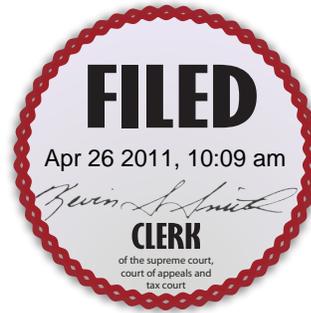


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY SCOTT,)
)
Appellant-Respondent,)
)
vs.) No. 29A05-1004-PL-250
)
SAUNDRA L. WALDEN,)
)
Appellee-Petitioner.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0903-PL-296

April 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Anthony Scott appeals the trial court's order dividing property between Scott and Sandra L. Walden. Scott raises three issues which we revise and restate as:

- I. Whether the trial court abused its discretion in denying Scott's request for a continuance to obtain counsel;
- II. Whether the trial court abused its discretion in admitting Walden's exhibits; and
- III. Whether the trial court erred in determining that Walden was entitled to equitable relief arising out of her cohabitation with Scott and erred by dividing and distributing the property of the parties.

Walden raises the issue of whether she is entitled to appellate attorney fees.

We affirm the trial court and deny Walden's request for appellate attorney fees.

The relevant facts follow. Walden met Scott in 1979 or 1980 and they began dating in 1983. In the summer of 1984 prior to Walden's college graduation, Scott asked Walden if she would be interested in moving in with him in Lafayette, and Walden indicated that she was interested. At the time, they did not have "a lot, but [they] had a couple of beds and a couch and some dishes" Transcript at 9. Scott and Walden leased a two bedroom apartment in Lafayette. Walden began working at an accounting firm, and Scott worked for Quality Farm and Fleet as a sales or operations manager. The parties opened a joint bank account at Lafayette National Bank and their earnings were deposited in that account.

They lived in Lafayette for just over a year and a half until Scott was transferred to Xenia, Ohio in October 1986. Walden joined Scott in Ohio in November 1986. While in Ohio, Walden's income was deposited into a joint bank account.

In October 1987, Scott was transferred to Noblesville, Indiana, and the couple purchased a home in Fishers, Indiana (the “Fishers Residence”) in July 1987.¹ At that time, Walden began working as a financial analyst earning \$21,000 a year, and Scott’s salary was between \$30,000 and \$39,000. The mortgage payments came from Scott and Walden’s joint account. Improvements to the Fishers Residence were paid for out of Scott and Walden’s joint account.

Scott and Walden discussed opening an equity line of credit secured by the Fishers Residence so that there would be funds “to do some flipping of some homes.” *Id.* at 18. Properties on Bay Brook and Melrose (the “Tudor Properties”) were acquired using this line of credit. At some point, Walden paid expenses on the Bay Brook property which were never reimbursed after that property was sold.

In 1988 or 1989, Scott and Bart Webber, a family friend, discussed purchasing property on State Road 23 (the “Webber Property”). Scott and Walden discussed their finances and whether they could afford monthly payments related to the Webber Property because Scott had been fired from his job and was working for a contractor at that time. Scott and Webber purchased the property, and the funds for Scott’s purchase of this land came from Scott and Walden’s joint account. At some point, Dennis Randall purchased one-third of the Webber Property.

In the early 1990s, Scott and Walden discussed marriage after Walden became pregnant. After Walden suffered a miscarriage, they decided not to marry. In 1993,

¹ Walden testified that the title to the Fishers Residence was in Scott and Walden as joint tenants.

Walden began working for American Health Network and her starting salary was \$21,000 or \$22,000 which increased to \$44,000 by 2008. Scott initially made \$15,000 more than Walden when they met but by 2007 Walden made only \$6,000 less than Scott. During that time, all of Walden's earnings were deposited into a joint account. On March 18, 1995, a child was born to Scott and Walden. Walden took eight weeks off but otherwise worked during the child's infancy.

During the period that Scott and Walden lived in the Fishers Residence, Scott worked odd hours while Walden worked "pretty much 8 to 5." Id. at 21. Walden prepared dinner, washed the laundry and dishes, cleaned the house, cooked, and cut the grass. Walden also prepared Scott's tax returns.

