Equity's New Child: The Birth of the Family Proprietary Estoppel

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Introduction

Much ink has been spilled in recent years on the common intention constructive trust ('**CICT**') and the proprietary estoppel. Judges have long noticed the similarities between the two doctrines[1] and commentators have long argued that the CICT can be considered a species belonging in the genus of proprietary estoppels.[2] In light of recent developments, this essay continues that line of work but with a new proposal: the family proprietary estoppel thesis.

Part 1 will first examine the doctrine of CICT, summarize the Gardner-Davidson theory and argue it is the best account of CICT. The Gardner-Davidson theory argues that the beneficial interest in the family home should be split according to the normative implications of the domestic relationship between its occupants. Part 1 will then argue that the doctrine of CICT, in its present state, is only able to accomplish the rationale posited by the Gardner-Davidson theory – namely giving effect to the normative implications of the parties' domestic relationship – in a limited manner.

Part 2 will examine the doctrine of proprietary estoppel and consider the domestic/commercial dichotomy devised by the most recent House of Lords case. It will then argue that the best way to understanding proprietary estoppel is to see it as a heterogeneous doctrine and within this heterogeneity, a subset of proprietary estoppels arising in a domestic setting will be identified. It will then discuss Birks' warning against unjustified remedial flexibility, which applies strongly to proprietary estoppel, before showing how his challenge can be met in principle and in the subset of proprietary estoppels identified earlier.

Part 3 will embark on the project of legal reform. It will first point out the burdens of proof taken up by any thesis seeking to assimilate CICT to proprietary estoppel, fully or partially. It will then evaluate three proposals: first, the conventional argument that the CICT should be judicially assimilated into proprietary estoppel ('**full assimilation thesis**'); second, the family proprietary estoppel thesis; and, third, that any reform should be undertaken by the Queen-in-Parliament ('**legislative reform**').

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[1] See e.g. per Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656; per Lord Oliver in *Austin v Keele* (1987) 72 ALR 579, 609; per Nourse LJ in *Stokes v Anderson* [1991] 1 FLR 391; per Robert Walker LJ in *Yaxley v Gotts* [2000] Ch 162, 177; and per Chadwick LJ in *Oxley v Hiscock* [2005] EWCA Civ 546, [2005] Fam 211 [66].

[2] See e.g. D Hayton, 'Equitable rights of cohabitees' [1990] Conv 370, and subsequently in 'Constructive trusts of homes - a bold approach' (1993) 109 LQR 485; B McFarlane, *The Structure of Property Law* (Hart Publishing 2008), 775-782; and, more recently, YK Liew, 'The secondary-rights approach to the "common intention constructive trust"' [2015] Conv 210, 223.

1. *Doctrine of CICT and the Gardner-Davidson Theory*

Any statement of the law of CICT must begin with the leading decision by the Supreme Court in *Jones v Kernott* ('***Kernott***').[3] While *Kernott* has conclusively settled particular points of the law on CICT, it has failed to clarify how its conception of CICT as a whole differs from that of the past decisions of the House of Lords and Privy Council.[4] This has led Miles to claim that the 'contours [of the CICT] have arguably become no easier to discern' despite these cases.[5] Hence, the following is a provisional statement of this uncertain area of law.[6] Briefly, if:

(1) The defendant (D) owns a house; and
(2) The claimant (C) is a member of D's family,

Then:

(3) The proportions of C's and D's shares are *prima facie* determined by how the legal title is held:
    (a) If the legal title is held solely by D ('**sole name**'), then D has all the beneficial interest.
    (b) If the legal title is held jointly by C and D ('**joint names**'), then they each have 50% of the beneficial interest.

But:

(4) This *prima facie* position can be displaced by a *genuine* (i.e. actual and inferred) common intention by C and D that C should have a greater share in the ownership of the house; and
(5) The proportions of C's and D's shares are determined by:
    (a) their *genuine* common intention, if there is one; or
    (b) in the absence of a *genuine* common intention, the courts will impute one so as to achieve fairness between them.

(4) and (5) are also commonly referred to as the acquisition and the quantification of beneficial interests respectively. There are many outstanding controversies in this provisional account of CICT, including:

i. The scope of the CICT as determined by (1) and (2);[7]
ii. The difficulty in displacing the *prima facie* position in (3);
iii. The desirability of separating (4) and (5) as distinct analytical stages and how common intention

[3] [2011] UKSC 53.
[4] They are, in chronological order, *Pettitt v Pettitt* [1970] AC 777 (HL), *Gissing v Gissing* [1970] UKHL 3, *Lloyds Bank v Rosset* [1990] UKHL 14, and *Stack v Dowden* [2007] UKHL 17 and *Abbott v Abbott* [2007] UKPC 53.
[5] J Miles, 'Cohabitation: Lessons for the South from North of the Border?' [2012] CLJ 492.
[6] The analysis in *Kernott* applies to both joint names and sole name cases, following [51] to [52]. Even this is a controversial point. The failure of *Stack* and *Kernott* to explicitly overrule *Rosset*, a sole name case that laid down detrimental reliance by C as a requirement, means that one could plausibly argue that the law currently treats joint names and sole name cases differently. However, such a distinction cannot be justified. The better view is that one should not read too much into whether the property is held jointly or solely in the context of family homes, this being more often than not a historical contingency than an act intended to have legal significance.
[7] What types of relationship between C and D and what kinds of purpose for which the home was bought and used will trigger the trust? The Court of Appeal in *Laskar v Laskar* [2008] EWCA Civ 347 seems to rule out a CICT in a case of 'investment for rental income and capital appreciation, even where [the parties'] relationship is a familial one'. But reliance on *Laskar* ought to be tempered by the realization that Lord Neuberger is applying his dissenting analysis in *Stack*; cf *Geary v Rankine* [2012] EWCA Civ 555, *Aspden v Elvy* [2012] EWHC 1387 (Ch), and *Ullah v Ullah* [2013] EWHC 2296 (Ch) for more variation on this theme.

is inferred, implied, or imputed, and how, if at all, these methods of ascertaining intention differ;

iv. The meaning of fairness in (5); and

v. Whether the requirement of detrimental reliance by C on her common intention with D, per *Lloyds Bank v Rosset*,[8] has survived *Stack v Dowden* ('***Stack***')[9] and *Kernott*.[10]

The family proprietary estoppel thesis is built upon the Gardner-Davidson theory, which is not neutral on these controversies. It is founded on the view that the development of the CICT is part of the increasing 'familialization' of property law[11] and that the doctrinal elements of CICT must be thus understood. In a domestic context where individuals repose trust in each other, it is neither sensible to expect nor reasonable to require adherence to formality rules. This justifies the informal creation of equitable interests under a CICT. Similarly, certainty is less important as people in family relationships are less likely to dispose property with an eye on the relevant law[12] and discretion is necessary to effect justice in family matters. All these stand in stark contrast to the norms in a commercial paradigm, where adversarial parties deal with each other at arm's length and legal certainty is paramount.

