

The Legal Uncertainties Surrounding the Property of Thai Cohabitants

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Abstract

This article examines the legal uncertainties surrounding the property of cohabiting couples in Thailand. While the Civil and Commercial Code recognizes only registered marriages under Sections 1457 and 1458, the Thai Supreme Court has nevertheless extended proprietary remedies to unregistered cohabitants through its interpretation of general law. Such rulings, grounded on analogies of ordinary partnerships and co-ownership, have sought to address inequities but have simultaneously produced doctrinal uncertainties. The article critically analyzes this jurisprudence, highlighting its rigid reliance on presumptions of equal contribution and its lack of clarity on exceptions. It further explores the growing social reality of unregistered cohabitation in Thailand and the potential surge in litigation arising from the Court's current approach. Through a comparative analysis of English law—particularly the doctrines of resulting trust, constructive trust, and proprietary estoppel—the article proposes alternative remedial frameworks that could provide more flexible and principled solutions. The author ultimately advocates for legislative reform to establish coherent statutory rules to govern property disputes between cohabitants, thereby enhancing fairness, predictability, and public awareness of the legal consequences of such relationships.

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I. INTRODUCTION

Family is one of the most fundamental and widespread units of society, a fact reflected by the Thai Civil and Commercial Code (CCC), dedicating Book V entirely to family matters. However, this article observes that when it comes to the matter of cohabiting couples who may also form the center of a nuclear family, Thai written law has remained largely silent, particularly with regard to property disputes between cohabitants. Cohabitation, for the purpose of this article, refers to two people living together in an intimate or romantic relationship, like spouses, but without having legally registered their marriage. While the CCC has provisions dealing with marital property (*Sin Somros*) under Chapter IV of Book V, these provisions do not extend to cohabiting couples since only marriages that has been registered are recognized under this code pursuant to Section 1457 and Section 1458.¹ Nonetheless, since the promulgation of the CCC, the Thai Supreme Court has issued several rulings granting co-ownership title to partners of cohabitation. Hence, the Supreme Court, for many decades, has established that co-ownership rights can arise from this kind of relationship.² These decisions demonstrate the issue that while there is a lack of a statutory framework surrounding cohabiting couples under Thai law, there is has been a need to grant remedies for inequities that arises in such familial arrangements.

However, this article goes on to argue that although the Thai Supreme Court has issued these decisions based on the need for remedies, these rulings have also introduced significant legal uncertainties. Given the Supreme Court's influence over the lower courts, such decisions have opened the door for either partner of a cohabitation to pursue property claims despite the lack of statutory recognition under Thai family law. However, due to the limited sample of factual scenarios and commentary provided by past decisions, there is no comprehensive or all-encompassing legal framework to guide lower courts in future variations of such types of cases. As a result, the author advocates that if the lower courts were to apply the principles of these past decisions strictly, there are risks of unfair results and injustices.

The author would even suggest that the legal uncertainty left behind by the Supreme Court's decisions on the matter of cohabitants presents a looming threat to the Thai judicial framework and overall social well-being of the Thai population. Especially as an increasing number of couples in Thailand decide to start a family without formally registering their marriage, many couples may still be unaware of the

¹ See CCC, ss 1458 and 1474.

² See Supreme Court Judgment No. 303/2488 (1945).

significant legal implications.³ If awareness of the Supreme Court's approach regarding property dispute increases, there could potentially be a surge in unexpected and complex litigation. Many couples may avoid registration with the intention to sidestep formal obligations or potential property disputes that come with marriage, but ironically, this can lead to even more burdensome, lengthy, and emotionally straining litigation when such relationships come to an end. The lack of a comprehensive legal framework leaves the lower courts to resolve disputes on a case-by-case basis, and subjects parties to unpredictable outcomes, which may be detrimental to the families involved.

In this article, the author will examine Thai Supreme Court decisions that involve property disputes between cohabitants, with a focus on compiling the available legal reasoning and factual elements that have been laid out by the Court thus far. Through analysis of this framework, the author will explore hypothetical issues that may be presented by modern-day cohabitation, aiming to highlight the doctrinal gaps, uncertainties, and rigidity of the current jurisprudence. To identify potential solutions to these challenges, the author will engage in a comparative legal analysis that involves the exploration of English law, which, in the author's view, offers a well-developed framework through its rich body of equity cases. Through this comparative approach, the author will propose a series of possible alternatives, for example, in the form of additional statutes or better adaptations of existing Thai civil law concepts that could be implemented by legislators or the Supreme Court. This is done in hopes of providing a firm starting point for developing a clearer and more consistent legal framework to address the proprietary claims of cohabitants.

II. DOMESTIC BACKGROUND AND HYPOTHETICAL ISSUES

Before engaging in a comparative analysis of English law, this section will thoroughly discuss the foundation of how Thai courts currently approach property disputes involving cohabitants. This includes analyzing the extent to which cohabitation is recognized under Thai written law, as well as compiling key Supreme Court decisions that currently form the boundaries for a cause of action. Particular attention will be paid to the key factual elements of these cases and the legal reasoning given by the courts when awarding proprietary rights.

Additionally, before discussing the key factual elements required to adjudicate proprietary claims, the author finds it important to mention the role of Supreme Court decisions in the context of Thai law. In countries that have adopted the civil law tradition, such as Thailand, Supreme Court decisions theoretically should not create binding precedent or be considered as law. Instead, the Supreme Court as an

³ Jiaying Zhao and others, "How Do Cohabitation and Marital Status Affect Mortality Risk? Results from a Cohort Study in Thailand" (2022) 12(9) *BMJ Open* <<https://doi.org/10.1136/bmjopen-2022-062811>>.

institution has the duty to interpret and apply written statutes as guidelines to lower courts. This is in contrast with the common law principle of *stare decisis*, where lower courts are, in theory, bound to follow legal precedents established by higher courts. While Supreme Court decisions in Thailand are classified as persuasive rather than binding, in adherence to civil law principles, they nonetheless carry substantial influence in practice. When cases involve the same legal issues, lower courts will sometimes cite past Supreme Court judgments, and will often repeat the same phrases and lines of reasoning used by the Supreme Court in the past.⁴ This pattern is also seen within Supreme Court Judgments themselves, which sometimes refer to past judgments to support its rulings.⁵ As a result, even though these judgments are not a source of law—unlike written law—they still hold a powerful influence over the legal outcomes of future cases and are often treated with authority similar to binding precedents in practice. As a result, criticizing and critically analyzing the Supreme Court’s interpretations is still of great significance to the Thai legal system. This is especially true when decisions are unprincipled or lack clear justification, as they could be applied in future cases in ways that perpetuate legal uncertainty or injustice.⁶

A. Definition of Cohabitation

The existence of cohabitation plays a central role in the Thai Supreme Court jurisprudence. More specifically, it serves as the first key factual requirement for unregistered couples to adjudicate a property claim. Despite its significance in Supreme Court decisions, the concept itself has been sparsely used in Thai written law and even less as a stand-alone legal concept. For instance, Section 1461 of the CCC uses the term ‘cohabit’ to refer to the duty of legally married couples to share physical living space and maintain one another.⁷ However, nowhere in the CCC does cohabitation independently give rise to a legal status; rather, it is regarded solely as a description of the marital obligation of spouses to physically live together as husband and wife.