In July 2007, Scott moved out of the Fishers Residence. At some point, Scott and Walden discussed their monthly expenses including "[i]nsurance, trash removal, household mortgage, etc.," which totaled approximately \$2,000, and Scott agreed to deposit \$2,000 in their joint account so that Walden could pay expenses out of that account. Id. at 83. In January 2009, Scott ceased the \$2,000 monthly payment.

On March 5, 2009, Walden filed a complaint for damages under the theories of quantum meruit and breach of oral cohabitation agreement. Walden also included a petition for paternity and hearing for child support. In July 2009, the court entered an Agreed Entry Establishing Paternity, Custody, Child Support, and Parenting Time. On July 14, 2009, the court scheduled a trial on the remaining issues for September 28, 2009. On July 20, 2009, the parties agreed to continue the trial to November 16, 2009. On

September 3, 2009, Scott filed a motion for extension of time, which the court granted the following day.² On September 10, 2009, Scott's counsel filed a motion to withdraw appearance, and the court granted the motion four days later.

On October 30, 2009, Scott filed a motion for a continuance stating that he needed additional time because he was seeking psychiatric help and was not able to make decisions. On November 3, 2009, Walden filed an objection to Scott's motion.³ On November 13, 2009, the court denied Scott's motion for a continuance following a hearing at which Scott failed to appear. However, due to a congested court calendar, the court rescheduled the trial for January 4, 2010.

On January 4, 2010, the court held a trial on Walden's complaint during which Walden moved to admit Plaintiff's Exhibit 1, which consisted of a summary that she prepared reflecting properties that were acquired during the period of cohabitation, and Plaintiff's Exhibit 2, which consisted of the same information with current values. The court asked Scott if he had any objection, and Scott indicated affirmatively and stated:

Well, I haven't had time to review these. I want to, I want to apologize to the Courts here. Yes I have come [sic] tremendously unprepared. This is not at all what I thought I was getting into today. The stories are very one sided. I didn't know we were going to go back through all of our history of time and again, I mean I don't understand how she got, he has my personal information on accounts. She's been opening my mail illegally, keeping mail from me. I obviously need to get an attorney. I thought this was just going to be a hearing of, you know, this property and, and the house.

² The record does not contain a copy of Scott's motion for extension of time.

³ The record does not contain a copy of Walden's objection to Scott's motion for a continuance.

Id. at 16. The court overruled Scott's objection.

Walden moved to admit Plaintiff's Exhibit 3 which consisted of a book that contained various supporting items identified in Plaintiff's Exhibits 1 and 2. The court asked Scott if he had an objection and the following exchange occurred:

[Scott]: I guess I have a question. When do I get time to review this fraudulent material?

THE COURT: Sir this has been pending since September or March of this year.

[Scott]: No this was presented –

THE COURT: Of last year. Sir we are here for trial. I don't have time for you to look at documents in trial.

[Scott]: Should I have gotten these ahead of time?

THE COURT: Did you ask for them?

[Scott]: No I did not.

THE COURT: Okay. Overrule that objection. You have a right to look at it so you can make an objection.

Id. at 35-36. Scott reviewed the document and then stated: "I object, I think, I feel I need time to review this and again I, I am in over my head and think I need to get a lawyer. I don't feel like I'm being represented well by myself." Id. at 37. The following exchange then occurred:

THE COURT: Sir let's talk about this because you keep talking about a lawyer. I show that you had a lawyer in this case for a substantial period of time, Mr. Greg Noland.

[Scott]: Not for this case sir.

THE COURT: Oh really?

[Scott]: No sir.

THE COURT: Wasn't Mr. Noland your attorney for a period of time?

[Scott]: For the child custody, correct, but never for this.

THE COURT: Sir this case originally started that way and Mr. Noland filed an appearance. He filed it March 30, 2009. He continued as your counsel in this case.

[Scott]: That was for child support.