According to this theory, the appellate courts do not take the requirement of genuine common intention seriously.[13] This is best illustrated by *Kernott*. In that case, while the Supreme Court unanimously discerned a genuine common intention in (4) – a point which was itself based on the trial judge's finding that the Court of Appeal had described as without evidential foundation[14]—they split 3-2 on (5). The majority went on to find a genuine common intention as to the shares,[15] whereas the minority disagreed and imputed a common intention on the basis of fairness.[16] Magically, they arrived at the same distribution of 90-10. This divergence in approach and eventual convergence in outcome are unlikely to be compatible with taking seriously the requirement of genuine common intention.

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[8] [1990] UKHL 14.

[9] [2007] UKHL 17.

[10] Conceivably, an essay arguing for proprietary estoppel and CICT to be (fully) assimilated might see some significance in detrimental reliance appearing as an element of proprietary estoppel and possibly CICT. This is a mistake. Rather, this essay argues that the normative implications of the relationship are the primary driver. For a contrary view, see B Sloan, 'Keeping Up With the *Jones* case: Establishing Constructive Trusts in "Sole Legal Owner" Scenarios' (2015) 35 LS 226, which argues that the requirement of detrimental reliance persists in CICT, and is crucial to justifying equity's intervention.

[11] It is the judicial process whereby individualistic, relationship-neutral property law principles affecting ownership of the family home are reinterpreted and recalibrated to accommodate the specific needs of family members. This was first identified in J Dewar, 'Land, Law, and the Family Home', in S Bright and J Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998).

[12] As Waite LJ observed in *Midland Bank plc v Cooke* [1995] 4 All ER 562, 575: 'When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.'

[13] S Gardner, 'Problems in Family Property' [2013] CLJ 301, 306-307.

[14] [2010] EWCA Civ 578, [81]-[83].

[15] *Kernott* (n 3) [48]-[49]. This is even though the trial judge himself had not done so.

[16] ibid [76]-[77].

As such, the CICT does not truly respond to common intention. From a legal realist perspective, purporting to respond to common intention serves to legitimize the outcome by dressing up the reasoning in the libertarian clothing that pervades other areas of private law. This is regrettable as it will cause difficulty for judges who apply the law and practitioners who advise their clients. Rather, it should be openly acknowledged that the CICT responds to (or ought to respond to) the normative implications of the parties' domestic relationship ('**NIDR**') instead.

The class of relationships capable in themselves of bearing normative implications cannot be exhaustively catalogued. Classic examples include cohabiting couples in CICT and inheritance representation cases in proprietary estoppels: where C has been led to believe that C would be granted property on death, if not before, and, in that belief, C has acted to their detriment by providing services to D, and sometimes as suffering other detriment.[17] To provide a non-exhaustive illustration, broad principles will be outlined with respect to cohabiting couples in CICT. As the ultimate goal of the CICT is asset redistribution, the Gardner-Davidson theory focuses on the *material* implications of the relationship. For example, do they pool their resources across the board? If the relationship is materially communal,[18] then the maxim 'equity is equality' is the starting point: for example, between two economically equal cohabitants, each should receive equal shares in the family home. However, there is no categorical imperative for strict equality: in *Kernott*, the eventual 90-10 split in favour of C arguably displays a new, more refined vision of 'equality': as D owned another house, this distribution meant she took roughly half of the combined value of the two houses. Furthermore, if there are dependants or disabilities on the part of either partner, this presumably should be taken into account. If the relationship is materially non-communal,[19] their shares are determined by reference to their contributions,[20] probably on the basis of reversing C's unjust enrichment of D.[21] But such an approach should be tempered by a sensitivity to the facts: for instance, if C and D have vastly disparate earning power and do not pool their resources at the insistence of the more powerful D, the appearance of material non-communality should not stop the judge from effecting a more humane and just outcome. These are matters of open-textured judgment that cannot be prescribed definitively in advance.

In truth, the Gardner-Davidson theory, on which the family proprietary thesis is based, is but

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[17] A list of such cases in recent years: *Re Basham* [1986] 1 WLR 1498 (Ch); *Wayling v. Jones* (1993) 69 P&CR 170 (CA); *Walton v Walton* Unreported April 14, 1994; *Gillett v. Holt* [2001] Ch 210; *Jennings v. Rice* [2002] EWCA Civ 159; *Campbell v. Griffin* [2001] EWCA Civ 990; *Grundy v. Ottey* [2003] EWCA Civ 1176; and *Uglow v. Uglow* [2004] EWCA Civ 987. It is central to the family proprietary estoppel thesis that commercial examples like *Crabb v Arun DC* [1976] Ch 179, *AG for Hong Kong v Humphreys Estate Ltd* [1987] 2 All ER 387 (PC), and *Cobbe v Yeoman's Row* [2008] UKHL 55 are not normatively similar enough to be assimilated.

[18] Examples in case law include *Abbott v Abbott* [2007] UKPC 53, *Bank of Scotland v Brogan* [2012] NICh 21 [42], and *Kernott* (n 3).

[19] *Stack* is an example, in which C and D were unmarried and had kept their financial affairs very separate and C had contributed (at least) 65% of the cost of acquiring the house and received 65% of the ownership of the house.

[20] There is continuing controversy over which contributions are relevant. It is arbitrary to look at who happens to make mortgage payments. cf *Stack* to *Aspden v Elvy* [2012] EWHC 1387 (Ch) and *Thompson v Hurst* [2012] EWCA Civ 1752, which seem to go beyond *Stack* without properly confronting the House of Lords precedent. Practically speaking, there are difficult issues of quantification within the family context which the law cannot deal with precisely, necessitating the use of discretion.

[21] See S Gardner, 'Family Property Today', (2008) 124 LQR 422, 437-439, for the difficulties in doing so. Etherton LJ's ambitious thesis in 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' [2008] CLJ 265 was that *Stack* is an example of a remedial constructive trust granted in response to a new ground of restitution for autonomous or subtractive unjust enrichment. This view has not gained currency and will not be considered further, except to note that the challenge of discretionary remedialism is more easily met in the family context, rather than within the emerging and unsettled law of restitution.

another stand in this controversy. While it has been cited by the Supreme Court,[22] it has never been fully adopted without reservation. As such, Gardner himself concedes the possibility that 'a judge could wrong-foot [him] on this tomorrow, by giving the law a trajectory different from that which [he] claim[s] to discern'.[23] This has arguably already happened in *Graham-York v York*.[24] However, the reason for this is 'the lack of an authoritative 360° exegesis (…) for in its absence a judge could not unreasonably strike out in a number of different directions'.[25] As such, even if the Gardner-Davidson theory is wrong, there must be an alternative exegesis of CICT. If a successful account of CICT is not possible, then it must be excised from English private law. With this disclaimer in mind, it is submitted that the family proprietary estoppel thesis is nonetheless viable because the Gardner-Davidson theory remains the best exegesis of the law.