While the CCC remains unchanged in this respect, cohabitation without registration has given rise to legal consequences in various Supreme Court decisions, which is the core of this article’s analysis. In these cases, the Supreme Court consistently describes cohabitation using the phrase “yùu kin kan chǎn sǎamii phrǐyaa”—to live together like husband and wife, which is also consistent with the official Thai translation of the term ‘cohabit’ under Section 1461 before its amendment. While this phrase has appeared several times in the CCC and other laws, such as the

⁴ See Supreme Court Judgment No. 516/2508 (1965); Supreme Court Judgment No. 12734/2558 (2015).

⁵ See Supreme Court Judgment No. 303/2488 (1945); Supreme Court Judgment No. 516/2508 (1965); Supreme Court Judgment No. 83/2512 (1969).

⁶ See Supreme Court Judgment No. 12734/2558 (2015).

⁷ Section 1461 of the CCC has been amended by the Civil and Commercial Code Amendment Act (No. 24) B.E. 2567 (2024), where the phrase “husband and wife” has been replaced with the term “spouses” to be more gender neutral. Other references to Section 1461 should be understood in this context.

Organic Act on Anti-Corruption, it was not until very recently that cohabitation was given an expanded definition under a written rule. The definition of this phrase first appeared in an Announcement of the National Anti-Corruption Commission (NACC) in the year 2018, and was later revised in 2025, where, for the first time, cohabitation was comprehensively defined and applied to have legal effect in conjunction with provisions on asset declaration.⁸ Even though the substantive purpose of this announcement is not directly related to the division of property between cohabitants, it nevertheless holds a degree of interpretive value on how Thai Law defines cohabitation. Specifically, under Clause 3 of the 2025 announcement, a person who cohabits with a government official without marriage registration shall be deemed a spouse under the Organic Act on Anti-Corruption if the criteria under Clauses 3(2) and (3) are met. The criteria to satisfy the element of cohabitation include having held a marriage ceremony or similar conduct recognized by family or community, which signifies a spousal bond, or where the official has publicly declared or demonstrated behavior indicating a spousal relationship.⁹ Although these clauses were developed from the administrative and anti-corruption point of view, they provide a rare instance in which Thai written law offered explicit behavior-based criteria to constitute the status of cohabitation.

1. Cohabitation as Defined by the Supreme Court

Returning to how the Thai Supreme Court defines cohabitation in the context of property disputes, the Court's description of cohabitation in various decisions suggests close alignment with both the core elements set out in Section 1461 of the CCC and the behavioral criteria later outlined in the NACC Announcement. The Court generally emphasizes the factual components of living together in a shared space and maintaining one another, which is consistent with the statutory expectations of Section 1461. Additionally, the Court has also placed some notable emphasis on the publicly recognized nature of such relationships, which reflects the criteria established in the NACC Announcement. In one notable decision, the defendant attempted to rebut proprietary claims by arguing that there was no cohabitation between him and the claimant because the sexual nature of the relationship had been kept secret.¹⁰ However, it seems that the Court rejected this claim since it appeared from the facts that, in addition to a child, a marital ceremony had existed between the defendant and the claimant despite the lack of registration. This aspect of the ruling suggests that public acknowledgment or the inability to plausibly deny a marital-like relationship is a significant component in the Court's determination of the existence of cohabitation. Given that not every successful proprietary claim required a marriage ceremony, it

⁸ Organic Act on Anti-Corruption B.E. 2561 (2018), ss 102 and 126.

⁹ Announcement of the National Anti-Corruption Commission (NACC) dated March 7, 2025, on the Criteria for Persons Living Together as Husband and Wife Without Registering a Marriage, Considered as Spouses (No. 2), B.E. 2568 (2025).

¹⁰ Supreme Court Judgment No. 684/2508 (1965).

appears that, to the Court, the most important element is the public understanding that there is a marital-like relationship.

In addition to the established legal framework, the Supreme Court has introduced several unique extensions to the concept of cohabitation that diverge from the boundaries of marriage provided in the CCC. In one significant decision, the Court recognized co-ownership rights of property between two women, where the defendant presented herself in a male-gender role. Despite both parties being biologically female, the Court treated their relationship identically to heterosexual couples found in other cohabitation cases.¹¹ This decision extended the scope of cohabitation beyond the heterosexual element of marriage embedded in Section 1458 of the CCC at the time, which deems that marriage shall take place between a man and a woman. It is also noteworthy that this extension occurred long before Thailand's legalized same-sex marriage in 2024, which, in the author's view, such legalization only increases the significance of this decision.¹²

In another noteworthy extension, the Supreme Court has also established that cohabitation is not invalidated even when one defendant remains legally married. In the example case, the defendant was still legally married to another woman, yet, according to the Court, this did not delegitimize the cohabitation status of the claimant and the defendant, nor did it affect the claim for co-ownership in the adjudicated property.¹³ Although such a relationship would contravene Section 1452 of the CCC, where a marriage cannot take place if one partner is already the spouse of another person, the Court nevertheless acknowledged that cohabitation existed between the claimant and the defendant.

Although cohabitation centers around the concept of living together like married couples, these extensions made by the Supreme Court suggest that, in property disputes, it is not necessary for the relationship to adhere strictly to the limitations of marriage laid out by the CCC.

B. Legal Conditions and Reasoning

Assuming that cohabitation is evident between two persons, this sub-section attempts to comprehensively compile other factual requirements and legal reasoning that the Supreme Court has established as the basis to award proprietary rights. Other than critically reviewing the Supreme Court's interpretation of Thai written law, this section will also examine how various circumstances of cohabitation—such as the joint acquisition of assets, mixing of properties, or managing the family household—are treated by the Court, and under what condition(s) properties held by one partner is eligible to be claimed by the other. Finally, some attention will be given to notable

¹¹ Supreme Court Judgment No. 3725/2532 (1989).

¹² CCC Amendment Act (No. 24) B.E. 2567 (2024).

¹³ Supreme Court Judgment No. 561/2510 (1967); Supreme Court Judgment No. 6292/2554 (2011).

exceptions that the Supreme Court has established as grounds to rebut proprietary claims.