THE COURT: He continued as your counsel in this case beyond that date sir. Until he filed to withdraw his appearance in September of 2009. You've known since September of 2009 this case has been set for trial. And you haven't hired counsel. Why should you be getting more time now, that's three months, two months.

Id. at 37-38. Scott then explained that he had been seeking medical help because he had been “having a tough time making decisions and just getting bills paid” and “seem[s] to be putting everything off and just not able to even open [his] mail and stuff.” Id. at 38. Scott explained that he was working with a physician for “depressed mood, excessive worry and anxiety, difficulty concentrating and completing personal tasks” Id. at 39. The court stated: “Sir, this is a law suit and it's been pending since March of last year and this trial has been set for some time and we're moving forward and I'm showing no objection to Exhibit 3 and it's admitted without objection other than the fact [Scott would] like more time to review it.” Id.

On March 26, 2010, the court entered a decree concluding that the parties cohabitated between 1985 and 2007 and that “the equitable theories of unjust enrichment and implied contract justify an award to each party to the cohabitation of one-half (1/2) of those assets which the Court has found were jointly created.” Appellant’s Appendix at 19. The court ordered that Scott deliver to Walden “a quitclaim deed conveying one-half of his interest in the [Webber Property] to [Walden] as a tenant in common.” Id. at 21. The court ordered that Walden be entitled to occupy the Fishers Residence as long as she pays the mortgage, taxes, insurance, and utility expenses associated with the residence. The court also ordered Walden to pay Scott \$26,927.99 “[i]n order to equalize the division of the jointly acquired assets.” Id. at 20.

I.

The first issue is whether the trial court abused its discretion in denying Scott’s request for a continuance to obtain counsel. “Under the trial rules, a trial court shall grant a continuance upon motion and ‘a showing of good cause established by affidavit or other evidence.’” Gunasekar v. Grose, 915 N.E.2d 953, 955 (Ind. 2009) (quoting Ind. Trial Rule 53.5). A trial court’s decision to grant or deny a motion to continue a trial date is reviewed for an abuse of discretion, and there is a strong presumption the trial court properly exercised its discretion. Id. “A denial of a motion for continuance is abuse of discretion only if the movant demonstrates good cause for granting it.” Id. A *pro se* litigant is held to the same established rules of procedure that trained counsel is bound to follow. Id.

Scott argues that he “showed good cause and it was an abuse of discretion to deny his request for a continuance so he could obtain counsel.” Appellant’s Brief at 31. Scott focuses his argument on his statements at the January 4, 2010 trial and does not reference or challenge the denial of his motion for a continuance filed on October 30, 2009 in his argument.

Even assuming that Scott’s comments at the trial constituted a request for a continuance, we cannot say that the court abused its discretion in denying Scott a continuance. The record reveals that the court had scheduled a trial for September 28, 2009 on July 14, 2009. After the parties agreed to continue the trial, the court rescheduled the trial for November 16, 2009. The court later rescheduled the trial for January 4, 2010 due to a congested court calendar. Thus, the trial was pending for almost six months. Further, while Scott filed a motion for a continuance on October 30, 2009, he failed to appear at the November 13, 2009 hearing on his motion, and does not challenge the denial of this motion on appeal.

Scott points out that he offered a written statement near the end of the hearing from his psychiatrist regarding his diagnosis and that the court excluded the statement. However, Scott does not argue that the court erred in failing to admit the written statement. While Scott’s attorney withdrew in September 2009, the withdrawal of an attorney does not automatically entitle a party to a continuance. Thompson v. Thompson, 811 N.E.2d 888, 908 (Ind. Ct. App. 2004), reh’g denied, trans. denied. Scott’s attorney withdrew more than sixteen weeks before the trial, and Scott provides no citations to the

record indicating that he was diligent in trying to engage new counsel. See Gunashekar, 915 N.E.2d at 955 (“If any inference can be drawn from the unexplained passage of six weeks from the time their attorney withdrew, it is that they were not forced to proceed without an attorney.”).