At this juncture, having summarized the Gardner-Davidson theory and its place in the ongoing controversy, it is helpful to note one of its implications: that C's rights in a CICT are necessarily indeterminate until they are crystallized in a judgment, i.e. there is a certain level of judicial discretion in ordering relief. This will be explicitly justified in Part 3. The arguments that apply to proprietary estoppels that effectuate NIDR apply with equal force to CICT. As C's rights are indeterminate and subject to judicial discretion, it has understandably led some to compare these rights to remedial constructive trusts.[26] But the difficulty with this view lies in the fact that there is nothing approaching a consensus on what 'institutional' and 'remedial' mean in the first place, or indeed whether all constructive trusts have to be one or the other.[27] Given that the idea that English law currently does (or should) recognize remedial constructive trusts (whether in general or CICT in particular) has met with firm judicial[28] and extra-judicial[29] rejection, characterizing C's rights this way is unnecessarily controversial.

For our purposes, it is important to note that the libertarian characterisation of C's rights – as determinate, involving no judicial discretion and responding to the parties' common intention – requires accounting for when C's rights arose and how they changed. In a joint names scenario where there is no express declaration as to the nature or proportion of co-ownership and it is not shown that the parties had a different common intention at the time when they had acquired the property,[30] English law's presumption of an equitable joint tenancy is not rebutted. This presents two problems to the libertarian characterisation.

Firstly, if C's equitable interests are determinate and distinct from those of D's by the time the case

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[22] *Kernott* (n 3) [21], [24].
[23] Gardner, 'Problems in Family Property' (n 13) 312.
[24] [2015] EWCA Civ 7.
[25] Gardner, 'Problems in Family Property' (n 13) 304.
[26] See, e.g. Etherton LJ, 'Constructive trusts and proprietary estoppel: the search for clarity and principle' [2009] Conv 104.
[27] This was helpfully pointed out by Professor Simon Gardner.
[28] See e.g. *Re Polly Peck International Plc (No 2)* [1998] 3 All E.R. 812 (CA), 823–825, per Millett LJ; and 830–832, per Nourse LJ, *Satnam Investments Ltd v. Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 (CA), 670, per Nourse LJ, and *Crossco No 4 v Jolan Ltd* [2011] EWCA Civ 1619 [84], per Etherton LJ.
[29] Lord Neuberger, 'The Remedial Constructive Trust – Fact or Fiction' (Speech at the Banking Services and Finance Law Association Conference, Queenstown, 10 Aug 2014) <https://www.supremecourt.uk/docs/speech-140810.pdf> accessed 21 March 2016. Also of note are more radical voices at the margin that see all constructive trusts today as either misclassified express trusts or merely a remedy given by a court. See W Swadling, 'The Common Intention Trust in the House of Lords: an opportunity missed' (2007) 123 LQR 511, for a flavour of this view in the context of CICT and W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399 more generally.
[30] *Goodman v Gallant* [1986] Fam 106 (CA) and *Malayan Credit Ltd v Jack Chia -MPH Ltd* [1986] AC 549.

is litigated, there must be a non-discretionary event that severed their joint tenancy. As Dixon notes, this is 'one lingering and unremarked issue in both *Stack* and *Kernott*'.[31] Liew argues that the CICT does not reflect any of the established methods of severance[32] and the only remaining plausible explanation is that severance occurs by judicial discretion.[33] While this does not mean C's rights are necessarily indeterminate, it implies that, in at least this respect, judicial discretion has replaced hard rules. This fits the Gardner-Davidson theory better than the general property law.

Secondly, even if the parties' initial beneficial joint tenancy had subsequently been severed in accordance with an established method of severance, the parties would have a tenancy in common with equal shares. As Mee pointed out, the ambulatory nature of this tenancy in common introduces another complication to the libertarian characterisation.[34] Given that the proportions of the interest may change from 50-50 to a new distribution depending on their common intention, this would *prima facie* fall afoul of s 53(1)(c) of the Law of Property Act 1925, which requires that any disposition of a subsisting equitable interest or trust (i.e. equitable interest responding directly to intention) must be in writing, a point raised by Walton J.[35] Mee's solution is that each new division of the beneficial ownership occurs under a 'newly refreshed' CICT, which is caught by the exemption in respect of "the creation or operation" of non-express trusts in s 53(2) of the 1925 Act. Such a contrived view is not out of place within the convoluted and much-criticized jurisprudence of s 53(1)(c).[36] However, it is submitted that the better view is simply that, following the Gardner-Davidson theory, the CICT, owing to its domestic context, is a disorganized mode of creating rights *in rem* which are only determinate on judgment day.[37]

But if the Gardner-Davidson theory is correct, its central rationale – giving effect to NIDR – has implications on how the doctrinal elements of CICT should be interpreted. Firstly, (1) is questionable: in principle, the availability of remedy for C should not turn on D's ownership of the house. Whether C and D are long-time licensees, leaseholders, or freeholders has no bearing on NIDR. But under CICT, courts are limited by its inability to order personal remedies. Secondly, the theory would mean that 'family' in (2) should not be not construed too strictly. Indeed, in *Gallarotti v Sebastianelli*,[38] the CICT rules were applied to friends in a platonic relationship who decided to live together and went into business. It is easy to imagine countless permutations of domestic relationships involving mutual trust whose normative implications include asset redistribution. Thirdly, the *prima facie* position in (3) must be easily displaced as how the property is held is only weakly correlated to NIDR. Fourthly, as argued above, the courts' expansive approach to genuine common intention undercuts the libertarian nature of (4) and (5)(a), which is at odds with CICT's rationale and thus better seen as fig leaves that camouflage CICT within the rest of property law. The work of quantifying beneficial interests is almost wholly done by (5)(b). As such, the doctrinal elements of the CICT must be re-interpreted. Part 3 will show the result of this re-interpretation: the family proprietary estoppel.

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[31] M Dixon, 'The Still Not Ended, Never-ending Story' [2012] Conv 83, 84.
[32] These methods consist of *inter alia* written notice, under Law of Property Act 1925 s.36(2), operating on one's share, mutual agreement, course of dealing, or the murder of a joint tenant, under Forfeiture Act 1982 s 1.
[33] Liew (n 2) 218.
[34] J Mee, 'Ambulation, severance, and the common intention constructive trust' (2012) 128 LQR 500.
[35] *Richards v Dove* [1974] 1 All E.R. 888, 894.
[36] See S Gardner, *An Introduction to the Law of Trusts*, (3rd edn, OUP 2011), 105-106.
[37] See n 74 and its accompanying text.
[38] [2012] EWCA Civ 865.

