

FILED
COURT OF APPEALS
DIVISION II

NO. 37794-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
DEPUTY

BRENDA M. BRYANT

Appellant

vs.

ALEX LOPEZ

Respondent

APPELLANT'S OPENING BRIEF

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II. INTRODUCTION:

Appellant Brenda Bryant sought to have her contribution to joint property accumulated during a five year relationship with Alex Lopez declared by the court.

At the close of her case, the trial court granted Mr Lopez's motion to directed verdict and dismissed her claim. That Order is not challenged here.

The trial court then went on to make various rulings awarding the parties property, designation of debt, damages, and attorney fees.

The 02/29/08, awards of property, the allocation of debts, award of damages and attorney fees were made by the trial court after the dismissal of the case and in the absence of any request for relief from Mr Lopez. This action was taken over Ms Bryant's objection to the procedure and the trial court's jurisdiction following the dismissal.

Following the Dismissal and the entry of the findings, the trial court admitted Ex 30, a copy of bills. CP 58.

On 03/7/08 Mr Lopez filed motion for an order finding Ms Bryant in contempt for failing to return property awarded in the 02/29/08 order to Mr Lopez and in the alternative for judgement in the amount of \$11,826.00.

Ms Bryant objected upon the basis that the trial court

lacked jurisdiction to make these awards following the dismissal of the Petition and in the absence of a plea by Mr Lopez for affirmative relief; the lack of court's jurisdiction to award judgement for damages or attorney fees.

III. ASSIGNMENT OF ERRORS:

2.1 Did the trial court commit an error of law in awarding specific property to Mr Lopez when he had not requested or sought any relief from the court in the pleadings or otherwise?

YES

2.2 Did the trial court commit errors of law in awarding specific personal property as the separate property of a party in its findings of fact 3.1 and 3.2 following the dismissal of Ms Bryant's petition for relief under the equitable doctrine of meretricious relationship?

YES

2.3 Did the trial court abuse its discretion in identifying specific personal property as the separate property of a party in its findings of fact 3.1 and 3.2, following the dismissal of Ms Bryant's petition for relief under the equitable doctrine of meretricious relationship?

YES

2.4 Did the trial court commit errors of law in awarding debt to the parties when Mr Lopez had not requested any relief from the court in his pleadings or otherwise?

YES

2.5 Did the trial court commit errors of Law in assigning specific debts as the separate property of a party in its findings of fact 3.3 and 3.4 following the dismissal of Ms Bryant's petition for relief under the equitable doctrine of meretricious relationship?

YES

2.6 Did the trial court abuse its discretion in identifying specific personal property as the separate property of a party in its findings of fact 3.1, 3.2, following the dismissal of Ms Bryant's petition for relief under the equitable doctrine of meretricious

relationship?

YES

2.7 Did the trial court commit an error of law in awarding attorney fees after dismissing the action for meretricious relationship?

YES

2.8 Did the trial court abuse its discretion in its Findings 1-6 that Ms Bryant had acted in violation of the court's 02/29/08 Order?

YES

2.9 Did the trial court commit errors of law in awarding damages as a result of its finding of contempt?

YES

IV. STATEMENT OF THE CASE:

A. PETITION FOR DETERMINATION OF MERETRICIOUS RELATIONSHIP.

Petitioner, Brenda Bryant filed a action 12/04/06 *entitled*
PETITION FOR DETERMINATION AND EQUITABLE
DISTRIBUTION OF MERETRICIOUS PROPERTY AND
DISSOLUTION OF MERETRICIOUS RELATIONSHIP against
Alex Lopez. CP3-4.

In the Petition, Ms Bryant alleged:

* * *

3. The petitioner and Respondent lived together in a meretricious relationship. . . .
4. During this meretricious relationship, the parties accumulated an interest in various

items of property and also accumulated certain debt.

* * *

Wherefore, the **Petitioner** prays for relief as follows:

1. The Court determine the properties of the parties subject to distribution;
2. The Court determine the indebtedness of the parties subject to allocation.
3. The Court decree a fair and equitable distribution of the meretricious property and a fair and equitable allocation of the meretricious debt. CP 4.

On 12/28/06, Mr Lopez filed a motion to dismiss the Petition under CR 12(b)(6). CP 5-9.

He alleged that; “The parties had a boyfriend/girlfriend relationship.” CP 7,11.

Respondent alleged the complaint failed “. . . to state a claim upon which relief can be granted,” CP 7, 14.

In his motion to dismiss Respondent contended that “parties did not continuously cohabitate” and a meretricious relationship did not exist. CP 8, 7; 8, 11-12.

On 12/29/06, Petitioner obtained *TEMPORARY ORDERS*. The Orders provided *Temporary Relief*, in part;

- [X] The Respondent is restrained. . . from concealing or . . . disposing of any property. . . “ CP 12, 7-9.

[X] The Respondent is restrained . . . from . . . changing entitlement of any insurance. . . .” CP 12, 10-11.

The Orders also required each party to be responsible for their own future debts. CP 12, 12. The Order gave Ms Bryant temporary use of the parties home, items in the home and the dog. CP 12, 16-17.

On 01/26/07, Judge Olsen denied Mr Lopez’s motion for reconsideration of the *Temporary Orders*. CP, 14.

On 02/12/07, Mr Lopez filed his response to the Petition. CP 15-16, on a form entitled *RESPONSE TO PETITION (DOMESTIC RELATIONS)*.

In his Response Mr Lopez made the following declarations:

In ¶1.1§ 3, Mr Lopez denied that the parties lived in a meretricious relationship. CP15, 19.

In ¶1.1§ 4, Mr. Lopez denied that the parties accumulated any property. CP 15,20.

In ¶1.1§ 5, Mr Lopez denied that the parties had a shared interest in real property or the personalty located thereon. CP 15,20.

In ¶1.1§ 6, Mr Lopez denied that the parties rights to said property and debts needed to be determined.