Under the circumstances, we conclude that the court did not abuse its discretion in denying Scott a continuance. See id. at 956 (“In ruling on the request to postpone, the trial court was entitled to consider how long the trial had been scheduled, the lack of explanation for eight weeks of apparent inaction, the relative simplicity of a three-witness bench trial, and the potential that the request was a conscious gaming of the system.”); Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, 311 (Ind. Ct. App. 2000) (affirming the denial of a motion for continuance where over five months elapsed from the time the movant’s attorney withdrew to the time of the trial).

II.

The next issue is whether the trial court abused its discretion in admitting Walden’s exhibits. Scott argues that the court erred “when it admitted [Walden’s] exhibits over [his] objections, especially Exhibit 3, containing multiple hearsay documents supporting [Walden’s] listing of assets and values set out in Exhibits 1 and 2, and for which there was no proper identification and authentication.” Appellant’s Brief at 29. Scott argues that the court erred in admitting Plaintiff’s Exhibits 1 and 2 because “they are replete with guesses as to value by a witness who did not express any expertise

in valuing such assets.” Id. at 33. Scott mentions Ind. Evidence Rules 802, 803(6), 901(a), and 902(9).

Scott did not object to Walden’s exhibits at trial on the same grounds that he argues on appeal. “A party may not present one ground for an objection at trial and assert a different one on appeal.” In re Guardianship of Hickman, 805 N.E.2d 808, 822 (Ind. Ct. App. 2004) (citing Lashbrook v. State, 762 N.E.2d 756, 759 (Ind. 2002)), trans. denied. Consequently, Scott has waived this argument. See id.

III.

The next issue is whether the trial court erred in determining that Walden was entitled to equitable relief arising out of her cohabitation with Scott and erred by dividing and distributing the property of the parties. At the outset we note that Walden requested specific findings of fact and conclusions. When a party has requested specific findings of fact and conclusions pursuant to Ind. Trial Rule 52(A), this court may affirm the judgment on any legal theory supported by the findings. Turner v. Freed, 792 N.E.2d 947 (Ind. Ct. App. 2003). When reviewing a judgment, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. Id. The judgment will be reversed where it is clearly erroneous. Id. Findings of fact are clearly erroneous where the record lacks any evidence or reasonable inferences from the evidence to support them. Id.

Scott argues: (A) that the evidence does not support several of the court’s findings; and (B) that the court erred in determining that Walden was entitled to equitable relief.⁴

A. Findings

1. Findings 5 & 8

Scott challenges the following findings:

5. In August, 1985, [Walden] graduated from Ball State University and at the express invitation of [Scott], moved into an apartment jointly chosen and leased by the parties in Lafayette, Indiana. Together, they: entered into a joint apartment lease; deposited their mutual earnings in a joint bank account; shared in the cost of living; and, accumulated property together.

* * * * *

8. In 1986, the parties moved to Ohio incident to [Scott’s] employment. Upon relocating to Ohio . . . [Walden] and [Scott] continued to cohabitate, and their income was deposited to a joint account to which each had unrestricted access. From the joint account the parties shared the costs of living and continued to accumulate property.

Appellant’s Appendix at 8. Scott argues that “[t]here is no evidence in the record that the parties accumulated any property while living in Lafayette, Indiana,” and that “[t]here is

⁴ Scott also argues that “[t]he Statute of Frauds precludes any action upon a contract for the sale of land unless it is in writing.” Id. The statute of frauds has no application here, however, because equitable relief is not subject to the statute under the circumstances presented, and such relief, particularly relief for unjust enrichment, was driving the trial court’s decision. See Brown v. Branch, 758 N.E.2d 48, 52 n.2 (Ind. 2001) (noting that there are a number of equitable doctrines that may provide a basis for avoidance of the Statute of Frauds, including quantum meruit, part performance, and constructive fraud).