2. Proprietary Estoppel as a Heterogeneous Doctrine

Any doctrinal statement of proprietary estoppel cannot be 'both comprehensive and uncontroversial' as there is uncertainty about virtually all of its aspects.[39] The standard account states that C has a claim against D in proprietary estoppel if:

(1') D has committed an act of assurance or acquiescence;
(2') D's act leads C to reasonably believes that C has or is going to get a right in D's property (which must be land, on some accounts);
(3') C acts in detrimental reliance on this belief; and
(4') It would be unconscionable to leave matters as they stand.

The House of Lords decisions of *Cobbe v Yeoman's Row Management Ltd* ('***Yeoman's Row***')[40] and *Thorner v Major* ('***Thorner***')[41] illustrate the instability of the law on proprietary estoppel. The polarity of the two cases has led commentators to announce, in a manner akin to Jesus Christ,[42] that they spelt the death[43] and the resurrection[44] of proprietary estoppel respectively.

In the later decision that is *Thorner*, Lord Neuberger was aware of the need to reconcile its outcome with *Yeoman's Row*. To that end, he did this both doctrinally and using the domestic/commercial dichotomy.[45] For our purposes, the doctrinal approach need not detain us.[46] It is Lord Neuberger's dichotomy that is relevant for our purposes: he noted that *Yeoman's Row* was a *commercial* dispute between two property developers who are presumably well-acquainted with the cautionary and channelling functions of formalities in land law,[47] whereas *Thorner* was but the latest iteration in a long series of inheritance representation cases arising within the *domestic* context and reflecting the court's sympathy for C in the form of less exacting judicial standards.

This dictum – while helpful to the family proprietary estoppel thesis – has come under criticism by commentators. For a start, Mee thinks that the normative positions of Mr Cobbe and David Thorner are closer than we might think. Adopting Goymour's terminology,[48] Mee argues that whereas that Mr Cobbe (in *Yeoman's Row*, a commercial example of the imperfect promises case) was a 'commercial risk-taker',

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[39] S Gardner, *An Introduction to Land Law*, (4th edn, Hart Publishing 2015), 143.
[40] [2008] UKHL 55.
[41] [2009] UKHL 18.
[42] Coincidentally, the first draft of this essay is written during Holy Week 2016.
[43] B McFarlane and A Robertson, 'The Death of Proprietary Estoppel: Yeoman's Row Management Ltd. v. Cobbe' [2008] LMCLQ 449.
[44] J Uguccioni, 'The Resurrection of Proprietary Estoppel' [2009] LMCLQ 436.
[45] [2009] UKHL 18, [93].
[46] It is the proposition that, whereas a representation which was clearly made to be revocable could not be the basis of a proprietary estoppel claim, the converse was not true. In *Yeoman's Row*, C knew the commercial agreement was binding in honour only and that both parties could walk out of negotiations without any legal liability; and that is why he could not reasonably rely on D's oral assurances. In *Thorner*, while representations about testamentary intent are inherently revocable, insofar as C's reliance is independently reasonable, he does not need to prove that that he believed that D was legally bound to leave him the farm. For an elaboration on this, see Uguccioni (n 44) 440. Mee shares a similar view in 'The Limits of Proprietary Estoppel: Thorner v Major' [2009] CFLQ 367, 374.
[47] See L Fuller, 'Consideration and Form' (1941) 41 Columbia Law Review 799 for a full exposition on formalities.
[48] A Goymour, 'Cobbling Together Claims where a Contract Fails to Materialise' [2009] CLJ 37. For a discussion of officiousness and risk-taking in the context of unjust enrichment, see e.g. G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006), 39-40.

David was a 'domestic risk-taker'.[49] This has been rightly criticized as '[reflecting] unrealistic expectations about the options open to a hard-working claimant in a domestic scenario'.[50] Furthermore, Mee argues that the factual boundary 'is far from secure'[51] and Sloan cautions against proprietary estoppel going the way of the CICT.[52] This point will be returned to in Part 3, where the dichotomy will be considered more fully.

It is submitted that the doctrinal approach to reconciling *Yeoman's Cobbe* and *Thorner* is unhelpful as it obscures the true nature of proprietary estoppel by presenting a unified doctrinal basis to what is really a heterogeneous creature. Unlike the CICT, which is relatively modern and whose application is confined to the context of family homes, proprietary estoppel dates back to the 19th century and is found in a wide range of situations. Within this diversity, commentators have noted that, despite commonalities among the three at an abstract level, it is practically more useful to discern three broad categories within proprietary estoppel.[53] They are:

i. Unilateral mistake cases: proprietary estoppel is classically applied to prevent landowners (D) from unconscionably asserting their strict legal entitlement as against another (C) who mistakenly thinks he owns the land and improves its value.[54]
ii. Common expectation cases: this category is distinguished from the first on the basis that here D has made a representation of an existing state of affairs to C, whereas D merely acquiesces in the first category.[55]
iii. Imperfect promise cases: where D promises (in an expansive sense of the word) a right *in rem* to C but fails to perfect it. Under certain circumstances, C can claim in proprietary estoppel. This category has developed the most in recent years and, unlike the previous two categories, it appears that C himself does not need to be a landowner.

Both *Yeoman's Row* and *Thorner* fall into the third category. It is submitted that Lord Neuberger's domestic/commercial dichotomy can be applied to this category, within which inheritance representation cases like *Thorner* are a further subset. In the language of the Gardner-Davison theory, in such an informal domestic context, proprietary estoppel effectuates the NIDR that C ought to receive something. While inheritance representation cases might be the most common subset of proprietary estoppel arising in a domestic context to be subsumed by the proposed family proprietary estoppel, it is submitted that in principle it is not the only one.[56]

The preceding account of proprietary estoppel omitted its controversial remedial flexibility.[57] The

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[49] Mee (n 46) 374.
[50] B Sloan (2010) 22 SAcLJ 110, 129.
[51] Mee (n 46) 374.
[52] Sloan (n 50).
[53] See B McFarlane, *The Law of Proprietary Estoppel* (OUP 2014) ch. 1, Low, 'Nonfeasance in Equity' (2012) 128 LQR 63, 67, and Mee 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed), *Modern Studies in Property Law, Vol. 6*, (Hart Publishing 2011), 182.
[54] E.g. *Ramsden v Dyson* [1866] LR 1 HL 129 (HL), and *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC).
[55] E.g. Lord Evershed MR's analysis in *Hopgood v Brown* [1955] EWCA Civ 7, [223].
[56] See e.g. the recent *Ely v Robson* [2016] EWCA Civ 774, in which it was unclear whether CICT or proprietary estoppel was being applied. As a rule of thumb, any case in which proprietary estoppel and CICT could plausibly be pleaded concurrently is caught by the family proprietary estoppel.
[57] There are many judicial acknowledgements of the remedial flexibility in proprietary estoppel. See e.g. *Ramsden v Dyson* (1866) LR 1 HL 129 (HL); *Plimmer v Wellington Corp* (1884) 9 App Cas 699 (PC); *Crabb v Arun DC*

mode of relief is less contentious: while it can operate both *in personam* and *in rem*,[58] this discretion is largely explicable on the basis of whether it is apt for C and D to live together. But the quantum of relief in proprietary estoppel is highly contentious. No single measure (i.e. C's expectation, detriment or restitutionary interest) is consistently pursued.[59]