Generally, in cases where a claimant claims to have cohabited with a defendant and seeks to be awarded co-ownership of property acquired during such period, the Court consistently reasoned that even though cohabitation exists, it still cannot be said that there is a legal marriage between the parties. By citing Section 1458, the Court upholds the written rule under the CCC that a valid marriage requires mutual agreement, which must then be publicly declared and officially registered before the registrar.¹⁴ Since no registration exists in these other cases, such relationships cannot constitute a legal marriage under Thai law. As a result, property(s) acquired during cohabitation cannot be classified as marital property (Sin Somros) under Section 1474(1), and neither party can claim for such property(s) to be equally divided under Section 1533, which governs the distribution of Sin Somros upon divorce.¹⁵ Nevertheless, even with the absence of a legal marital status, the Supreme Court affirms that this does not prejudice the right of a party to seek proprietary remedies under general law.¹⁶

In determining whether to award proprietary rights under general law to a claimant, the Court focuses primarily on whether the facts demonstrate that the cohabitants had the common intention to make a living together (thả mã hākin r`wm kạn) with regard to the property being claimed. If the intention to make a living together is evident, the Court deems that the cohabitants also had the intention for property acquired during cohabitation to be jointly owned, and thus, become co-owners of such property regardless of who is currently in possession or holds legal title. Through such reasoning, the Supreme Court has consistently held that each cohabitant is strictly entitled to claim distribution of their half/equal share of such property (Kự`ng hñự`ng/Thềā kạn), often citing Section 1357, which establishes the presumption that co-owners are presumed to have equal shares.¹⁷ Under this reasoning, claimable property include those acquired or generated during the period of cohabitation, such as income, or immovable assets, including the fruits arising therefrom. This also includes property acquired before marriage registration if it appears in the facts that the couple had cohabited prior to such arrangement.¹⁸

When it comes to classifying what factual circumstances demonstrate that cohabitants had the intention to jointly own the respective property, the Supreme Court has adopted a rather broad and inclusive scope of interpretation. By reviewing the factual scenarios that are available thus far, the Supreme Court appears to accept a wide range of behaviors that suggest that the couple had the intention of making a

¹⁴ CCC, s 1458.

¹⁵ CCC, ss 1474 (1) and 1533.

¹⁶ See Supreme Court Judgment No. 83/2512 (1969); Supreme Court Judgment No. 303/2488 (1945).

¹⁷ CCC, s 1357.

¹⁸ Supreme Court Judgment No. 1296/2558 (2015).

living together, especially when there is evidence of financial contribution or shared domestic responsibilities.

For example, when cohabitants have commingled their earnings acquired during cohabitation—such as depositing income into one bank account—the Court views this as evidence of an intention to make a living together and to jointly own such funds, regardless of each partner’s share or whose labor or contribution such funds were derived from. The Court reasoned that the facts reflected the act of sharing hardship and prosperity, which justifies co-ownership.¹⁹

Similarly, when each cohabitant has made financial contributions to acquire property, either as a home or in relation to a business venture during the course of their cohabitation, the Courts have also deemed that this indicated an intention to co-own the acquired property, including the fruits and profits generated therefrom.²⁰

Interestingly, even in the circumstance where one partner was solely responsible for earning income, which in this case was derived exclusively from his individual business venture, while the other partner undertook household duties such as taking care of the children, the Court still interpreted these circumstances as indicative of making a living together. The domestic partner’s role in maintaining the household and supporting the family seems to be viewed as a contribution that enables the other partner to pursue economic activities. As such, the Court deemed that both partners had a mutual intention to jointly own the house acquired, as well as the income itself.²¹ However, it remains to be seen how the Court will treat cases in which one partner maintains the household but did not necessarily enable the other partner to pursue economic activities. This may occur for example, in cases where one or both partners are already quite wealthy.

Noteworthy, in many cases where the Court was satisfied that the factual circumstances demonstrated the partners’ intention to make a living together, the Court often states that it is not of importance whether the disputed property is entirely or partly derived from one partner’s labor or financial input.²² This stands in contrast to the ordinary interpretation of Section 1357 in standard co-ownership disputes, where the Courts have repeatedly affirmed that the presumption of equal shares is rebuttable. For instance, in situations where it could be proven that one co-owner made little to no contribution whatsoever, the Courts have recognized that the division of property between co-owners should not be equal.²³ Additionally, where the parties had, from the outset, agreed to an unequal division—whether through a will, a

¹⁹ Supreme Court Judgment No. 303/2488 (1945).

²⁰ Supreme Court Judgment No. 516/2508 (1965).

²¹ Supreme Court Judgment No. 83/2512 (1969); Supreme Court Judgment No. 3725/2532 (1989).

²² See Supreme Court Judgment No. 303/2488 (1945); Supreme Court Judgment No. 83/2512 (1969); Supreme Court Judgment No. 3725/2532 (1989); Supreme Court Judgment No. 12734/2558 (2015).

²³ Supreme Court Judgment No. 1376/2544 (2001).

contractual arrangement, or clear evidence of separate possession—the Courts have accepted to these facts as grounds to rebut the presumption of equal shares.²⁴

However, in cases involving cohabiting partners, the Court has stated that the degree of contribution of each cohabitant is immaterial, which seems to foreclose the possibility of rebutting the presumption of equal shares through evidence of unequal contribution. It remains to be seen how the Court will treat prior express agreements between cohabitants concerning property division. Such agreements could, in theory, provide a basis for rebutting the presumption if the Court were to follow the ordinary application of Section 1357. Yet, given the familial and informal nature of most cohabiting relationships, the author would speculate that such type of prior agreements are most likely rare.

Even though it can now be established that the Supreme Court awards co-ownership in cases where an intention to make a living together is evident, there is still a notable gap in the Court's legal reasoning. Specifically, the Court in many cases has given minimal elaboration on how the implied intention to be co-owners or to make a living together can legally give rise to co-ownership under general law. However, in older cases, the court has cited provisions governing ordinary partnerships, suggesting that it draws an analogy from such concepts as the method to justify awarding co-ownership.²⁵ For example, the Court in some cases has cited Section 1012 of the CCC, which provides the definition of a partnership as a contract between persons to unite for a common undertaking with the aim of sharing profits.²⁶ This indicates the Court's view that the intention of cohabitants to make a living together resembles the formation of an ordinary partnership. Since there was no provision directly applicable to property acquired during cohabitation, pursuant to Section 4, the Court is able to draw an analogy to the concept of ordinary partnership as the provision most closely applicable.²⁷

By suggesting that some aspects of cohabitation can be analogized to an ordinary partnership, the Court has also cited the provisions of Section 1044 and Section 1027 to support its presumption of equal contribution. For example, Section 1027 provides that when the value of each partner's contribution is unclear or not fixed, it is presumed to be equal.²⁸ It seems that this provision has been cited by the Court to justify its decision in awarding 50:50 ownership (in monogamous cases), even when the contribution of each partner after the establishment of cohabitation may not be factually even.²⁹ As a result of the presumption that contributions are of equal value, the cohabitants will each be entitled to co-own half of the property acquired

²⁴ Supreme Court Judgment No. 2115/2551 (2008); Supreme Court Judgment No. 6034/2551 (2008); Supreme Court Judgment No. 344/2540 (1997).