Scott also cites Engelbrecht v. Prop. Developers, Inc., 156 Ind. App. 354, 296 N.E.2d 798 (1973), reh’g denied, for the proposition that “[i]nasmuch as relief is available to [Walden] through a legal action for partition of the Fishers residence, there can be no recovery on the theory of implied contract or quantum meruit.” Appellant’s Brief at 23. In Engelbrecht, the court held that “[w]here there is a contract controlling the rights of the parties there can be no recovery on the theory of quantum meruit.” 156 Ind. App. at 358, 296 N.E.2d at 801. Scott does not cite to the record to suggest that an express contract existed in the present case. Thus, we cannot say that Engelbrecht requires reversal of the trial court’s division of the parties’ property.

no evidence in the record that the parties accumulated any property together prior to moving to Ohio such that they could ‘continue to accumulate property.’” Appellant’s Brief at 24-25. Scott also argues that “[t]he only evidence in the record is that the parties acquired two automobiles,” and that “[t]here is no evidence of what automobiles were purchased or whether their acquisition was by joint efforts.” Id. at 25.

The record reveals that Scott and Walden did not have “a lot” when Walden moved in, that Scott and Walden opened a joint bank account in Lafayette, that Walden deposited her earnings into that account, and that Scott purchased a vehicle, specifically an “Olds,” during that time using Scott’s personal account. Transcript at 45. The following exchange occurred during the direct examination of Walden regarding Scott and Walden’s time in Ohio:

Q Alright so your money went into a joint account?

A Yeah.

Q As did Mr. Scott’s money?

A His paycheck was deposited in that account and so was mine and we paid bills.

Q And did you accumulate –

A We still didn’t have a lot.

Q Did you accumulate property with money from that account?

A We had, we had the two vehicles, but we did not purchase a home in Ohio. We rented a condo.

Id. at 14. Based upon the record, we cannot say that the trial court’s findings were clearly erroneous.

2. Finding 10

Scott challenges the following finding:

10. Upon returning to Indiana, the parties were each gainfully employed. Each party deposited his or her income into a jointly held Key Bank account or a jointly held Forum Credit Union account to which each party has unrestricted access. This Key Bank account was used to pay for the parties [sic] joint living expenses including the payment of the monthly mortgage payments for the Fishers Residence and to acquire personal property. The Forum Credit Union Account was generally used to fund significant one time expenses such as vacations and special purchases.

Appellant’s Appendix at 9. Scott argues that “[t]here is no evidence in the record indicating when, or how, the parties acquired any of the personal property at issue.”

Appellant’s Brief at 25. Scott does not develop an argument regarding what personal property was acquired during this time or how this impacts the division of property. We observe that Walden indicated that the joint account was used in “getting the household and all that set up.” Transcript at 49-50. We cannot say that this finding is clearly erroneous.

3. Finding 12

Scott challenges the following finding:

12. In 1988, [Scott] and Barton Webber purchased approximately 23.8 acres located at Cherry Tree Road and Highway 32 in Noblesville, Indiana (“Webber Property”). The property was originally purchased on contract and was paid for in part with funds from the parties’ joint account, funds from [Scott’s] separate account, funds from a third partner, Dennis Randall, and the sale of some lots off of the property. This property is now

owned by the three partners in equal shares and [Scott] is title holder of a one third interest in the total property. This property has not been appraised except by [Walden's] personal estimate which she candidly admitted was a number she put down so that there was some number associated with the property's value.

Appellant's Appendix at 9. Scott appears to argue that the Webber Property was not purchased using funds from the parties' joint account. Specifically, Scott argues that Walden "speculated that at the time of the purchase, the parties only had the joint account, so that must be where the down payment for the property came from;" "[h]owever, by [Walden's] own later admission, [Scott] also had a separate money market account." Appellant's Brief at 25.

The record reveals that Scott and Walden discussed their finances and whether they could afford monthly payments related to the Webber Property because Scott had been fired from his job and was working for a contractor at that time. Walden indicated that the funds for Scott's purchase of the Webber Property came from Scott and Walden's joint account. Again, we cannot say that this finding is clearly erroneous.