In ¶1.1§ 7, Mr Lopez denied that Petitioner did not have plain and speedy or adequate remedy at law. CP 15,21.

He went on to state in response that “If the Petitioner believes she has an interest in property she has other recourse available.” CP 15, 21-22. This statement clearly alludes to other legal theories which have not been plead by either party.

Mr Lopez’s pleadings were never amended.

On February 6, 7, and 8th, 2008, the court tried the Petition filed by Ms Bryant. Mr Lopez made no CR 15 motion to amend his response to include an affirmative request for relief, either prior to or during trial. The affirmative relief granted to Mr Lopez by the trial court was not tried by express or implied consent.

In his Trial Brief dated 02/06/08, Mr Lopez’s attorney continued to argue that no meretricious relationship existed between the parties. CP 42, 19.

Mr Lopez does state in his brief CP43, 16-23 that other women resided with him in the family home during extended periods during which Ms Bryant’s was absences. CP 52, 22-23.

At trial, Mr Lopez made no motion to amend the pleadings to conform to the evidence at the conclusion of the case, nor did he seek any post judgement relief as required by CR 15 (a, b or c).

Following the trial, Mr Lopez filed a Motion for Attorney

fees. CP 46. Attorney fees were not sought in the 12/28/07 *Motion to Dismiss* (CP8-9), nor were they sought in Mr Lopez's *Response to Petition*. CP 16, 8-11.

The trial started on 02/06/08. At the conclusion of Petitioner's case, Respondent moved for a directed verdict. RP 211, 23-24. On 02/08/08 the trial court granted Respondent's motion dismissing Petitioner's case. RP221, 21-25. However, the trial court then went on to grant Mr Lopez relief not requested in the pleadings. It bifurcated the matter, entering orders on 2/29/08 and 05/09/08.

Ms Bryant's attorney objected to this procedure arguing that if the court dismissed her petition it lost jurisdiction to make further orders, because Respondent had not plead any claim or requested any relief. RP241, 19 thru 242, 7; 245, 8-22.

On 02/29/08, the trial court entered its written *ORDER GRANTING RESPONDENT'S MOTION FOR DIRECTED VERDICT AND DISMISSING PETITIONER'S PETITION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW*. CP 48-56.

The 02/29/08 *Order*, provided, in part;

THIS MATTER, having come on for trial on February 6, 7, and 8th, 200. . . The court makes the following findings of fact:

* * *

3.28 The purpose of the relationship was
boyfriend/girlfriend . . . CP 53, 13.

* * *

3.31 Mr Lopez incurred \$10,968.08 in attorney fees.
* * * CP 50, 23.

From the findings the court drew *Conclusions of Law*
including paragraph;

3.2 There is not a legally sufficient evidentiary basis to
find a meretricious relationship existed. CP54, 7-8.

The court then ordered that, “. . . the above entitled matter
is dismissed with prejudice. CP 55, 15-16.

The court went on to order;

- 1) Alex Lopez shall have judgement against Brenda
Bryant in the amount of \$200.00. CP 55, 17.
- 2) Alex Lopez shall have judgement against Brenda
Bryant in the amount of \$3,113.16 plus 12% interest
based on the December 29 2006 Temporary Order.
CP 55, 18-19.

On 02/29/08, at the time the order was presented and
findings entered, Mr Lopez argued for an award of damages and
attorney fees. CP 58. Ms Bryant’s attorney objected to this request
citing Mr Lopez’s failure to request any relief in his pleadings. CP
58. The court awarded \$200 for damages, \$3,113.16 based upon
violation of the 12/29/07 TRO and attorney fees of \$10,968.08. CP
55. 17.

Mr Lopez’s attorney then requested the admission of

additional bills as the next exhibit in the case and the court admitted Exhibit #30. CP 58.

B. CONTEMPT PROCEEDING FOLLOWING
DISMISSAL OF PETITION

On 03/07/08, Mr Lopez made a *MOTION FOR CONTEMPT AND/OR THE RETURN OF PERSONAL PROPERTY OR IN THE ALTERNATIVE ENTRY OF JUDGEMENT*. CP59.

In that motion, Mr Lopez requested “. . . return of the personal property that was awarded to him and/or reducing the lost/broken/damaged items to judgement in an amount to be determined by the court. Mr Lopez has estimated the repair of some items, the replacement of some items and some items were valued at trial. The total itemized by Mr Lopez is \$11,826.00. CP 60, 5-9.

This figure was later amended to \$ 14,827.94. CP 110, 13.

In support of his motion Mr Lopez made a declaration dated 03/06/08. CP66-68. He submitted photos taken on 03/05/08 documenting the damage that he found on the property. CP 66, 15-18. There was no showing that the conditions existing in the photos did not predate the trial of this matter. There was no showing when many of these conditions came into existence.

Mr Lopez claimed that personal property I was awarded in the 02/29/08 order was missing. CP 66, 18 thru 67, 8.

His declaration then went on to value some of the items. CP 67, 9-23.

He also listed "OTHER ITEMS MISSING OR DAMAGED". CP 68, 1-13.

Mr Lopez asked the court to award him damages of \$11,826.00. CP 68, 15.

On 04/24/08 Mr Lopez submitted a "Reply in Support of the Motion for Contempt. . . ." CP 85-6.

He stated that some of the damaged items were covered and paid by his insurance carrier, State Farm Insurance. CP 85, 22-24. Other items of loss were more expensive than anticipated and *he sought judgement of \$14,807.94*. CP 86, 1-4.

On 04/25/08 new counsel appeared for Ms Bryant at the hearing for Contempt, etc. and objected to the proceeding based upon the trial court's lack of jurisdiction, following the dismissal on 02/29/08 and Respondent's failure to plead or request relief. CP 93.