It is submitted that this is principally due to the imperfect promise cases. Unilateral mistake cases and common expectation cases are more akin to the larger genus of estoppels and their remedies have a natural shape: D is simply estopped from making his claim. It is tempting to explain the remedial irregularity in imperfect promise cases as a matter of judicial discretion made in pursuit of fairness. But this remedial flexibility requires justification. In an essay on the general phenomenon of 'discretionary remedialism', Birks points out that separating liability and remedy in such an opaque manner is problematic. With characteristic eloquence, he argued that it would: firstly, 'make the management of litigation impossible, promoting unjust settlements based on guesswork as to the operation of the discretion'; secondly, 'deprive citizens of their dignity, bringing them as child-like supplicants (…) before a court which had grown much too big for its boots'; and, thirdly, 'threaten the stability of our society, because it would destroy the legitimacy of judicial authority' in a pluralist democracy, by failing to attain of 'transparent rationality [that] can be accepted by all sub-communities'.[60]

Fortunately, Birks' challenge can be met in principle. Gardner argues that the discretionary relief in proprietary estoppel is compatible with a democratic legal system and a commitment to the Rule of Law if three conditions of 'transparent rationality' – to adopt Birks' phrase – are met:[61]

i. The aim of the discretion must be fixed by the law;
ii. The discretion must be necessary; and
iii. Decisions taken under the discretion must be susceptible to audit.

While most judges have left it quite unclear how the discretion in proprietary estoppel operates, Walker LJ – as he then was – in *Jennings v Rice*[62] shed some light on this by arguing that the discretionary relief, firstly, must always be 'proportionate'[63] and, secondly, should reflect various other factors where these appear in the circumstances of the case. But Gardner points out that proportionality is about balancing ends, and not the end in itself. Thus an end must first be identified. Gardner concluded on a mixed note: the law as it stood 'cannot be sufficiently reconciled with the Rule of Law' but was 'fully capable of repair', with 'Walker LJ's analysis representing a promising start on this project'.[64]

It is submitted that the three conditions of transparent rationality are met where proprietary estoppel effectuates NIDR. Of necessity, the following arguments are borrowed from the Gardner-Davidson theory, in the similar context of CICT. Firstly, the aim of such a discretion is *ex hypothesi* fixed by the law: to effectuate NIDR. Secondly, the discretion is necessary. Consider the example postulated by Lord Scott in *Thorner*: what if D, before his death, needed to sell the farm in order to fund the costs of

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[1976] Ch 179; *Pascoe v Turner* [1979] 1 WLR 431 (CA); *Sledmore v Dalby* (1996) 72 P & CR 196 (CA); *Jennings v Rice* [2002] EWCA Civ 159.

[58] Unlike the CICT, which, as the name implies, is confined to a right *in rem*.

[59] Gardner, *An Introduction to Land Law* (n 39) 153-154.

[60] P Birks, 'Rights, wrongs, and remedies' (2000) 20 OJLS 1, 23.

[61] S Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492, 505.

[62] [2002] EWCA Civ 159.

[63] See *Henry v Henry* [2010] UKPC 3, [65] for a similar sentiment: 'proportionality lies at the heart of proprietary estoppel and permeates its every application'.

[64] Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (n 61) 512.

his medical treatment?[65] As Lord Scott pointed out, C had no strict entitlement to the farm and their relationship would imply that it is only fair for C to receive a portion of the proceeds of sale. If D's death occurred much sooner than either D or C anticipated, it would appear contrary to the implications of their relationship to award the entire farm to C. All these examples speak to the broader point that discretionary relief is necessary to effecting justice in family matters. Thirdly, such judicial decisions are susceptible to audit. There are manifestly unjust outcomes that essentially rule themselves out. But this point should not be overstated: the necessity of discretion suggests that this auditing is by nature open-textured and not mechanical. Within an intermediate range of reasonable outcomes, when all is said and done, we must rely on the judges' common-sense to do justice.

It is unnecessary for the family proprietary estoppel thesis to put the whole of proprietary estoppel on a footing of transparent rationality. Indeed, if proprietary estoppel is a heterogeneous doctrine, its remedial flexibility can only be justified within its particular context, as we have just done. The search for an overarching justification is futile. This is a point overlooked by proponents of the full assimilation thesis. The near-identical ways in which remedial flexibility is justified in CICT and proprietary estoppel paves the way for the family proprietary estoppel to be carved out from proprietary estoppel in general. This will bring greater conceptual rigour and result in a clearer guide for the relevant factors judges should look to in adjudicating such cases. Indeed, it is plausible that judicial recognition of the family proprietary estoppel could place implicit pressure on the residual areas of proprietary estoppel to meet the demands of transparent rationality.

3. *Two Weddings and an Act of Parliament*

As mentioned, three proposals for legal reform will be considered: the full assimilation thesis, the family proprietary estoppel thesis and legislative reform. It is necessary to point out the burdens of proof taken up by the first two proposals.

Firstly, they presuppose the legitimacy of proprietary estoppel, fully or in part. This is open to question,[66] particularly in light of its remedial flexibility. Besides justifying its remedial flexibility, which Part 2 has done in respect of the family proprietary estoppel thesis, it also requires proposing solutions to the following theoretical debates:

i. Justifying the circumvention of formality requirements relating to wills and land;
ii. The consequences of conditionality and the realization of the property forming the subject-matter of the representation;
iii. The significance of unconscionability as an independent element of the doctrine.

If Part 2 is correct, i.e. proprietary estoppel should be viewed as a heterogeneous doctrine, then there are no general correct answers to these debates. But even if proprietary estoppel is a monolithic doctrine, the unlikelihood of conclusively settling these debates counts against the plausibility of the full assimilation thesis. These challenges are watered down for the family proprietary estoppel thesis, as its scope is limited to the domestic context.

Secondly, both theses presuppose that the judiciary is well-suited to reform the law in this area. This is not without controversy.[67] On a thin account, any development of the common law must be made

[65] [2009] UKHL 18, [19].
[66] Sloan (n 50) 129.
[67] See J Mee, 'Burns v Burns: The Villain of the Piece', in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart Publishing 2010), 175 and 187, regarding democratic legitimacy in the judicial reform of

with reference to the courts' institutional role and the retrospective nature of common law judgments. On a thick account, the judiciary has a duty to develop the law in pursuit of a more coherent conception of justice.[68]

The conclusions can be summarized at this point. Firstly, the full assimilation thesis, while promising, fails because of the overwhelming difficulty of rationalizing the entire law of proprietary estoppel. Secondly, the family proprietary estoppel thesis redeems the practical benefits of assimilating CICT in a principled manner and proves to be the best proposal for legal reform. Thirdly, there is simply no feasible proposal for legislative reform in the horizon and any proposal must be compatible with the UK's commitments under the European Convention of Human Rights.