4. Finding 20

Scott challenges the following finding:

20. The untangling of the parties' affairs is made substantially more difficult in this proceeding because [Scott] has failed to provide requested discovery. On October 21, 2009, [Scott] was ordered to provide discovery responses on or before October 28, 2009 to the discovery requests submitted by [Walden] on August 6, 2009. [Scott] never responded to those requests. [Scott] testified that he had certain medical issues which prevented him from attending to business matters such as this and in fact for a substantial period of time he did not even open his mail. [Scott] further appeared uncertain during the trial of this case as to what

was expected and needed in order for the Court to make an informed decision. He adequately presented his case at trial and competently questioned the witnesses and presented testimony.

Appellant's Appendix at 12-13. Scott argues that the court's finding that he adequately presented his case and competently questioned witnesses and presented testimony is clearly erroneous. To the extent that Scott did not adequately present his case at trial or competently question Walden, we cannot say that this finding affects the outcome of this case.

5. Finding 21

Scott challenges Finding 21 which listed approximately thirty items of real estate, financial accounts, and personal property and assigned a value for all but one of the items. Scott does not challenge the valuation of any specific item in Finding 21. Rather, he argues that "[t]he court's finding as it pertains to value is not supported by probative evidence indicating value with a reasonable certainty." Appellant's Brief at 26. Scott also argues that Walden "testified regarding value that she took her best guess on her exhibits." Id. Scott cites to the following exchange which occurred during the direct examination of Walden:

Q And the other items, small items there, the non-furniture tools, things like that, that you're asking that the Court set over to [Scott] and you have valued those at some \$3,000.00?

A He has some gun collections and a couple of pieces of art, and some scuba diving equipment. Took my best guess on what all that would add up to.

Transcript at 69.

The record reveals that the value of financial investments came from financial statements, and the values of personal property came from the “Blue Book” and Walden’s best estimates. Id. at 30. Again, we cannot say that Finding 21 is clearly erroneous based upon Scott’s arguments.

6. Finding 22

Scott challenges Finding 22, which indicates in part that the Webber Property, the Tudor Properties, and some personal property was acquired by the joint efforts of the parties and indicates the value of certain assets and debts. Scott argues that there is no evidence of whether the Webber Property was acquired by joint efforts, of the value of the Tudor Properties, or when and how the personal property was acquired.

As previously mentioned, the record reveals that the parties discussed whether they could afford monthly payments related to the Webber Property and that the funds for the purchase of the Webber Property came from the parties’ joint account. As to the Tudor Properties, these properties were acquired using a line of credit on the parties’ Fishers Residence. Further, at some point, Walden paid expenses on the Bay Brook property which were never reimbursed after that property was sold. Again, we cannot say that this finding is clearly erroneous.

B. Equitable Relief

Scott argues that the trial court erred in finding that Walden was entitled to relief based on the equitable theories of unjust enrichment and implied contract. Scott argues that the court “erred in determining that [Walden] was entitled to equitable relief in this

case because she wholly failed to meet her burden of presenting evidence to establish that she was entitled to relief based on either equitable theory.” Appellant’s Brief at 13.⁵ “[A] party who cohabitates with another person without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment.” Turner, 792 N.E.2d at 950. There is no claim of an express agreement in this case. Thus, we consider whether there was evidence presented to support an equitable theory of recovery.

We begin by examining Scott’s arguments related to unjust enrichment. “A claim for unjust enrichment ‘is a legal fiction invented by the common law courts in order to permit a recovery . . . where the circumstances are such that under the law of natural and immutable justice there should be a recovery’” Zoeller v. East Chicago Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009) (quoting Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991)), reh’g denied. “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” Id. (quoting