²⁵ Supreme Court Judgment No. 303/2488 (1945); Supreme Court Judgment No. 4656/2567 (2024).

²⁶ CCC, s 1012.

²⁷ CCC, s 4.

²⁸ CCC, s 1027.

²⁹ In cases of non-monogamous relationships, the share of property may be divided into three or more equal parts; See Supreme Court Judgment No. 6292/2554 (2011).

during the cohabitation, since Section 1044 states that the share of profit (property) should be proportional to each partner's contribution.³⁰ Furthermore, to rationalize situations where one cohabiting partner contributes solely through personal services—such as labor or raising children—the Court has cited Section 1028, which provides that if no monetary value is fixed for services, a partner is entitled to a share equal to the average value of other contributions, which—between two cohabiting partners—will always be half.³¹

1. Exceptions

Upon examining a body of Supreme Court decisions, it becomes apparent that the Court has generally adopted a relatively lenient and broad interpretation for granting co-ownership of property between cohabitants. However, recently the Court has developed and clarified some exceptions to this approach, drawing some boundaries around certain circumstances in which a cohabitant will not be entitled to claim co-ownership.

In the past, the Supreme Court has hinted that in a case where several different kinds of property were acquired during cohabitation, a cohabitant has no right to claim co-ownership of property to which they did not provide any contribution to its acquisition.

This exception was exhibited much later in a more recent case where the lower courts had initially granted a claimant co-ownership of property acquired by the deceased during their cohabitation. The Supreme Court reversed these decisions on the grounds that there was no concrete evidence that the claimant had made any contribution toward the acquisition of such property. The Court has emphasized several factual elements. Firstly, the Court mentions that it did not appear from the facts that the claimant had the financial capabilities to contribute to the deceased's acquisition of the disputed property at that time. Secondly, it did not appear that the claimant had ever contributed any kind of labor or service in a regular or established manner (*Pěn kiccalaks'na*) with regard to any business ventures of the deceased.³² Lastly, the Court also mentioned that the business ventures of the deceased had already existed before cohabitation with the claimant. Hence, through such factual elements, the Court concluded that it was not evident that the cohabitants had the intention to make a living together, which disqualifies the claimant from claiming co-ownership of property acquired by the other during cohabitation. Through the emphasis of these facts by the Court, it seems that the boundary of denying co-ownership claims of one partner is whether it can be proved that such partner had made no contribution of any kind throughout the entirety of the relationship.

³⁰ CCC, s 1044.

³¹ CCC, s 1028.

³² Supreme Court Judgment No. 12734/2558 (2015).

C. Doctrinal Gaps and Hypothetical Issues

Given that a comprehensive compilation of the Supreme Court's reasoning has been laid out, this sub-section seeks to address the theoretical and practical issues that have arisen due to the Supreme Court's approach in resolving proprietary claims of cohabitants. This includes the Supreme Court's analogous use of ordinary partnership, the practical issues that may stem from the Court's interpretation of contribution and share of property, and the absence of clearly defined exceptions to rebut such claims.

Regarding the Court's analogous use of ordinary partnership, as previously discussed, the formation of an ordinary partnership under Thai law is based on the existence of a contract between persons to unite for a common undertaking with a view to sharing the profits, as stipulated in Section 1012.³³ Hence, the existence of an ordinary partnership is also grounded on the general principles of contract formation. Under Thai Law, a contract is formed by a clear, unequivocal offer of one party and an express or implied acceptance of the other. Furthermore, a contract also requires the existence of mutual agreement, which is based on the Roman law concept of *consensus ad idem*—"agreement to the same thing" or "meeting of the minds"—which signifies that all parties to a contract must have a clear and mutual understanding of the terms of a contract.³⁴ Although Thai law does not prescribe a specific form for the contract of ordinary partnership, it remains debatable whether it was principled for the Court to analogize the formation of an ordinary partnership from the conduct and domestic arrangements of two persons.

Firstly, there is the problem of whether cohabitants actually had an agreement to equally share the respective property, or understood the obligations that could arise when they entered into this kind of familial arrangement. For example, in cohabitation cases, a common defense raised by the party refuting a co-ownership claim is that the parties were not legally married and, therefore, no proprietary claims can be made with regard to marital property.³⁵ From such arguments, it can be inferred that in many cases, it is likely that at least one, if not both, cohabitants did not initially intend to share the respective property or anticipate that proprietary claims could arise when they began to cohabit with one another. In some cases, one or both parties may have intended to avoid registration in order to side-step such legal consequences. Furthermore, there is also the practical issue of the lack of specific statutory provisions governing proprietary claims of cohabitants. With the absence of a clear legal framework, laypersons are unlikely to be aware of the intricate string of interpretations that are only found in court decisions. Consequently, it can be assumed that many cohabiting couples may not have initially understood the legal implications of their conduct and familial arrangement. Hence, when the Court imputes in its judgments that the parties intended to equally co-own the respective property (based on the

³³ CCC, s 1012.

³⁴ Munin Pongsapan, "The Roles of 'Good Faith' and 'Good Commercial Practice' in Interpreting a Contract in Thailand" (2018) 8 *Thammasat Business Law Journal* 272.

³⁵ See Supreme Court Judgment No. 684/2508 (1965).

inference that they intended to make a living together), it is questionable whether this interpretation is always a reflection of the truth. In many cases, the true intentions of cohabitants may have been more rooted in familial commitments rather than a deliberate contractual agreement to enjoy an equal share, or their intended share may have been different. Thus, in the author's view, the Court's consistent reliance on this line of reasoning to grant equal co-ownership may be for the purpose of arriving at a simple outcome, while providing claimants with some sort of remedy. However, in cases where an agreement between cohabitants did not exist to begin with, this also leads to the issue of whether it is reasonable for the Court to analogize ordinary partnership to these cases, even though ordinary partnership requires a clear and mutual agreement akin to a contract.