A. Full Assimilation: Left at the Altar

This essay began by noting that commentators have long argued in favour of the full assimilation thesis. But the enormity of the task of principled assimilation has never been fully confronted. It is apt to note that whatever initial judicial enthusiasm for this idea[69] had since met with a cold reception in *Stack*, the latest judicial word on this issue. Lord Walker opined in *obiter* that the CICT cannot be seen as a specific application of proprietary estoppel principles.[70] However, the two reasons given by Lord Walker are unsatisfactory.

His first reason is that assimilation will lead to the CICT losing its retrospectivity, and by extension its ability to bind a third party (X). With respect, this is wrong. Prior to the Land Registration Act 2002, there was legitimate doubt over whether a claim in proprietary estoppel was capable of binding third parties.[71] It is submitted that the orthodox view is that it could not: this policy consideration might explain why the courts have 'reinvented the proprietary estoppel in the guise of the [CICT]',[72] making CICT 'historically the court's preferred legal mechanism for giving effect to the property claims of a spouse or partner who had neither legal title nor entitlement under an express trust'.[73] However, the enactment of s 116(a) of the Land Registration Act 2002 ensures that by the time *Stack* was decided, C's equity by estoppel is capable of having proprietary effect against X, rendering Lord Walker's statement legally inaccurate.[74]

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trusts and also Law Commission, 'Cohabitation: the Financial Consequences of Relationship Breakdown' (Law Com No 307 Cm 7182, 2007), paras 5.98-5.101.

[68] Dworkin, *Law's Empire* (Harvard University Press 1988), ch 8.

[69] Chadwick LJ in *Oxley v Hiscock* [2005] EWCA Civ 546, [2005] Fam 211 [66]: 'it seems to me very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result [as under a CICT analysis].' See also *Grant v Edwards* [1986] Ch. 638, 656; *Re Basham* [1986] 1 W.L.R. 1498 (Ch) at 1504; *Austin v Keele* (1987) AJLR 605 (PC), 609; *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 A.C. 107, 132-133; *Yaxley v Gotts* [2000] Ch 162, 176-177.

[70] [2007] UKHL 17, [37].

[71] McFarlane, in (n 2) 778, thinks that a duty imposed by proprietary estoppel creates a right in C's favour before any judicial order is made and LRA 2002 merely confirms this. This view is shared by Liew in (n 2) 224. In his secondary rights approach, C obtains 'an unliquidated secondary right when B breaches his or her primary duty, [which] is liquidated at the day of judgment'.

[72] Hayton, 'Constructive trusts of homes - a bold approach' (n 2) 486.

[73] Etherton LJ (n 21) 271.

[74] There is, however, an ambiguity in s 116(a) between a strong and weak meaning, as pointed out by Professor Simon Gardner in his lectures at Oxford, HT16. While it necessarily means that C has rights against D from the time of the required facts, on the strong meaning, C's rights will be thus fixed and be the same against X. On the weak meaning, the content of C's rights can vary from time to time, as the relevant facts change. As noted in Part 2,

Lord Walker's second reason is that proprietary estoppel requires only 'the minimum award necessary to do justice, which may sometimes lead to no more than a monetary award'.[75] In other words, whereas C would have deserved and received a proprietary remedy under CICT, assimilation with proprietary estoppel would result in C receiving only a monetary award. With respect, his argument is self-defeating: assuming *ex hypothesi* that the minimum remedy required to do justice is a proprietary remedy, making personal remedies available does not hinder the court's ability to award a proprietary remedy in any way. On the contrary, the greater remedial flexibility in proprietary estoppel vis-à-vis CICT is a policy reason for assimilation.[76] In the following discussion of the family proprietary estoppel, it will be shown that this remedial flexibility can be attained in a principled way.

However, the full assimilation thesis is hamstrung by the transparent rationality objection to proprietary estoppel's remedial flexibility, as noted in Part 2.[77] Whereas other commentators simply glide over this difficulty,[78] Hayton, one of the earliest proponent of this thesis, claims that the underlying justification for both the CICT and proprietary estoppel is 'the discretionary prevention of unconscionable conduct'.[79] He anticipates the transparent rationality objection to the open-texturedness of 'unconscionability' by asserting that '[a]s time goes on, there should be an interpretative community of judges and legal advisers who can come to a significant consensus on what is unconscionable in particular circumstances in the light of decided cases like the already existing cases involving constructive trusts and proprietary estoppels.'[80]

Hayton's proposal surely underestimates humanity's propensity to disagree. As noted above, proprietary estoppel is a heterogeneous doctrine and the wide range of contexts in which it applies calls for an equally wide range of value judgments. Full assimilation would obscure CICT's uniquely compelling domestic context, which is vastly different from the considerations in cases involving unilateral mistake, common expectations or imperfect promise in a commercial context. 'Unconscionability' would be the indiscriminate catch-all, giving judges an unacceptably large latitude in determining liability and the mode and quantum of remedies. Not only would this inject an intolerable degree of uncertainty into property rights, it is illegitimate for the judiciary to wrest this power for itself.[81] But if we substitute unconscionability for a less abstract concept like detrimental reliance as an organising principle, then proprietary estoppel loses the remedial flexibility that typifies its allure in the first place.[82] In light of this pessimistic conclusion, we must look elsewhere for a solution.

B. Family Proprietary Estoppel: A New Proposal

As noted at the end of Part 1, the doctrine of CICT is unable to fully vindicate the rationale of the

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the weak meaning is the better characterization of CICT and, by extension, the family proprietary estoppel. But it must be noted that this is an outstanding controversy that has not been resolved by the courts.

[75] As Gardner pointed out in fn 65 of 'Family Property Today' (n 21), speaking of 'the minimum necessary to do justice' merely begs the question what that is.

[76] This was noted by both McFarlane, in (n 2) 778, and by Liew in (n 2) 223, claiming that this would encourage 'a more efficacious legal system'.

[77] Gardner makes a similar point in 'Family Property Today' (n 21) 434: '[Arguing for full assimilation] would be nonetheless helpful if it were clear what does drive the [proprietary estoppel]: but that is notoriously not the case'.

[78] McFarlane simply calls proprietary estoppel 'a recognised means by which [D] can come under a duty to [C]', whereas Liew notes that it is 'the only equitable doctrine which enforces B's secondary duty to allow A informally to acquire proprietary rights', without pausing to wonder whether that uniqueness is justified.

[79] 'Equitable rights of cohabitees' (n 2) 380.

[80] ibid 385.

[81] The family proprietary thesis, as we will see, is better insulated to this objection.

[82] The measure of the relief would have to be tailored to correct for C's detrimental reliance, for instance.