Following the conclusion of the trial, on 02/07/08, Exhibit # 30 was submitted by Mr Lopez's attorney on 02/29/08. This Exhibit was a letter, from State Farm Insurance Company to Mr Lopez's attorney, John Grossclothes. It consisted of the letter dated

04/22/08, CP88, and a report dated 04/17/08 consisting of eight pages. CP88-96. This letter was generated almost two months after the dismissal. CP 48.

On 05/07/08 Ms Bryant filed the *PETITIONER'S MOTION TO DISMISS RESPONDENT'S REQUEST FOR POST JUDGEMENT AWARDS*. CP 99-106.

On 05/09/08 a hearing was held on Mr Lopez's motion for contempt and/or judgement. The trial court found Ms Bryant in contempt and entered judgement against her. CP 109.

FINDING #1: The Order Granting Respondent's Motion found that Petitioner intentionally failed to comply with lawful order of the court dated February 29, 2008. CP 109, 4-5.

FINDING #2: The court found that the order related to transfer of personal property. CP 109, 6.

FINDING #3: The order was violated by Ms Bryant in failing to provide the items of personal property set forth in the Findings of Fact entered on February 29, 2008. CP 109, 7-8.

FINDING #4: The court found that; BRENDA BRYANT had the ability to comply with the order by leaving the items of personal property in the home. CP 109, 9.

FINDING #5. BRENDA BRYANT has the present ability to comply with the order as follows by providing the missing items of personal property. CP 109, 10-11.

FINDING #6: BRENDA BRYANT does not have the present willingness to comply with the order. CP 109, 12.

The court went on to order:

2.1 BRENDA BRYANT is in contempt of court.

2.2 CONDITIONS FOR PURGING THE CONTEMPT.

The contemtor may purge the contempt by returning the items of personal property set forth below:

* * *

2.5 Ms Lopez [sic] *caused damage waste to the property* while in her care and control and did not take steps to protect the property and/or *she purposely damaged the property*. Alex Lopez shall have judgement against Brenda Bryant in the amount of \$14,852.94 for damages. CP 110, 11-13.

Ms Bryant maintains that the trial court lacked jurisdiction to make any other order on 02/29/08 than one dismissing the action. She the court committed errors of law in awarding attorney fees and damages.

She further contends that the trial court abused its discretion in finding that she had failed to comply with any portion of the order dated 02/29/08 or that order directed or required her to do any act.

VI. ISSUES ON APPEAL:

4.1 *Did the court commit an error of law when it awarded Respondent damages and attorney fees after it dismissed Ms Bryant's petition ?*

Yes

4.2 *Did the trial court commit an error of law when it awarded damages in the continuation of the original matter or in response to the citation for contempt?*

YES

4.3 *Did the trial court abuse its discretion in finding that Ms*

Bryant had violated the restraining order, wilfully and with ability to comply?

YES

4.4 *Did the* Did the trial court abuse its discretion in finding that Ms Bryant had violated the restraining order, wilfully and with ability to comply?

V. ARGUMENT:

A. STANDARD ON REVIEW: ERRORS OF LAW

1. LAW RELATED TO COURT'S JURISDICTION:

Ms Bryant contends that the trial court never had jurisdiction to award damages or attorney fees in a Petition for Declaration of a Meretricious Relationship.

Further, that its authority to award damages or attorney fees was lost when the order dismissing the action was granted.

“Lack of jurisdiction over the subject matter may be raised at any time, but lack of jurisdiction over the person is subject to waiver if not timely asserted. CR 12(g), (h).” 9 WAPRAC § 12.22. *First Union Mgmt., Inc. v. Slack*, 36 Wn.App. 849, 679 P.2d 936 (1984).

The determination of subject matter jurisdiction is a question

of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn.App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is ‘the authority of the court to hear and determine the class of actions to which the case belongs.’ *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985) (holding that trial court's factual findings on the jurisdictional issue must be accepted unless they are clearly erroneous, but that the ultimate legal conclusion is subject to de novo review).

When the trial court dismissed Petitioner’s action, it loss jurisdiction to award damages and it had no legal basis to award attorney fees.

2. ERRORS OF LAW:

Application of the correct legal standard by the trial court is reviewed by the court of appeals de novo under the error of law standard. *Western Ports Transp., Inc. v. Employment Sec. Dept. of State of Wash.* 110 Wash.App. 440, 449, 41 P.3d 510, 515 (2002); *Inland Empire Distrib. Sys. Inc. v. Utilities & Transp. Comm'n*, 112 Wash.2d 278, 282, 770 P.2d 624 (1989).

3. ABUSE OF DISCRETION:

The trial courts exercise broad discretion when deciding evidentiary matters, and will not be overturned unless there was a manifest abuse of that discretion . *Cox*, 141 Wash.2d at 439, 5 P.3d 1265. And a trial court abuses its discretion when it bases its

decision on untenable grounds or untenable reasons. *Hayes v. Wieber Enterprises, Inc.* 105 Wash.App. 611, 617, 20 P.3d 496, 499 (2001).

Abuse occurs when the trial court's discretion is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983).

B. FAILURE OF RESPONDENT TO PLEAD
ACTION AND REQUEST REMEDY LIMITS RELIEF COURT
MAY GRANTING.

The dismissal of Ms Bryant's Petition in the absence of a cross-claim terminated the trial court's jurisdiction to make further awards of damages or attorney fees.

Even our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff's claim. There must be allegations worded in such a way as to permit the introduction of evidence concerning the propriety of the process by which it was determined not to sue, and which advise the defendant that it is this decision-making process which is to be the action under scrutiny. Absent such allegations, the complaint is properly dismissed. *Lightner v. Balow*, 59 Wash.2d 856, 370 P.2d 982 (1962). Equivalent federal rules are construed similarly by federal courts. *Berge v. Gorton* 88 Wash.2d 756, 762, 567 P.2d 187, 191 (1977).

There is nothing in the law which prevents a party to a petition for dissolution of a meretricious relationship from pleading alternative theories of recovery if different relief is required. As a matter of pleading, it is required, if the meretricious relationship status is not found and the aggrieved party seeks to recover personal property or address other rights. CR 13 (a). The same standard applies to counterclaims. CR 13, *COUNTERCLAIMS AND CROSS CLAIMS*.