Additionally, under the current jurisprudence, claimable property include that acquired since the moment cohabitation began up to the point where the relationship ends. This also leads to the controversy of whether individuals have lost the freedom and private autonomy to form marital-like familial arrangements without the risk of immediately imposing significant legal implications on themselves. This is in contrast with formal marriage, where the parties typically understood and clearly agreed to the terms and obligations of marriage prior to registration. This issue is observable in the case where a partner of a cohabitation understood that he was legally entitled to independently dispose of his property (held sole title) through a will, only for arduous familial disputes to arise upon his death. In that case, the other cohabitant was able to claim that the deceased had no right to distribute the property to the legatees since it is allegedly co-owned.³⁶

Other than the issue of analogizing ordinary partnership, in the author's view, a more significant concern lies in the rigidity of the Supreme Court's interpretation of contribution and sharing of property. As previously mentioned, since the status of cohabitation often arises without the parties having any formal agreement as to property division, the Court frequently relies on the concept found in Sections 1027 and 1028, where, in cases of doubt, contributions in an ordinary partnership are presumed to be of equal value.³⁷ While Sections 1027 and 1028 were originally intended to address situations where partners in a partnership contract initially fail to specify the value of their contributions, in the context of cohabitation—where a clear agreement is often absent—this provision becomes readily applicable. Since there is rarely a clear or fixed agreement on the value of contributions before or during cohabitation, the Court can technically always default to the presumption of equal contribution since there will always be some kind of doubt. It also appears that the Court intended for this rigid outcome, as indicated by its consistent decisions to strictly award equal shares in property, often dismissing arguments of unequal contributions. This raises a major concern regarding objective fairness, especially in situations where one party may have contributed significantly more—either financially or through labor—to the acquisition of the disputed property, yet is entitled to the same share as

³⁶ Supreme Court Judgment No. 12734/2558 (2015).

³⁷ CCC, ss 1027 and 1028.

the other party. Such unfairness may also be apparent in cases where the contribution of one partner is not directly correlated to the acquisition of the disputed property. For example, where one partner maintains the household or does not make any direct or significant contribution to a business venture.

Lastly, there is the issue of the vagueness and applicability of the exceptions the Supreme Court has developed to rebut claims of equal ownership. In practice, particularly in long-term cohabiting relationships, it is exceedingly rare for a cohabitant to make absolutely no contribution—whether directly or indirectly—to the other’s personal business ventures or to shared domestic responsibilities. Even when such contributions are minimal or insignificant, they are often present in some form. For instance, a partner may occasionally assist with bookkeeping, customer service, or logistical tasks in the other’s business, even if not in a formal employment capacity. More commonly, one partner may also, at some point, assist in household duties such as cooking, cleaning, or childcare. Therefore, under the Supreme Court’s current approach—which seems to require that a claimant must have made almost no contribution to be denied co-ownership—the current threshold of this exception is likely inapplicable to most cases of cohabitation.³⁸

Furthermore, in cases where one partner claims to have contributed through service or labor, the Court has established that such a claim can be rebutted if it is proven that the partner did not provide any labor or service in a “regular or established manner” (Pěn kiccalaks’ña).³⁰ However, there is currently no clear legal test or standard for determining what constitutes “regular” or “established.” The term remains vague and open to interpretation, leaving significant uncertainty in its application. As a result, even when a partner raises this defense to deny co-ownership, it remains highly uncertain how the Court will assess the nature and frequency of the claimant’s alleged contributions, and whether such claims would be successful.

In the author’s view, the Supreme Court—through its extensive efforts to analogize general legal principles and its consistent practice of awarding equal ownership—appears committed to granting cohabitants remedies akin to those available in a formal marriage, where each spouse is entitled to an equal share of marital property. However, in its eagerness to supply remedies where the law is silent—almost echoing the role once played by the old courts of equity—the Court has arguably overlooked several important theoretical and practical implications of its approach. These include concerns relating to legal certainty, contractual principles, private autonomy, and overall fairness. As a result, even though the Court’s intentions may be rooted in providing remedies in isolated cases, its current jurisprudence may not be sufficiently developed for the Thai legal system in the long term.

³⁸ Supreme Court Judgment No. 12734/2558 (2015).

III. COMMON LAW REMEDIES

Currently, it can be said that the Thai Supreme Court is keen on providing remedies for cohabitants; however, constrained by the civil law tradition where decisions must be grounded in written statutes, Thai courts cannot freely create new concepts or binding precedents like a court of common law. Instead, it has attempted to achieve similar outcomes through extensive legal analogy. However, unlike common law courts that are institutionally designed to develop doctrines through case law, the Thai Supreme Court is not institutionally equipped to efficiently fill doctrinal gaps when introducing new methods of legal interpretation. Thai lower courts, as aforementioned, will often mirror interpretations of the Supreme Court until there is further development or newly established exceptions. On the other hand, common law judges are free to develop doctrines incrementally through extensions and refinement of existing legal principles in response to new societal norms and contexts. Hence, the author suggests that English common law—through its large sample of equity cases and rich commentary—is a strong candidate for Thai law to draw upon to formally develop its legal framework surrounding property rights between cohabitants.

A. Recurring Issues

Before examining how English law has evolved to handle claims of cohabitants, it can be observed that many nuances of cohabitation found in the context Thai law have also reemerged in the English context. Both jurisdictions have witnessed a rise in cohabitation, where in England, the majority of disputes over the family home have come to surround cohabitants.³⁹ Despite this social development, English law—much like Thai law—suffers similarly from the conspicuous absence of statutory provisions that directly address the proprietary rights of cohabitants. In both systems, the absence of the political will to legislate this area has left the courts to bridge this legal gap—English courts through the doctrine of implied trust, and Thai courts through the legal analogy of an ordinary partnership. Moreover, research on English home buyers suggests a recurring social issue that couples are unlikely to have a clear understanding or formal agreement concerning their beneficial share of property acquired during their relationship. The common tendency is that most couples are—at the time—usually more focused on acquiring the property itself rather than what is to be their respective shares.⁴⁰ This supports with the author's previous speculation of the unlikelihood that Thai cohabitants will have clear terms between them, and the controversy behind broadly applying the concept of ordinary partnership in the absence of an explicit agreement. With the lack of a clearly expressed intention as to who should have what interest in a property, courts in both jurisdictions are left with

³⁹ Graham Moffat, Gerry Bean, and Rebecca Probert, *Trusts Law: Text and Materials* (5th edn, Cambridge University Press 2009) 613, 614 <<https://doi.org/10.1017/CBO9780511840517>>.

⁴⁰ Gillian Douglas, Hilary Woodward, and Julia Pearce, “Cohabitants: The Financial Consequences of Relationship Breakdown” (2007) *Family Law* 36, 39; Graham Moffat and others (n 39) 617.

the difficult task of navigating through a wide variety of factual circumstances to uncover the true intention of cohabitants, or at least arriving to a fair outcome. This is particularly evident when examining the operation of implied trusts under English law, where the courts have yet to adopt a completely unified approach in determining a party's respective share.⁴¹ The author further speculates that this may also provide an explanation for why Thai courts have opted for the very rigid—but perhaps safer or simpler—remedy of equal co-ownership rather than venturing into the more complex realm of uncovering the cohabitants' true intention.