Gardner-Davidson theory. Building on this theory, it is the vision of the family proprietary estoppel thesis to do so fully and in a principled manner. For the judiciary to fulfil this vision, the premise that the judges have a duty to develop the law in pursuit of a more coherent conception of justice is needed. Both foundations are contestable.

The strongest argument against the family proprietary estoppel is that the context-based dichotomy between domestic and commercial cases is unstable and unpredictable. Unsurprisingly, proponents of the full assimilation thesis[83] and legislative reform[84] endorse this view. However, it is submitted that the very fact that the lower courts are dealing with CICT cases containing both familial and commercial elements, ostensibly without any grave difficulties ought to diminish the force of these criticisms.[85] After all, law operates by imposing categories onto an unruly world. It is trite wisdom that legal categories, so analytically elegant and immensely sensible at the time of conception, have a habit of being reduced to absurdity by the vicissitudes of life. So long as the dichotomy works most of the time, when borderline cases arises, all we can ask for is the judge to pay meticulous attention to factors such as the sophistication of parties and the relative significance of the commercial/domestic elements of their relationship, with the understanding that the 'domestic context' justifies both the law's remedial flexibility and circumvention of formality requirements relating to land.[86] Furthermore, it is apt to point to similar dichotomies in other areas of English private law, namely one that is firmly established in contract law[87] and another that is emerging in express trusts.[88]

With that out of the way, we can examine the main argument for judicial development of the family proprietary estoppel, i.e. a proper understanding of the normative positions of C and D requires extending a greater range of remedies to cases currently caught under CICT and abandoning some of the doctrinal limitations imposed by CICT and proprietary estoppel.

Firstly, it is central to the Gardner-Davidson theory that the law should treat cohabitation and

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[83] McFarlane in (n 2) 776–7, calls it 'an unprincipled and unstable distinction' and that the domestic context is merely 'a *factual* difference to the *factual* question of whether [D] can be found to have made an implied commitment to give [C] a share of the benefit in [D]'s Freehold or Lease'. Liew, in (n 2) 217, argues that 'the domestic/business distinction is inherently unhelpful, causing uncertainty where the parties' use of the property or the parties' relationship is atypical'.

[84] Sloan (n 50) 126. He argues for a statutory alternative to estoppel for the enforcement of inheritance representation cases in emulation of New Zealand's Law Reform (Testamentary Promises) Act 1949. If the domestic context is not simply the 'circumstances of the case', but instead 'effectively determines where the decision-making process begins', then 'the attachment of importance to [the domestic context] is much more vulnerable to objection'.

[85] See n 7 and accompanying text. There are cases relating to investment properties (see *Geary v Rankine* [2012] EWCA Civ 555, [2012] 2 F.L.R. 1409, [18]) and properties bought by business associates (see *Gallarotti* [2012] EWCA Civ 865, [2012] 2 F.L.R. 1231, [6]).

[86] It is accepted that in inheritance representation cases, there must be an additional justification for circumventing formalities relating to wills, which is more well-known. This justification must come from the facts: in *Thorner*, we know that Peter's destruction of the old will leaving the farm to David and failure to make a new one are for reasons unrelated to David, and this would, it is submitted, provide the justification.

[87] The inaptly named 'intent to create legal relations' doctrine operates to police, *inter alia*, the boundaries between family arrangements where promises are presumed to be legally unenforceable, and commercial situations where they are. See e.g. *Rose & Frank Co v JR Crompton & Bros Ltd* [1924] UKHL 2 and *Balfour v Balfour* [1919] 2 KB 571 (CA).

[88] First raised by Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1995] UKHL 10, [1996] AC 421, 436, this has been echoed in *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58, [70]-[71] per Lord Toulson and [102] per Lord Reed. Their Lordships were quick to emphasize this distinction is not categorical, however.

marriage the same way.[89] It should be noted that many European countries have legislated as such.[90] The sociological findings are clear. It is very unlikely that people decide not to marry because of the legal consequences, firstly because few people even know this area of law in the first place,[91] and secondly because even those who do are more likely to base their decision to marry on religious and social views, or to be influenced by their families, friends, and culture.[92] This ought to allay any fears that extending rights to cohabiting couples would undermine the legal institution of marriage or the individual's autonomy. As such, it is no coincidence that 'fairness' under the Gardner-Davidson theory resembles how the courts apply the Matrimonial Causes Act 1973, ss 24 and 25, to divorcing couples.[93] But there is one aspect which is dissimilar: under the statutory regime for divorcing couples, C can claim a monetary award as well as a beneficial interest. For cohabiting couples, C is invariably awarded a proprietary interest under CICT. This has practical consequences. Consider a reverse-*Kernott* scenario: if the value of the house C happens to be living in is the cheaper of the two, even if C receives all the beneficial interest in the house under the CICT, C remains undercompensated according to the deeper conception of equality displayed in *Kernott*. If the law should treat cohabitation and marriage the same way, in this scenario we have a strong reason to escape the confines of a constructive trust and seek the greater remedial flexibility offered by the family proprietary estoppel, which can give C simultaneously all the beneficial interest in the house *and* a monetary award. This principle of consistent treatment also legitimizes *judicial* development of the family proprietary estoppel: the legislation already in place gives democratic imprimatur to judges who are duty-bound to ensure that the law treats like cases alike.[94]

Secondly, it is submitted that the NIDR of C and D ought to be based entirely on the nature of their relationship, with no reference to whether D has a freehold (or leasehold). In principle, C equally deserves a share of D's assets, even if D does not own a home and C and D are long-time contractual licensees. Under the CICT, effectuating the implications of their relationship is made conditional in this way, per (1) and (5'), and is restricted to proprietary relief. There ought to be no such limitations under the family proprietary estoppel, providing another reason for its remedial flexibility.[95] In fact, this need for this flexibility will only sharpen, in light of 'the increasing number of situations where the parties' home is rented rather than owner-occupied'.[96] Admittedly, without a high-value asset like a family home, any claim against D would be contingent on D holding other types of assets and might not be viable in

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[89] Gardner and Davidson, 'The future of Stack v Dowden' (2011) 127 LQR 13, 18. As they concede, the Law Commission seems to disagree, in its consultation paper on this area. See Law Commission, 'Cohabitation: the Financial Consequences of Relationship Breakdown' (n 67) at paras 6.23, 6.48-6.49, 6.62-6.66, 6.92-6.114. But note that under the Inheritance (Provision for Family and Dependants) Act 1975, if a cohabiting couple's relationship dissolves due to D's death and D's will does not give adequate financial protection to C, then the court is empowered to give C financial support from D's estate, as if C and D are married. This is certainly a *legislative* acknowledgement their normative positions are at least identical in this respect.

[90] Thorpe LJ, 'Property rights on family breakdown', (2002) 32 Family Law 891, 893.

[91] C Smart and P Stevens, *Cohabitation Breakdown* (FPSC/Rowntree 2000).

[92] J Herring, *Family Law*, (5th edn, Longman Publishing 2011), 94.