⁵ Scott also argues: “There is no published authority in Indiana which allows a trial court to divide, distribute, or transfer title to any property held by cohabitants. Cohabitants must instead rely on equitable principles to seek out relief in the form of monetary damages.” Appellant’s Brief at 27 (citing Turner v. Freed, 792 N.E.2d 947 (Ind. Ct. App. 2003); Bright v. Kuehl, 650 N.E.2d 311 (Ind. Ct. App. 1995), reh’g denied; and Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. Ct. App. 1980)). The cases cited by Scott do not support his argument. The trial courts in Turner and Bright both awarded a monetary award only and the opinions on appeal did not address whether a trial court could award only monetary damages. See Turner, 792 N.E.2d at 949; Bright, 650 N.E.2d at 313. In Glasgo, the trial court ordered that the defendant pay the plaintiff \$6,062.03 and not receive a hutch or, in the alternative, the defendant pay the plaintiff \$8,062.03 and receive the hutch from her. 410 N.E.2d at 1327. On appeal, the court affirmed the trial court and did not hold that the trial court erred by awarding a hutch as one possible division of property but held that “[j]ust as married partners are free to delineate in ante- or post-nuptial agreements the nature of their ownership in property, so should unmarried persons be free to do the same.” Based upon Scott’s argument and the cases cited by Scott, we cannot say that the trial court erred.

RESTATEMENT OF RESTITUTION § 1 (1937)). “To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust.” Id. Principles of equity prohibit unjust enrichment of a party who accepts the unrequested benefits another person provides despite having the opportunity to decline those benefits. Turner, 792 N.E.2d at 950. “One who labors without an expectation of payment cannot recover in quasi-contract.” Sonnenburg, 573 N.E.2d at 408. See also 9 ARTHUR, INDIANA PRACTICE § 17.21 (2010) (“A benefit gratuitously conferred upon the other party is not unjust enrichment.”).

Scott argues that Walden failed to prove that she conferred a measurable benefit to him and that his retention of that benefit is unjust. Scott also argues that “[t]here is no evidence in the record [Walden] ever anticipated repayment for any contributions she made to the acquisition of property in [his] possession.” Appellant’s Brief at 26. Walden argues that she “conferred a measurable benefit by providing housekeeping, financial services and child care to [Scott] throughout their twenty-two (22) [year] cohabitation and [Scott’s] retention of that benefit without payment would be unjust.” Appellee’s Brief at 8.

The trial court found that Walden had presented evidence to support recovery under a theory of unjust enrichment. Specifically, the court stated:

To prevail on a claim of unjust enrichment, the former cohabitant must show that a measurable benefit had been conferred under circumstances in which the retention of that benefit without payment would

be unjust. During the time of cohabitation, [Walden] was gainfully employed, contributed her earnings into a joint account with [Scott], and the parties' acquired property as valued above. The Fishers Residence was purchased with the parties' joint funds and titled as joint tenants. The joint home equity line of credit on the Fishers Residence was used to acquire [Scott's] interest in the Tudor Properties, which realized a \$20,000 gain. Joint funds were used to acquire and maintain the Webber Property until individual lots were sold to satisfy the contract price. The acquisition of personal property was also attributable to the financial contributions of both parties. "Principles of equity prohibit unjust enrichment of a party who accepts the unrequested benefits another provides despite having the opportunity to decline those benefits." *Turner* 792 [N.E.2d] at 947; [Bright v. Kuehl,] 650 N.E.2d [311, 316 (Ind. Ct. App. 1995), reh'g denied]. In addition, [Walden] performed house keeping, exterior residential maintenance, financial planning, tax preparation, and child care during the twenty-two (22) year period the parties' cohabitated. ". . . it would be unjust for one party to assert in one breadth [sic] that the other party can in no way be presumed to be his spouse for purposes of either the dissolution of marriage statutes or the concept of putative spouse and to assert in another the presumption that she rendered her services voluntarily and gratuitously." [Turner, 792 N.E.2d] at 951 citing *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980). [Scott] would be unjustly enriched if he were permitted to keep more than one-half (1/2) of the value of the property obtained through the joint efforts of the parties during cohabitation.

The record does not reflect that [Walden] deposited money or contributed a measurable benefit to [Scott's] retirement, or money market accounts; therefore [Scott] retaining the full value of these accounts does not unjustly enrich [Scott] nor should the value of . . . these accounts be used in determining an equitable division of the estate. Likewise the record does not reflect that [Scott] deposited money or contributed a measurable benefit to [Walden's] retirement accounts; therefore, [Walden] retaining the full value of these accounts does not unjustly enrich the Plaintiff.