B. The Approach of English Law

Nonetheless, despite the inherent difficulties in uncovering the true intentions of cohabitants or determining a share that is considered fair, English law has not been deterred from adopting this approach. The value in analysing the English position lies in the fact that English courts have notably avoided defaulting to the Thai solution of imputing the intention of cohabitants and strictly awarding equal shares. In contrast, English law appears to have adopted almost an opposite approach, where the search for the true intention of the parties is prioritized, followed by what is considered a fair outcome based on the parties' conduct and contributions. Only when the evidence is inconclusive will the court fall back on the maxim that equity is equality. This stands in stark contrast to Thai law, where 50:50 co-ownership is often the primary remedy, regardless of the underlying factual complexities or the absence of a clearly expressed intention. Accordingly, a closer examination of the English approach may provide insight into the potential gaps of Thai law, and how it can adjust its current solution in favor of a more intention-based and context-flexible framework. Since the majority of cohabitation cases involve property in which the legal title is held solely by one person, but is also claimed to be held for the benefit of another, this naturally leads to the review of English trust law—more specifically, the doctrine of implied trust in the family context.

1. Resulting Trust

The resulting trust represents one form of implied trust through which English courts may recognize a cohabitant's beneficial interest in a property held in the sole legal name of the other. The general rule—assuming there is no presumption of advancement—is that where a party has made a direct financial contribution to the initial purchase price of a property, they will acquire a beneficial equitable interest in that property proportionate to their contribution.⁴² Applied to a Thai case, if two cohabitants contribute financially to acquire land for business purposes, but the title is registered in only one of their names, the resulting trust doctrine would entitle each

⁴¹ Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2014) 777 <<https://doi.org/10.4324/9781315774411>>.

⁴² *ibid* 711.

to a beneficial share in proportion to their respective contributions. This would result in a different outcome than the Thai courts' solution of awarding 50:50 co-ownership, arguably offering a more flexible and fairer remedy in certain circumstances.⁴³

However, more recent developments in English law have witnessed a clear shift away from the use of resulting trusts in the context of domestic property disputes. While the resulting trust may appear to provide greater flexibility in attributing variable shares compared to Thai law, English judges have come to agree that this doctrine is still too rigid to be readily applicable in every dispute of the family home. This is largely due to the reality that most home buyers are unable to purchase a house with outright cash, where they usually rely on a mortgage to finance such a purchase instead.⁴⁴ The narrow scope of the resulting trust, which focuses solely on initial contributions to the purchase price, fails to account for subsequent financial contributions such as mortgage payments, and other non-financial contributions, or a change in intention during the course of the relationship. This limitation prompted further doctrinal developments beginning with *Gissing v Gissing*, where the House of Lords acknowledged that beneficial interests could be founded not just on initial contributions of the resulting trust, but also on broader considerations of common intention and conduct.⁴⁵ The courts began to move away from the rigid structure of resulting trusts simply because the doctrine no longer fit the facts found in situations where cohabitants acquired a home.⁴⁶ This trajectory has been solidified in *Stack v Dowden* and *Jones v Kernott*, where it was held that in the typical domestic scenario involving cohabiting couples and the family home, a common intention constructive trust is currently the preferred doctrinal framework. Nonetheless, the resulting trust continues to play a role in cases where a property is acquired for business purposes rather than as a family home.⁴⁷ Similarly, in cases of the family home where the only evidence presented is contributions to the initial purchase price and no further context is presented, the resulting trust remains the appropriate doctrine.⁴⁸

2. Constructive trust

As mentioned above, the constructive trust—more specifically, the common intention constructive trust—has been adopted to give the courts greater flexibility in determining the respective interests of cohabitants in a family home. This is to avoid the limitations and constraints of the resulting trust, which only accounts for direct financial contributions at the time of acquisition. The central authorities guiding the doctrine of constructive trust in the domestic context are *Stack v Dowden* and *Jones v Kernott*, which attempt to provide a structure on how English courts should resolve

⁴³ See Supreme Court Judgment No. 516/2508 (1965).

⁴⁴ Hudson (n 41) 723, 777.

⁴⁵ *ibid* 716; *Gissing v Gissing* [1971] AC 886 (HL).

⁴⁶ *Graham Moffat and others* (n 39) 627; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

⁴⁷ *Laskar v Laskar* [2008] EWCA Civ 347, [2008] 1 WLR 2695.

⁴⁸ *Graham Moffat and others* (n 39) 648.

such disputes. It has been established in these cases that when there is no express trust declared, the starting point is that equity follows the law.⁴⁹ Accordingly, if legal title is held solely by one cohabitant, there is a presumption that the entire beneficial interest belongs to that individual. However, this presumption may be rebutted where there is evidence—either before or after the acquisition—that the parties had a different common intention, as recognized under the constructive trust. Where an express agreement as to the intended share of each cohabitant is absent, the court must then consider whether a common intention can be inferred objectively from the parties' conduct, taking into account their entire course of dealings. If no such intention can be inferred, the court is to award a share it considers fair, based on—again—the entire course of dealings between the cohabitants.⁵⁰ This order of steps reflects the English courts' intention to avoid developing a remedial constructive trust—that is, one based purely on the sense of fairness. Instead, the courts prioritized uncovering the true intention of the parties, only turning to what is considered fair when no clear intention can be inferred. The general attitude is that an outcome, which appears unfair, does not render a decision to be unjust.⁵¹ Even though recent case law has laid out the underlying structure to deal with the family home, it is important to note that neither *Stack v Dowden* nor *Jones v Kernott* has overruled most of the earlier cases on common intention constructive trusts.⁵² Accordingly, reviewing earlier decisions remains necessary to identify factual circumstances the courts have previously accepted as indicative of the common intention between cohabitants.

The foundation and starting point for the development of the common intention constructive trust can be traced back to *Gissing v Gissing*. In this case, Lord Diplock acknowledged the practical reality that couples are, at the time, more likely to have been focused on acquiring the disputed property than the legal consequences of their conduct. This observation aligns with the author's earlier speculation regarding the legal awareness of Thai cohabitants. With this tendency in mind, Lord Diplock's dicta suggests that the court's task is not to bind cohabitants to any particular legal formula, but the court should instead determine their shared intention in light of the economic and relational context as the cohabitants understood it.⁵³ This leads to the idea that common intention may be found through express agreement between the cohabitants, or inferred from their conduct and surrounding circumstances. The attempt to provide structure to this concept was later found in *Lloyds Bank v Rosset*, where Lord Bridge articulated a two-limbed test for identifying common intention constructive trusts. Under the first limb, where there is evidence of an express agreement or understanding as to beneficial ownership, the court will enforce that agreement if the claimant has also suffered a detriment via the constructive trust. Under the second limb, in the absence of such an agreement, the court may infer a

⁴⁹ Hudson (n 41) 706.