Review of the meretricious cases in Washington demonstrates the use of multiple claims is the preferred way of pleading, so that the action not all-or-nothing.

In *Vasquez v. Hawthorne* 145 Wash.2d 103, 107-108, 33 P.3d 735, 738 (2001) following the death of one of two male cohabiting males, the survivor presented claims for equitable relief under several theories, including meretricious relationship, implied partnership, and equitable trust.

The case law is clear that the court has authority to allocate property rights acquired during cohabitation when a meretricious relationship is found. *Soltero v. Wimer* 128 Wash.App. 364, 371, 115 P.3d 393, 397 (2005).

No authority can be found for the court's right to sua sponte implement other remedies upon a finding that this relationship **does not exist in the absence of other theories requesting relief plead by the party.**

1. SCOPE OF REMEDIES PLEAD IN THIS ACTION

Ms Bryant pleadings are entitled *PETITION FOR DETERMINATION AND EQUITABLE DISTRIBUTION OF MERETRICIOUS PROPERTY AND DISSOLUTION OF MERETRICIOUS RELATIONSHIP*. CP 3-4.

Ms Bryant's complaint is very specific. It requests that the court make a "determination of and equitable distribution of meretricious property". *It further requests that the court dissolve the meretricious relationship.*

If the threshold is not reached no further action or relief is requested.

The scope of the equitable doctrine is set forth above and is limited to a division of the "community- like- property" acquired by cohabitants, i.e. property which had they been married would have been community property, but not property which was separate in nature. *Pennington v. Pennington* , 142 Wn.2d 592 , 14 P.3d 764 (2000).

Mr Lopez did not join in this petition or counterclaim as required by court rules. CR 7, 8, 12 and 13. He sought no remedies for replevin, waste, conversion, or other affirmative equitable remedy or to quiet title.

CR 8(a) provides that a pleading which sets forth a claim for relief, whether an original claim, counterclaim , cross claim or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.

Relief in the alternative or of several different types may be demanded. There is no penalty for theories initially plead and latter discarded. The provisions of CR 9 on pleading special matters and CR 10 on the form of the pleadings apply as well to claims for relief asserted in the form of a counterclaim.

A compulsory counterclaim is one that arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim so long as the court has all necessary parties properly before it. CR 13(a). **The failure to assert a compulsory counterclaim bars a later action on that claim.** *Schoeman*, 106 Wn .2d at 863. CR 13(a) is construed broadly to avoid a multiplicity of suits. *Schoeman*, 106 Wn.2d at 864 (citing *Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1261 (7th Cir.1977); *Annis v. Dewey County Bank*, 335 F.Supp. 133, 137 (D.S.D.1971)).

Mr Lopez failed to plead any theory or make any request for relief.

“The considerations behind compulsory counterclaims include judicial economy, fairness and convenience.” *Chew v. Lord* 143 Wash.App. 807, 813, 181 P.3d 25, 29 (2008); *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 866, 726 P.2d 1 (1986);

Mr Lopez could also have joined the action under CR 18,

but failed to do so. CR 18 provides in part: (a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, *equitable*, or maritime, as he has against an opposing party.(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. *Clark v. Baines* 114 Wash.App. 19, 37, 55 P.3d 1180, 1190 (2002).

Mr Lopez had the option of amending his pleadings after filing his response, CR 15(a) or at the conclusion of the case. CR 15 (b). He did neither.

A court has no jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process. *Conner v. Universal Utils.*, 105 Wash.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wash.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wash.2d 879, 884, 468 P.2d 444 (1970).

The principle upon which such a rule rests is that the court is without jurisdiction to grant relief beyond that which the allegations and prayer of the complaint may seek. If upon the hearing of the matter before the court the complaining party desires additional relief, or if the court feels that other or additional relief should be awarded, the defendant is entitled to have notice given to him and an opportunity to be heard on the merits thereof; otherwise he is denied procedural due process of law in violation of § 3, art. I, of our constitution. *In re Groen*, 22 Wash. 53, 60 P. 123; *Morley v. Morley*, 131 Wash. 540, 230 P. 645.

In its oral ruling, the trial court after indicating that she was dismissing Ms Bryant's Petition stated at RP 222; "This leaves some other issues that cannot be decided on motion for directed verdict.

* * *

The only two issues out are the Kruger judgement, the dollars owed, and I suppose there is a personal property issue based on Exhibit No. 20, the exhibit list of personal property that your client has not had an opportunity to testify on those. "

Ms Taylor, Petitioner's attorney raised the following objection to additional evidence offered by the Respondent after the court had granted the dismissal.

MS. TAYLOR: A procedural point or question I have is, based on the court's ruling yesterday that there was . . . not a meretricious relationship, I am having a hard time understanding the

jurisdiction al basis that we are proceeding on to rule on these other issues, because if there is no relationship, then I believe that there is no jurisdiction to enter rulings on the remaining issues. . . .”

THE COURT: Okey. Well, in response to that, I had the same thought and reviewed the complaint. . . and it asks for four types of relief. One of them is to divide the debts, one was to divide the property, . . . so there’s relief requested outside of the court finding a meretricious relationship. RP 240, 24 thru 241,18.

MS. TAYLOR: I understood that the equitable jurisdiction of the court in order to divide the property was based on whether there was a finding of meretricious property, meretricious relationship in the first place, and without that initial finding, the other findings would have no basis.”RP 241, 19-25

* * *

There were no cross claims on these issues . . .and no other basis alleged in the complaint, so from a procedural/jurisdictional point of view, I am . . . puzzled. . .” RP 242, 2-7.

In re Hendrickson, 12 Wash.2d 600, 123 P.2d 322, 325

(1942) we said: “The essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.” *State ex rel. Adams v. Superior Court of State, Pierce County* 36 Wash.2d 868, 872, 220 P.2d 1081, 1084 (1950).