[93] *White v White* [2000] UKHL 54, [2001] 1 AC 596, 599-600, authoritatively states that, assets should be divided equally unless the parties' have more specific needs, reflecting a more general moral obligation on each of them to share their resources created by the materially communal relationship that is marriage.

[94] See n 89.

[95] This might lead to a semantic worry: why call it family *proprietary* estoppel if there is no *real* property involved? Put this way, the worry dissolves: firstly, reference will inevitably be made to the property (tangible or intangible) of C and D, which in the modern age is increasingly unlikely to be held in land, and, secondly, it could be read as an estoppel of *family property*.

[96] According to the 'English Housing Survey, Headline Report 2013-14' conducted by the Department for Communities and Local Government, English homeownership rate was at 63%, down from 70.9% in 2003, a level last seen three decades ago. See, also, Gardner 'Problems in Family Property' (n 13) 312.

practice.

Thirdly, on a related note, it is submitted that (2') should be tweaked: any remedy should not be conditional upon whether C has any belief about D's land. Consider a twist in the facts of *Thorner*: suppose that David spent all his years working unpaid in Peter's *studio* on the basis that he will inherit Peter's *intellectual property rights* in a hit Christmas song. Think Hugh Grant in *About a Boy* (2002). If Peter fails to do so in his will, David should nonetheless be able to claim from Peter's estate.[97] The centrality of land to personal wealth is in many ways a contingent upon the structure of the national economy and has been steadily declining from its zenith in feudal society. Understanding the rationale of family proprietary estoppel in this manner allows us to see the requirement of C's belief about D's land (if indeed this requirement exists) as non-essential to effectuating NIDR.

Taking the arguments above as a whole, it is submitted that the family proprietary estoppel has strong foundations in existing legal principles. But more than that: suppose there is a judicial duty to develop the law to further a more coherent conception of justice. As shown above, the family proprietary estoppel is necessary for the law to treat normatively identical Cs and Ds the same way. If that is right, it is obligatory and not merely supererogatory for the judiciary to develop the family proprietary estoppel.

Having fully explored what is demanded by principle, there are two further instrumental advantages offered by the family proprietary estoppel.

Firstly, the remedial flexibility of a family proprietary estoppel might become potentially helpful where the relationship is materially non-communal. Accepting that the driver here is reversing C's unjust enrichment of D, it is not at all clear that giving C a proprietary interest under CICT, as opposed to a monetary award, accords with the logic of unjust enrichment.[98] Given this is 'one of the most difficult, and certainly unsettled, issues in the law of restitution',[99] it is submitted that a family proprietary estoppel is future-proof: if and when this issue is settled by restitution lawyers, the judges will have the option of giving C a monetary award, if that is so required, under a family proprietary estoppel, rather than the compulsion of granting a proprietary interest under a CICT.

Secondly, it is submitted that, by assimilating the inheritance representation cases within family proprietary estoppel, the feminist criticism of the Gardner-Davidson account of the CICT can be met.[100] Bottomley argued the Gardner-Davidson communitarian approach is too prescriptive of family relationships and runs the risk of determining legal rights on the basis of patriarchal norms, such as finding 'communality' in relationships with classic gender roles. In the intervening twenty years since this argument was made, its force has diminished significantly. Today, English law recognizes same-sex marriage and civil partnerships, whereas material communality in CICT (on the Gardner-Davidson theory) already applies across the board to all types of family relationships. The family proprietary estoppel would finally consign this criticism to history. Juxtaposing the material communality of cohabiting couples next to that of prospective heirs who spend much of their lives working without pay is

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[97] Admittedly, this factual matrix is freakish – or merely prescient of things to come.

[98] Gardner, 'Family Property Today' (n 21) 439.

[99] As Gardner pointed out in fn 78 of ibid: 'According to "the powerful argument" advanced in Birks, *Unjust Enrichment* (OUP 2003), ch 8, unjust enrichment relief should be proprietary where the claim involves an initial failure of basis, as where C mistakenly believes that he already has an interest in the house; but personal where the claim involves a subsequent failure of basis, as where D fails to perform his promise to give C such an interest. In practice, applying this distinction would often be difficult in our situation, given the rather unfocused quality of the typical facts.'

[100] A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar (eds), *Land Law. Themes and Perspectives* (OUP 1998).

a powerful reminder of the diverse forms of familial organization and that gender roles, blood ties, romance, sexual fidelity, and so on are non-essential to the creation of relationships with normative implications.

C. An Act of Parliament?

As stated in Part 1, the law in this area is in disarray and there have been calls for legislative reform of both CICT[101] and proprietary estoppel.[102] The government announced in 2011 that it would not take forward the Law Commission's recommendations for reform of CICT during the 2010-2015 parliamentary term,[103] presumably because doing so might be framed politically as undermining marriage. The weakness of this argument has been pointed out above. The Law Commission has no plans to reform proprietary estoppel. The fact that legislation is not forthcoming in both areas of law is itself fatal to proponents of legislative reform.

But if this essay is right, it means that parties caught under the family proprietary estoppel have certain proprietary entitlements under the law. Though these entitlements are subject to a degree of judicial discretion, under s 116(a) of the Land Registration Act 2002, they arise from the time of the facts as an inchoate 'equity'. As such, they cannot be taken away in a manner that constitutes a disproportionate interference with rights under European Convention of Human Rights First Protocol Article 1, which protects the peaceful enjoyment of possession, and Article 8, which ensures respect for one's private and family life and one's home.[104] This should militate against any rashly hatched legislative proposals.

4. *Conclusion*

To complain that the law on CICT is unsatisfactory has become clichéd. This essay has presented a principled case for the judiciary to unite the CICT with parts of proprietary estoppel, resulting in the birth of the family proprietary estoppel. This is the best proposal for legal reform. Full assimilation is overly ambitious and there is no feasible proposal for legislative reform.

Hayward's verdict of the legal developments culminating in *Kernott* is sound: '[O]wing to the well-documented failings of the trust framework by the judiciary, academics and reform bodies coupled with the fact that statutory cohabitation reform is not imminent', the judiciary's incremental development of the CICT is 'an avowedly imperfect yet truly necessary development'.[105] Against this backdrop, the family proprietary estoppel represents the next step in the familialization of property law. Equity is not past the age of child bearing indeed.

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[101] Law Commission (n 67).
[102] Sloan (n 50).
[103] Law Commission on Cohabitation <http://www.lawcom.gov.uk/project/cohabitation/> accessed 23 March 2016.
[104] See e.g. Gardner, *An Introduction to Land Law* (n 39) 196-7 for a brief discussion of Convention rights and legislative reform vis-à-vis the Law Commission's proposals. For a more general discussion of the applicability of Convention rights to private property law, see A Goymour, 'Property and housing' in D Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (CUP 2011).
[105] A Hayward, '"Family property" and the process of "familialisation" of property law' [2012] CFLQ 284, 303.