracks theory).[39] Another Supreme Court precedent states that "if the heir's qualified acceptance of succession is recognized and a ruling is made conclusively to order repayment within the limited extent of the inherited property from the previous lawsuit

37) Since it will only limit the acquisition of the title of execution, inheritance creditors can freely take a preservative measure for the inherited property or heir's own property.

38) Supreme Court [S. Ct.], 2005Geu128, Dec. 19, 2005 (S. Kor.).

39) Supreme Court [S. Ct.], 2006Da23138, Oct. 13, 2006 (S. Kor.).

between the inheritance creditor and heir about a claim for the decedent, the inheritance creditor is not allowed to seek another ruling non-reserved for the extent of heir's executable property with regard to the above claim by arguing through a new lawsuit against the heir with facts that are incompatible with a qualified acceptance of succession, such as a statutory absolute acceptance before the end of pleadings in fact-finding proceedings of the previous lawsuit. This is because the disputed object in the previous lawsuit directly exists within the claim (inheritance debt), but the existence and effect of a qualified acceptance of succession is heard and judged accordingly and the limited extent of the heir's executable property is reserved explicitly in a ruling if a qualified acceptance is recognized. Thus, a ruling from the previous lawsuit must be considered to have the effect of res judicata for the existence and effect of qualified acceptance of succession."[40] It is doubtful whether this Supreme Court precedent can be harmonized with another Supreme Court precedent that allows the heir to file an objection suit against execution after a non-reserved ruling is made conclusively because the heir did not defend the qualified acceptance of succession in the previous lawsuit.

There are various views on such seemingly confusing and conflicting positions in the Supreme Court precedents: (i) one is a view that a ruling does not need to explicitly state that the heir's executable property is limited within the scope of the inherited property since such reservation can be made during the execution process; choosing not to defend the qualified acceptance of succession in a lawsuit does not block the heir's chance of defending the qualified acceptance later based on res judicata, and the heir can exclude inheritance creditors from seeking compulsory execution for the heir's own property by filing a lawsuit of objection of third party to the execution as long as the heir has qualified acceptance (weighing more on the execution procedure),[41] and (ii) in contrast, another view suggests that the heir can no longer argue for limiting executable property if a non-reserved ruling is given as the heir does not defend a

40) Supreme Court [S. Ct.], 2012Da3197, May 9, 2012 (S. Kor.).

41) In-kwon Song. *Hanjeongseungineui Yogeon Mit Hyogwae Gwanhan Silmusang Munje [Problems in Practice Regarding the Requirements and Effect of Qualified Acceptance]*, 55 S. Ct. L. Rev. 193 (2012) (In Korean).

qualified acceptance of succession in a lawsuit although he or she could have (weighing more on the lawsuit).[42] Furthermore, there are opposing views on how the heir can block compulsory execution, even among the arguments that agree with the position of the Supreme Court precedent that res judicata for a final and conclusive judgment does not work when inheritance creditors who receive the non-reserved final and conclusive judgment seek compulsory execution for the heir's own property.

According to the view weighing more on the execution procedure, since executable property can be limited during execution process even though a non-reserved ruling is made conclusively, it could break the trust of laypeople who believe that they can seek compulsory execution freely for the heir based on the non-reserved title of execution. Apart from arguing whether such trust is worth protecting, it is not necessary to produce the non-reserved title of execution in large numbers, which can be misunderstood from the perspective of laypeople. While the view weighing more on the lawsuit procedure ensures authority and legal stability for the title of execution, it could be harsh for the heir. A provision blocking the acquisition of the title of execution by inheritance creditors for the heir during the period in which the heir can exercise his or her option after the initiation of inheritance could resolve most of this complex controversy. Since it is not difficult for the court of lawsuit to identify whether the disputed object is a claim for the decedent (inheritance debt), the foregoing provision may not impose too much of a burden on the court of lawsuit. This provision may make it difficult for inheritance creditors to acquire a final and conclusive judgment and exercise their right, but temporarily limiting the right of inheritance creditors would not be a big problem as the heir's creditors cannot seek compulsory execution for the inherited property. While the heir's creditors may freely seek compulsory execution for the heir's own property during the option exercise period, inheritance creditors cannot. Therefore — if the heir chooses absolute acceptance — some may think it is disadvantageous for inheritance creditors in the end. However, since it is allowed for inheritance creditors to pursue provisional

42) Jinsu Yune, *supra* note 1, at 474; Si-yoon Lee, Sinminsajibhaengbeob [New Civil Execution law] 95 (7th ed. 2016) (In Korean).

seizure on the heir's own property, differential treatment between inheritance creditors and heir's creditors cannot be considered unfair for the inheritance creditors. Instead, tentatively banning inheritance creditors from acquiring the title of execution for the heir may mediate the relationship of complex and opposing interests surrounding the inherited property in a fair and simple way.

IV. Conclusions

As a legislative suggestion for a qualified acceptance of succession, separation of inherited property, and bankruptcy procedure of inherited property in this article, I propose: (i) creating a public inventory system, (ii) integrating qualified acceptance of succession and separation of inherited property to create a new system of usual inherited property liquidation, (iii) consolidating the over-indebted inherited property liquidation procedure into a bankruptcy procedure for the inherited property, (iv) supplementing the shortcomings of the current bankruptcy procedure of inherited property, and (v) banning inheritance creditors from acquiring the title of execution and heir's creditors from seeking compulsory execution during the period in which the heir can exercise his or her option. What will change substantially are (i) more choices for the heir (4 choices: absolute acceptance, acceptance under public inventory, usual inherited property liquidation, or giving up inheritance), (ii) usual inherited property liquidation delegated to a third party liquidator, not the heir himself, and (iii) restrictions on creditors' compulsory execution. There is not just one answer for better legislation. My suggestions may be too theoretical, and an amendment of the law may not be urgently required. Since the size of the inherited property is not large in cases where the qualified acceptance of succession or bankruptcy procedure of inherited property is an issue, total stakes to be distributed are small. Hence, though the law is amended, each stake distributed to the interested parties may not change greatly. However, it is not desirable to leave unfair outcomes unattended no matter how small the dispute; small or large, injustice is injustice. Even if an amendment is not made right now, it is necessary to actively discuss the problems with the current system. A comprehensive approach based on

this legislative suggestion may help to come up with a creative interpretation of the current law.