This is not a case of insufficient pleadings by Mr Lopez and his attorney. It is a case were they choose for tactical reasons to stand on their denial of the relationship.

Ms Bryant pleadings are entitled *PETITION FOR DETERMINATION AND EQUITABLE DISTRIBUTION OF MERETRICIOUS PROPERTY AND DISSOLUTION OF MERETRICIOUS RELATIONSHIP*. CP 3-4.

Mr Lopez did not join in this petition or counterclaim as required by court rules. CR 7, 8, 12 and 13.

Mr Lopez did not plead any counterclaims as required by CR 13 (a). He sought no remedies for replevin, waste, conversion, or other affirmative equitable remedy. He did not make a general request for relief.

CR 8(a) provides that a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. The provisions of CR 9 on pleading special matters and CR 10 on the form of the pleadings apply as well to claims for relief asserted in the form of a counterclaim.

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opposing party's claim so long as the court has all necessary parties properly before it. CR 13(a). **The failure to assert a compulsory counterclaim bars a later action on that claim.** *Schoeman*, 106 Wn .2d at 863. CR 13(a) is construed broadly to avoid a multiplicity of suits. *Schoeman*, 106 Wn.2d at 864 (citing *Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1261 (7th Cir.1977); *Annis v. Dewey County Bank*, 335 F.Supp. 133, 137 (D.S.D.1971)).

“The considerations behind compulsory counterclaims include judicial economy, fairness and convenience.” *Chew v. Lord* 143 Wash.App. 807, 813, 181 P.3d 25, 29 (2008); *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 866, 726 P.2d 1 (1986);

Mr Lopez could also have joined the action under CR 18, but failed to do so. CR 18 provides in part: (a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal, *equitable* , or maritime, as he has against an opposing party.(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the

relative substantive rights of the parties. *Clark v. Baines* 114 Wash.App. 19, 37, 55 P.3d 1180, 1190 (2002).

Mr Lopez had the option of amending his pleadings after filing his response, if he had chosen to do so. CR 13 (f); CR 15(a) or at the conclusion of the case. CR 15 (b). He did neither.

A court has no jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process. *Conner v. Universal Utils.*, 105 Wash.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wash.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wash.2d 879, 884, 468 P.2d 444 (1970).

2. DISMISSAL TERMINATES TRIAL COURT'S JURISDICTION:

In this case, the trial judge found that a meretricious relationship did not exist. That finding has not been challenged by either party. The court went on to make findings as to the ownership of personal property, ownership of debts, award damages and attorney fees. Ms Bryant appeals these later rulings as unsupported by the law, the pleadings, court rules or the facts.

Ms Bryant sought to have the court establish a meretricious

relationship in order to invoke the court's equitable power to divide the property acquired by the parties during its existence.

"A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Olver v. Fowler*, 131 Wn. App. 135, 140, 126 P.3d 69 (2006); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001); *Pennington v. Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *In re Meretricious Relationship of Sutton*, 85 Wn. App. 487, 933 P.2d 1069 (1997); *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995); *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984).

Our court has developed “. . . this equitable doctrine because the legislature has not provided a statutory means of resolving the property distribution issues that arise when unmarried persons, who have lived in a marital-like relationship and acquire what would have been community property had they been married, separate. *Olver v. Fowler*, 161 Wash.2d 655, 168 P.3d 348 (2007); *Vasquez v. Hawthorne* 145 Wash.2d 103, 33 P.3d 735 (2001); *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984).

RCW 26.09.080 authorizes the court to divide property and debts in a marital dissolution. Our court has analogized the joint acquisition of property during a meretricious relationship to “community property” in that statute.

That statute provides that “[i]n a *proceeding for dissolution* of the marriage, ... the court shall ... make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors.” RCW 26.09.080 (emphasis added).

This analogy has only been extended to property jointly acquired, and not to property which would be separate property. *Olver* 161 Wash.2d at 668-9. Unlike the dissolution court, the MR court does not have jurisdiction over the parties separate property. *Connell*, 127 Wash.2d 339, 351-52, 898 P.2d 831 (1995) .

If a party wishes to recover personal property from another in the absence of cohabitation, the theories of recovery are numerous, i.e., restitution, replevin, waste, conversion, resulting trust etc. Mr Lopez plead none of those theories nor did he ask the court for the relief which it granted.

Washington has “a three-prong analysis for disposing of property when a meretricious relationship terminates.” *In re Pennington*, 142 Wash.2d 592, 602, 14 P.3d 764 (2000) (citing *Connell*, 127 Wash.2d at 349, 898 P.2d 831). **First**, the court decides whether a meretricious relationship existed. **Second**, “the trial court evaluates the interest each party has in the property acquired during

the relationship. **Third**, the trial court then makes a just and equitable distribution of such property.” *Soltero v. Wimer* 159 Wash.2d 428, 433, 150 P.3d 552, 555 (2007).

In *Soltero*, supra 433, the trial judge, found that a meretricious relationship existed, then went on to find that no community-like property existed.

The *Soltero* court said at 430, “[U]nlike the distribution in a divorce, however, the *separate* property of the parties in a dissolving meretricious relationship is **not** subject to distribution. In this case, after a full trial, the judge below identified no community-like property. Nonetheless, he awarded the women \$135,000 based upon an equitable lien to be paid by the other. Because an equitable distribution of community-like property requires community-like property to distribute, we reverse.

The Supreme Court held , at 435, “. . . if the Ms Soltero had argued that contributions of effort by the cohabitants which increased the value of assets separately held by one party and create community-like interests in that increase, she is correct. But if she means to say that all of Wimer's separate property is potentially subject to equitable distribution, she is incorrect. In *Connell* we held that only property that would be considered community property in a marriage is subject to distribution. *Connell*, supra. We have been given no grounds to reconsider that opinion.