⁵⁰ *ibid* 708.

⁵¹ *ibid* 718; *Cowcher v Cowcher* [1972] 1 WLR 425 (Fam).

⁵² Hudson (n 41) 703.

⁵³ *Gissing v Gissing* [1971] AC 886 (HL).

common intention from the cohabitants' conduct if the claimant has made direct contributions to the purchase price or mortgage repayments—again giving rise to a constructive trust.⁵⁴

In terms of the first limb of the *Rosset* test, the subsequent cases following this principle have held that there must be a clear agreement between the cohabitants regarding their beneficial ownership. For example, in a case where a claimant sought to establish an equitable interest in the defendant's home based on the fact that the claimant had lent money to the defendant's business, it was held that this did not constitute a clear agreement or understanding that the claimant would acquire any interest in the house.⁵⁵ Similarly, in another scenario where there was an express agreement that the claimant would have no interest in the property, the courts have maintained that agreement even if the claimant subsequently made contributions. In such cases, no beneficial title in the home would be awarded.⁵⁶

However, the major issue of the *Rosset* test lies in its second limb, which stems from Lord Bridge's dicta that he doubted whether anything less than a direct financial contribution to the initial purchase price or mortgage repayments would suffice to support an inference of a common intention through conduct. This formulation has been criticized for imposing a standard that is too restrictive, particularly in cases where a party has made substantial but indirect contributions, such as paying for renovation work or covering maintenance costs, which may also have enabled the other party to meet their mortgage obligations. In this respect, the second limb mirrors the rigidity of the resulting trust, which similarly excludes post-acquisition or non-purchase-related contributions and intention. Subsequently, the English courts of appeal have, in a number of cases, effectively avoided the application of Lord Bridge's test.⁵⁷ The lower courts have come up with a more flexible test referred to as the "balance sheet" approach, where the court takes into account the parties' respective financial contributions over the course of the relationship to determine each party's proportionate equitable interest. This method is similar to the resulting trust, but different in the sense that the court did not restrict itself to taking only initial contributions into consideration. This shift from *Rosset* has been solidified in *Stack v Dowden*, where the House of Lords has established that the court is to apply the more flexible approach of considering the whole course of dealing between the parties to determine their common intention.

Applying this principle: In the case of *Stack v Dowden*, Ms. Dowden had contributed approximately 60% of the mortgage capital, while Mr. Stack was responsible for the mortgage interest instalments and had carried out substantial physical work on both the first and second homes. Although the parties shared many aspects of their domestic life, the House of Lords placed particular emphasis on the fact that they had maintained separate bank accounts throughout the entirety of their

⁵⁴ *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL); Hudson (n 41) 703.

⁵⁵ Hudson (n 41) 722; *Churchill v Roach* [2004] EWHC 336 (Ch), [2004] 1 FCR 744.

⁵⁶ Hudson (n 41) 776; *Griffiths v Cork* [2007] EWHC 1827 (Ch).

⁵⁷ Hudson (n 41) 726.

relationship. This financial separation was seen as indicative of a lack of intention to equally share the interest in the property, and thus provided a strong basis for rebutting the presumption of equal beneficial ownership. Accordingly, the court allocated a 65:35 division of the equitable interest in favor of Ms. Dowden, a share that closely reflected the overall financial contributions made by each cohabitant.⁵⁸

In *Jones v Kernott*, despite the parties' initial intention of joint tenancy, the House of Lords held that Mr. Kernott's departure from the property and his lack of contribution over 14 years amounted to a severance of the intention to share the property equally. Over the course of 23 years, Ms. Jones had contributed around 90% of the financial costs related to the property. As a result, the court upheld the decision of the court of first instance and awarded a 90:10 share in her favor, reflecting both the parties' change in intention and their respective contributions.⁵⁹

In *Midland Bank v Cooke*, despite Mrs. Cooke's limited direct financial contribution to the property, the court held that she was entitled to half of the beneficial interest. The rationale was that her role in raising the children, paying household expenses, and acting as a co-signatory to the mortgage reflected a shared intention between the parties to share everything equally. While Lord Justice Waite cautioned that the maxim equality is equity should not be applied unthinkingly, it has been agreed that it is appropriate where the evidence strongly indicates that the parties genuinely intended to share everything.⁶⁰

What is particularly notable is the English courts' approach regarding claims arising from domestic contributions, such as performing household duties, caring for children, or paying household bills. The English courts have often held that such contributions alone do not entitle a cohabitant to an interest in the property unless there is clear evidence of something more. The prevailing principle requires the cohabitant to demonstrate contributions that go beyond what would ordinarily be expected within the family setting. This is because fulfilling domestic duties is not generally regarded as sufficient evidence of the intention to acquire an interest in the property, nor does it necessarily constitute a detriment, since such duties may have been understood and performed as a part of normal family life.⁶¹ This contrasts sharply with the Thai approach, where fulfilling domestic duties has justified granting a cohabitant a half share of the home. Nevertheless, in circumstances where contributions to household expenses exceed the norm—especially where such contributions have enabled the other party to meet mortgage payments—an equitable interest in the property may still be recognized.

⁵⁸ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; Hudson (n 41) 766.

⁵⁹ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776; Hudson (n 41) 778.

⁶⁰ *Midland Bank plc v Cooke* [1995] 4 All ER 562 (CA); Hudson (n 41) 742.

⁶¹ *Graham Moffat and others* (n 39) 627; Hudson (n 41) 728; *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598.

3. Proprietary Estoppel

The discussion of English law on the property rights of cohabitants would not be complete without exploring the doctrine of proprietary estoppel. In a nutshell, the rule of proprietary estoppel operates when there is a representation—for example, a promise by one party that the other party will acquire an interest in the property, and, through the reliance on that representation, a detriment has been suffered.⁶² Although there have been hints that courts intend to merge this doctrine with constructive trust, there still remain good reasons to distinguish them. Unlike the common intention constructive trust, which requires a shared intention as to each party's interest in the property, proprietary estoppel can fill the gap of a scenario where there is the intention to acquire a future benefit or ownership. This makes it particularly useful in situations where, for example, a cohabitant is promised an interest in property under a future will or other delayed arrangements and acts in detriment based on that unfulfilled expectation.