Appellant's Appendix at 16-17.

The record reveals that Walden moved in with Scott after Scott's invitation, began working after graduating from college, and began depositing her earnings into a joint

account, which was used to make mortgage payments on the Fishers Residence, make improvements to the Fishers Residence, and acquire the Webber Property. An equity line of credit which was secured by the Fishers Residence was used to acquire the Tudor Properties. Walden prepared dinner, washed the laundry and dishes, cleaned the house, cooked, and cut the grass. Walden also completed Scott's taxes. At some point, Walden paid expenses on the Bay Brook property which were never reimbursed after the property was sold. Scott does not suggest or point to the record to indicate that he rejected these benefits.

To the extent that Scott argues that there is no evidence in the record that Walden anticipated repayment for any contributions, we observe that we addressed a similar argument in Turner as follows:

Interestingly, Turner also argues that “when parties are living as a family, there is a presumption that services are provided each other without expectation of payment.” Appellant's Br. p. 13. However, we agree with this Court's holding in Glasgo v. Glasgo, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980), reh'g denied, which states:

While we do not subscribe to the theory that cohabitation automatically gives rise to the presumed intention of shared property rights between the parties, we find in this case that it would be unjust for [one party] to assert in one breath that [the other party] can in no way be presumed to be his [spouse] for purposes of either the dissolution of marriage statutes or the concept of putative spouse and to assert in another the presumption that she rendered her services voluntarily and gratuitously.

792 N.E.2d at 950 n.3.

While Walden benefited from the resources provided her by Scott, we also agree with the trial court that Scott substantially benefited from the monetary contributions and services that Walden provided and that Scott would be unjustly enriched if Walden were awarded no part of the value of the assets Scott acquired in his name alone during their twenty-two year cohabitation. Accordingly, we conclude that there is evidence to support the court's finding that Scott had been unjustly enriched. See Turner, 792 N.E.2d at 950-951 (concluding that there was evidence to support the trial court's finding that defendant had been unjustly enriched); see also Sclamberg v. Sclamberg, 220 Ind. 209, 212-215, 41 N.E.2d 801, 802-803 (1942) (holding that although the purported marriage was void, the court could settle the property rights acquired during the "marriage relation").⁶

IV.

The next issue is whether Walden is entitled to appellate attorney fees. Walden's discussion regarding attorney fees is limited to the following sentence: "[Walden] respectfully requests that the court award reasonable appellate attorney fees to be determined by the trial court." Appellee's Brief at 34. Ind. Appellate Rule 66(E) provides that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." Our discretion to award attorneys' fees under Ind. Appellate Rule 66(E) is limited to instances when "an

⁶ Because we find support for the trial court's decision under the theory of unjust enrichment, we need not address Scott's separate arguments regarding implied contract. See Turner, 792 N.E.2d at 950 n.2.

appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003) (citing Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152 (Ind. 1987)). In addition, while Ind. Appellate Rule 66(E) provides this court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. Id. (citing Tioga Pines Living Ctr., Inc. v. Ind. Family & Social Serv. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), affirmed on reh’g, trans. denied).

Indiana appellate courts have classified claims for appellate attorneys’ fees into substantive and procedural bad faith claims. Id. (citing Boczar v. Meridian Street Found., 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)). To prevail on a substantive bad faith claim, the party must show that “the appellant’s contentions and arguments are utterly devoid of all plausibility.” Id. Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Id. at 346-347. Even if the appellant’s conduct falls short of that which is “deliberate or by design,” procedural bad faith can still be found. Id. at 347.

We cannot say that Scott’s arguments are utterly devoid of all plausibility or that Scott’s brief is written in a manner calculated to require the maximum expenditure of

time both by the opposing party and the reviewing court. Accordingly, we decline to remand for a determination of appellate attorney fees.

For the foregoing reasons, we affirm the trial court's order dividing property between Scott and Walden and deny Walden's request for appellate attorney fees.

Affirmed.

ROBB, C.J., and RILEY, J., concur.