In this case, the trial judge found that a meretricious relationship **did not** exist between Ms Bryant and Mr Lopez. It dismissed Ms Bryant's petition. The court then went on to grant relief which had not been requested in any pleading or which the law gave her authority to award..

The trial judge identified and awarded property in findings 3.1, 3.2 and separate liabilities in 3.3 and 3.4 as separate to each party. She then award damages to Mr Lopez of \$200., CP 55, 17; \$3,113.16 CP 55, 18-19; and attorney fees of \$10,968.08 CP 53, 23. Th trial court later amended the damage award to \$14,827.94. CP 110, 13. After accepting further evidence on a motion for contempt.

The award of damages was without legal basis and were not plead by Mr Lopez.

The award of the \$3,113.16 under the 12/29/06 temporary order is also problematic. The dismissal of the case terminates the court's jurisdiction to make such award, a point conceded by Mr Lopez's attorney. RP 242, 17-19.

The availability of temporary orders during the pendency of litigation to dissolve a meretricious relationship largely depends upon the type of order sought and the theory upon which it is based. An important fact in some cases is whether the property rights of the Cohabitants are deemed to be vested during the relationship in the same manner as are the rights of spouse in the community property, or whether the Cohabitants has no vested property rights until a court

adjudicates them to exist. 21 WAPRAC § 57.21

A temporary order is terminated by entry of a final decree in the proceeding, or by dismissal of the proceeding, or by abatement of the proceeding. 19 WAPRAC § 28.11. The issue of preclusion will be discussed further below.

C. JURISDICTION TO AWARD ATTORNEY FEES.

On 02/29/08 the trial court Ordered Ms Bryant's case dismissed with prejudice. CP 55, 15-16.

In its findings of fact, 3.31 the court found that; "Mr Lopez incurred \$10,968.08 in attorney fees." CP53, 23. It also awarded Mr Lopez a judgement against Brenda Bryant in the amount of \$200.00. CP 55, 17. There is an obvious discrepancy in the order, if the order was extra jurisdictional then it must be stricken. If the court had authority this discrepancy must be clarified.

Those amounts are set forth in the "JUDGEMENT SUMMARY" as Judgement amount: \$3,113.16. CP 49, 13. The source of this figure is order #2 based on the December 29th temporary order. CP 55,18-19.

Even counsel for Mr Lopez concedes that dismissal of the Petition terminates the TRO. RP 242, 17-19.

The court cited made no findings as to "reasonableness or

necessity” of the attorney fees, nor did it cite authority for their award.

The award needs to be supported by a finding that the attorney fees were “. . . reasonably necessary for the preparation and conduct of the trial. *Olsen v. National Grocery Co.* 15 Wash.2d 164, 176, 130 P.2d 78, 84 (1942). This finding is required only after a legal basis for an award is established, whether or not a MR existed.

Washington follows the “American Rule” when it determines an award of attorney fees. “. . . [A]ttorney fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity. *City of Seattle v. McCreedy* 131 Wash.2d 266, 275, 931 P.2d 156, 161 (1997).

RCW 26.09.140 provides authority for attorney fees in dissolution actions.

Our court’s have used some dissolution statutes to analogize application of dissolution standards in meretricious relationships. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984).

Lindsey applied RCW 26.09.080 in the division of property to a meretricious relationship only by analogy. Our courts have refused to make an across the board application of marital remedies to other cohabitation relationships. To do so would create de facto

common law marriages, which Washington has refused. *In re Marriage of Pennington*, 142 Wash.2d 592, 601, 14 P.3d 764 (2000).

Lindsey did not apply RCW 26.09.140, authorizing the award of attorney fees in dissolutions in meretricious relationships. There is no authority for such awards. *Western Community Bank v. Helmer* 48 Wash.App. 694, 699, 740 P.2d 359, 362 (1987), (held that no statutory or equitable basis existed for award of attorney fees to female former co-habitant.).

It is not reasonable to conclude that upon a finding dismissing the meretricious relationship action, a basis for the award of attorneys fees, particularly were the party making the request has not requested them nor shown them to have been reasonably and necessarily incurred.

B. ERROR RELATING TO THE CONTEMPT ORDER

The order dated 05/09/08 makes findings of fact which are unsupported by the evidence and violative of the law or preclusion.

On 03/07/08, thirty-eight (38) days after the court dismissed Ms Bryant's petition, Mr Lopez filed a *MOTION FOR CONTEMPT AND/OR RETURN OF PERSONAL PROPERTY OR IN THE ALTERNATIVE ENTRY OF JUDGEMENT*. CP 59. This motion was heard on 05/09/08.

In his motion Mr Lopez asked “. . . for the return of his personal property awarded to him and/or reducing the lost/broken /damaged items to judgement in an amount to be determined by the court. Mr Lopez has estimated the repair of some items, the replacement of some items and some items were valued at trial. The total itemized by Mr Lopez in his 03/07/08 declaration is \$11,826.00. CP 68.

Mr Lopez acknowledge that another women resided in the home for two months (CP 52, 22, Finding 3,18), there was no supporting testimony that Ms Bryant had possession of or control over the premises or property at the time of the damaged or lost. There was no proof that she caused the damage or loss.

On 04/24/08 Mr Groseclose, attorney for Mr Lopez submitted a supplemental declaration requesting total damages of \$14,807.94 for Mr Lopez. CP 85-6 after the court had awarded him more than \$3,3000 in the 02/29/08 order.

This is a second bite at the apple. Matters which were ripe for litigation at the time of the original trial may not be revisited under the guise of a motion for contempt.

In the case of *State ex rel. Kerl v. Hofer* 4 Wash.App. 559, 566, 482 P.2d 806, 810 (1971), the court said; “. . . we, therefore,

hold that when the underlying malpractice cause of *Kerl v. Hofer*, No. 52258 was *dismissed with prejudice* based upon a settlement of all matters in controversy between the parties, the pending civil contempt proceeding brought under RCW 7.20 were necessarily terminated.”