However, another key distinction is that proprietary estoppel is not concerned with enforcing a promise or agreement, but is focused on remedying a detriment when the expected outcome is unfulfilled.⁶³ As such, the range of remedies under estoppel is much broader and more flexible. The courts may award remedies in the form of proprietary rights, monetary compensation, or even the right to occupy property, depending on what is considered necessary to prevent a detriment. The case *Porntip Stallion v Albert Stallion Holdings (Great Britain) Ltd* is a clear example of this attribute, where the claimant was granted a life-long right to occupy the property in common with others, rather than outright title or compensation.⁶⁴ Furthermore, proprietary estoppel is not confined to disputes over the family home, where it may also extend to other types of property held between cohabitants. However, despite its remedial flexibility, the doctrine does not necessarily provide a more generous route for claimants relying on domestic contributions. Courts have maintained a similar attitude to the constructive trust that detriment is proved by conduct that goes beyond what might ordinarily be expected in the context of a familial relationship.⁶⁵ Overall, proprietary estoppel is a broader equitable doctrine that is useful in filling the gaps left by constructive trusts, including situations involving expectations of future benefits, and potentially provides a more flexible spectrum of remedies.

⁶² Hudson (n 41) 745.

⁶³ *ibid* 749.

⁶⁴ *ibid* 751; *Stallion v Albert Stallion Holdings (Great Britain) Ltd & Anor* [2009] EWHC 1950 (Ch), [2010] 1 FCR 145.

⁶⁵ Graham Moffat and others (n 39) 639.

IV. APPLICATION TO THAI LAW

By reviewing the English approach to implied trust and proprietary estoppel, the author is not suggesting that Thai law should adopt the concept of implied trust into its legal system to deal with disputes of cohabitants. Adopting the concept of trust into a civil law system has its own nuances, which this article will not discuss. However, what the author does suggest is that the English approach is a prime reference point to assist in developing the Thai framework for cohabitants, such as the reform of available remedies and the various factual scenarios that Thai law must address. This holds regardless of whether Thai law chooses to legislate new provisions or continues to rely on the current model of legal analogy.

Firstly, what the author views as most critically drawn from the English approach is the variety of remedies. Through the cases that have been reviewed, it can be seen that when a legal system allows judges to organically develop concepts over time through many cases, it becomes clear that the English courts did not find that one type of remedy could serve as a one-size-fits-all solution. Sometimes, English courts found that an equal share in the property was fair, and many times it did not. Even when variable shares were available through the resulting trust, English courts still found the approach to be too rigid, and the development of cohabitation cases has generally trended toward needing more flexibility. This strongly suggests that Thai law cannot continue with its “nothing or half” remedy for cohabitants and expect that the outcome will be fair, regardless of which legal theory it applies to arrive at that conclusion. In the author’s view, this is the first and most pivotal point that Thai law must come to grasp.

Secondly, what English law has revealed are the various nuances that arise in cohabiting relationships that future development of Thai law must address if it is to be adequately equipped to deal with the various cases. With this in mind, the author views that the first-order question that Thai law must answer in granting property rights is what kind of conduct, direct contribution, or indirect contribution is sufficient to grant a claimant a cause of action in the first place.

In this regard, the author would suggest that the English concept of detriment is a strong foundation for this basic threshold. For example, financial contributions—whether made before or after the acquisition—should give rise to a claim in the property in which the contribution was made. In terms of non-financial or indirect contributions, the author supports the English reasoning that such contributions should go beyond what is ordinarily expected in a domestic or family context. The reason being is that otherwise, many cohabitants would be able to claim an interest in the property even when their original intention was purely familial. Additionally, the author contends that contributions made to one property should not automatically give rise to claims over another property, unless an agreement to the contrary can be observed. Overall, if there is no detriment, then no claim should be possible.

The second issue is how the court should determine what share each party is entitled to. Following the current jurisprudence, the Thai Supreme Court appears to

reason that the equal shares granted reflect the court-founded intention of the parties to make a living together. However, as the author has previously argued, the court should not completely disregard other surrounding conduct and contributions of cohabitants to determine what shares were actually intended. Doing so would undermine the very reasoning behind awarding a share based on intention if the reality is that the cohabitants' conduct points to something different.

In this regard, the author suggests that Thai law could instead adopt the English framework, where, if there is clear enough evidence of an agreement between the parties, the court should honor that agreement. In the absence of a clear agreement, the court should interpret the true intentions of the parties through conduct, taking into account the entirety of their relationship. For example, if cohabitants clearly segregate their assets—such as maintaining separate bank accounts—this should indicate that they did not intend to share the respective property equally. In such a case, a share could then be inferred from each cohabitant's overall contribution throughout the relationship. Similarly, if there is evidence of an agreement that one party is to have no interest in the property, even if some contributions were made, this intention should also be respected.⁶⁶ Where a clear inference of the intended share cannot be made, the court could then determine what is fair based on the available evidence. For example, in cases where a cohabitant fails to exhibit a clear agreement to demonstrate their share in the property but has nonetheless suffered a detriment, the Court could consider applying the Thai principle of unjust enrichment to remedy the financial contribution or labor that was provided.⁶⁷ This could also be applied to the situation where a future interest was promised in a similar manner to English proprietary estoppel.

Even though these concepts could possibly be applied to how the Thai courts currently interpret general law, the author would still advocate for the enactment of specific statutory provisions that directly addresses property rights between cohabitants. While the English doctrines of implied trusts may offer a more comprehensive framework, this does not mean that Thai law must similarly suffer from the absence of political will to legislate in this area. Given the significance of the issue, which may affect a large number of families, the author views that, beyond delivering a just outcome to individual disputes, it is equally important that the legal consequence of cohabitation is made clear to the general public.

V. CONCLUSION

In conclusion, this article has found that by relying on the narrow analogy of ordinary partnership, Thai law currently still lacks a coherent framework for addressing property rights between cohabitants. As demonstrated through the exploration of

⁶⁶ CCC, s 407.

⁶⁷ CCC, s 406.

English law, this approach is still too rigid to be justly applied in every dispute. While this analogy may have offered a starting point for courts to grant remedies in the past, it still falls short in providing a predictable and fair outcome for cohabitants in the modern context. The limitations of this model are apparent when contrasted with the more developed English framework, which provided more flexible remedies and has answered to a wider range of scenarios. Since cohabitation has become a social norm, it is essential for Thai law to catch up to this social development. Doing so would not only provide a fairer outcome for the disputes of cohabitants, but would also serve a preventive function by helping individuals understand the legal consequences of their intimate relationships. Without a legal framework that reflects social realities, cohabitants remain vulnerable to unpredictable litigation and injustices. In the current social context, where Thai couples are likely to be in long-term relationships without registering a legal marriage, there has never been a better time for Thai law to develop this area.

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* **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." *The Chicago Manual of Style* (18th edn, University of Chicago Press 2024) §15.93.