The general term *res judicata* encompasses claim preclusion (often itself called *res judicata*) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaintiff's second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which *might* have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded. *Babcock v. State By and Through Dept. of Social and Health Services* 112 Wash.2d 83, 93, 768 P.2d 481(1989).

Claim preclusion is proper when the later suit presents the same claim as the earlier suit. For example, in *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash.2d 438, 441, 423 P.2d 624, 38 A.L.R.3d 315 (1967), the plaintiff sued first for specific performance

and then for damages under the same contract. The second suit was dismissed on the ground that the plaintiff had improperly split his claims. The doctrine of claim preclusion prohibits claim splitting as a matter of policy, primarily in order to conserve judicial resources and to ensure repose for parties who have already responded adequately to the plaintiff's claims. *Babcock v. State By and Through Dept. of Social and Health Services* 112 Wash.2d 83, 92-93, 768 P.2d 481, 486 - 487 (1989).

If the alleged damages occurred before the dismissal of the meretricious relationship claim they should have been litigated in that matter. Mr Lopez failed to make such claim. He was precluded from making a second claim for that relief regardless of how it was denominated.

Mr Groseclose attached a copy of the insurance claim form filed for these losses. It shows that the loss was caused by "vandalism". CP 90. Nowhere are the losses attributed to Ms Bryant. This is an assumption by the court.

The repair order CP 91-96 describe removal of vinyl flooring, underlayment and application of vinyl, counter tops, painting, hauling and clean-up. CP 90-96. There is no evidence that Ms Bryant is responsible for any of these damages or that the conditions did not

exist before and during the trial of the matter.

Much of the damage and need for repairs predated the dismissal of Ms Bryant's petition and were not plead by Mr Lopez. See above authority.

1. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING #1 THAT MS BRYANT FAILED TO COMPLY WITH A LAWFUL ORDER BECAUSE IT IS UNSUPPORTED BY THE FACTS OR LAW.

The court found that: "BRENDA BRYANT intentionally failed to comply with lawful orders of the court dated February 29, 2008." CP 109, 4-5.

This finding is an abuse of discretion. It is not based upon any reasonable fact in the record or it is precluded by the dismissal of the primary action and/or the court's lack of jurisdiction.

The trial court's decision is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard of law or the facts do not meet the requirements of the correct standard of law. *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997).

In Cork Insulation Sales Co., Inc. v. Torgeson 54 Wash.App. 702, 705, 775 P.2d 970, 972 (1989) the court ruled;

The order vacating the default judgment and assessing terms was entered March 28, 1988. Dismissal was granted June 20, 1988, at which time, the court lost jurisdiction of the matter. Entry of a judgment after the order of dismissal exceeds the jurisdiction of the court. Cork could have reduced the terms to judgment on March 28 or June 20 and included them in its order vacating judgment or dismissal.

In the Order dated 02/29/08 the court made certain findings which the Ms Bryant submits were beyond her jurisdiction in this case. For the sake of argument, Finding 3.2, The Respondent has the following separate property: (list not included). CP 50, 13-25. The trial court establishes no value for this property. The trial court did not find that the property was in the possession of Ms Bryant or order her to deliver it to Mr Lopez. The only order in this regard is that the Kitsap County clerk issue a Write of Restitution. There is a total lack of any evidence that this process was ever initiated.

Mr Lopez did not seek restitution or recovery of his property in the underlying case.

Contempt is not available to recover property awarded in a dissolution action.

Joinder of a claim for replevin, waste or damages in the event the property held by another is not returned (conversion) is permitted. 20 WAPRAC § 32.46. Mr Lopez did not seek that relief in the primary cause of action.

While it is clear that the law would allow a contempt proceeding for failure of one in possession of property ordered to be returned to another, that is not the order in this case. 15 WAPRAC § 40.8.

A party who has been ordered to deliver property to the receiver and refuses to do so is guilty of contempt of court and subject to such coercive measures as the court may determine. *Arnold v. Nat. Union of Marine Cooks & Stewards Ass'n*, 41 Wn.2d 22, 246 P.2d 1107 (1952).

2. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING #2 THAT THE ORDER RELATED TO THE TRANSFER OF PERSONAL PROPERTY BECAUSE IT IS UNSUPPORTED THE ORDER.

The order dated 02/29/08 did not establish that Ms Bryant had possession of the items listed, even if the court had jurisdiction to award them to Mr Lopez.

The Order dated 02/29/08 does not order Ms Bryant to do anything.

Contempt of court is intentional disobedience of any lawful order of the court. RCW 7.21.010(1)(b); *In re Personal Restraint of King*, 110 Wash.2d 793, 797, 756 P.2d 1303 (1988).

The court must find a direct and proximate violation of a clear and unequivocal order requiring or prohibiting the contemtor from doing something.

The only valid defense to a charge of contempt is that the underlying judgment, decree, or order was entered without subject matter jurisdiction, or without jurisdiction over the parties. 15 WAPRAC § 43.3.

The trial court abused its discretion because the order is unsupported by substantive evidence. If the court had jurisdiction to enter the order dated 02/29/08, it contains a list of both personal and real property.

Nowhere in the order does it state that Petitioner has these items or that she is ordered to return them.

In his answer, Mr Lopez (¶1.1§ 6) . . . denied that the parties rights to said property and debts needed to be determined.”

3. THE TRIAL COURT ABUSED ITS DISCRETION
IN FINDING #3 THAT THE ORDER WAS
VIOLATED BY FAILING TO RETURN ITEMS OF
PERSONAL PROPERTY BECAUSE IT IS
UNSUPPORTED BY THE FACTS.

If the order of 02/29/08 were valid. If Ms Bryant were found to be in possession of the property. If it required Ms Bryant to return the property, there is no evidence to support a showing that Ms Bryant

was responsible for the damage to the property.

Mr Lopez testified that when he returned to the property he found damage to the property, items missing, broken or damaged. CP 66 -68.

There is no credible evidence that Ms Bryant was the cause of these damages. The only specific statement attributes the loss to “vandalism”. CP 90.

The trial court goes on in its order of 05/09/08 at CP 110, 11-12 to hold:

“Ms Lopez [sic] caused damage waste to the property while in her care and control and did not take steps to protect the property and/or she purposely damaged the property. ”

There is no evidence that Ms Bryant caused damage to the property, or failed to protect it, or had a legal duty to do so.

This finding is unsupported by the evidence.

The court further states, Alex Lopez shall have judgement against Brenda Bryant in the amount of \$14,852.94 for damages.

There is no evidence to support this judgement against Petitioner.

Respondent has recovered a damage award against Petitioner when it was not plead or pursued in the original action. He was

awarded damages in the prior action and this award constitutes violation of the preclusionary rules.

An award of damages in a contempt proceeding is not authorized by the statute.

The so-called civil contempt statutes sometimes termed the general contempt statutes, were repealed in 1989. The statutes were replaced by new provisions in RCW 7.21 that allow the court to impose what are now termed *remedial sanctions* for any act constituting contempt of court. A remedial sanction is defined as “a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.”

If the sole purpose of the contempt proceeding is to punish, rather than to coerce, the procedures for imposing remedial sanctions are inapplicable, and the court must instead follow the more rigorous procedural requirements for imposing punitive sanctions. 15 WAPRAC § 43.6

A contempt sanction is coercive, and thus civil in nature, when the condemner can avoid the sanction by doing something to “purge” the contempt. In such a case the condemner “ ‘carries the keys of his prison in his own pocket.’ ” *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). A contempt sanction is punitive, and thus criminal in nature, when it is imposed to punish completed acts of disobedience without providing an opportunity to purge the contempt. Prosecutions for criminal contempt are designed to serve the limited but fundamental purpose of vindicating the authority of the court so as to preserve respect for the judicial system itself. *In re Mowery* 141 Wash.App. 263, 275, 169 P.3d 835, 841 (2007); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987).

The distinction is illustrated by *Mead School Dist. No. 354 v.*

Mead Educ. Ass'n., 85 Wash.2d 278, 287-88, 534 P.2d 561 (1975). Our Supreme Court characterized as criminal a \$1,000 fine imposed on a teachers' association for violating an anti-strike injunction. The fine was not imposed to compel the teachers to perform a duty owed to the school district. Rather, it was an unconditional penalty imposed to vindicate the authority of the court, "totally independent of any concern of these parties": *In re Mowery* 141 Wash.App. 263, 275, 169 P.3d 835, 841 (2007).

Washington's criminal contempt statute, RCW 7.21.040, provides that a punitive sanction for contempt of court may be imposed only in a separate action initiated by a public prosecutor.^{FN13} The information or complaint that commences the action must charge contempt and must recite the punitive sanction sought to be imposed. RCW 7.21.040(2)(a),(b). *In re Mowery* 141 Wash.App. at 276.

RCW 7.21.040 provides in material part;

Punitive sanctions--Fines

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

© A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

* * *

4. THE TRIAL COURT ABUSED ITS DISCRETION
IN FINDING #4 AND 5 THAT MS BRYANT'S
ABILITY AND UNWILLINGNESS TO COMPLY
WERE UNSUPPORTED BY THE FACTS.

It is well settled that “ ‘the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.’ ” But exercise of the contempt power is appropriate only when “ *the court finds* that the person has failed or refused to perform an act that *is yet within the person's power to perform.*” Thus, **a threshold requirement is a finding of current ability to perform the act previously ordered.** *Moreman v.*

Butcher, 126 Wash.2d 36, 40, 891 P.2d 725 (1995) (quoting *In re King*, 110 Wash.2d 793, 804, 756 P.2d 1303 (1988);) *see also Smith Western Ports v. Smith*, 17 Wash. 430, 432, 50 P. 52 (1897).

There was no jurisdiction to support the court's order of contempt. The order is unsupported by the facts and the award of additional damages were precluded by the previous dismissal.

V. CONCLUSION:

The dismissal of the Petition for Determination and Equitable Distribution of Meretricious Property and Dissolution of Meretricious Relationship, terminated the court's jurisdiction to grant any relief. Petitioner, had the right to rely upon her pleadings, in the absence of any counter action or amendment by Mr Lopez.

The court expanded the pleadings before her to address issues over which she had no jurisdiction. She granted Mr Lopez relief in the form of Damages and attorney fees which were not property plead or proven.

The trial court miss applied the law and made findings unsupported by the evidence.

She the allowed additional evidence to be admitted into the record in the form of EX 30 after the dismissal.

She found that Ms Bryant had willfully violated the order of 02/29/08 and found her in contempt. These findings were not supported by the record and were an abuse of discretion.

She sought to award Mr Lopez damages for waste, when he had not requested that relief in the earlier action and should have found that he was precluded from such relief, if she had jurisdiction to make that award.

The trial court sought to redress Mr Lopez's damages through an award of damages for waste, without allowing an appropriate opportunity to purge her contempt. The award of damages under the facts of this case were punitive in nature making the proceedings outside of the civil contempt statute.

RESPECTFULLY SUBMITTED THIS 26th DAY OF
NOVEMBER 2008.



James M Caraher WSBA #2817

Attorney for the Appellant/Petitioner

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STATE OF WASHINGTON)
) SS.
COUNTY OF PIERCE)

I certify that I know or have satisfactory evidence James M Caraher who appeared before me and said person acknowledged that he/she signed this instrument and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: 11/26/08

Ronald L. Hendry

NOTARY PUBLIC in and for the State of Washington
Residing at Tacoma
My commission expires: 02-09-10

RONALD L. HENDRY
STATE OF WASHINGTON
NOTARY — — PUBLIC
MY COMMISSION EXPIRES 02-09-10