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No. 66269-4-I
(consolidated with No. 66363-1-I)

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

In re the Marriage of:

CARMEN ROCKWELL n/k/a PALOMERA,

Respondent,

v.

PETER ROCKWELL,

Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable James A. Doerty)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Peter Rockwell is before this Court again, and this litigation remains unresolved, because Carmen is determined to play games and mislead the trial court. Carmen admits telling the trial court its discretion was constrained by this Court's prior decisions when this Court said exactly the opposite, and even though this Court admonished the parties against telling the trial court its discretion was constrained. The only constraint this Court imposed was that the overall division "must put the parties in roughly equal positions for the rest of their lives."¹ Nevertheless, Judge Doerty accepted Carmen's arguments and entered her proposed orders, without revision. The trial court thus treated the character of property as dispositive of the overall division, as it did in *Rockwell II*,² and failed to exercise its discretion. This again requires reversal, just as in *Rockwell II*.

Even if the trial court had exercised its discretion, the resulting 67/33 division—a \$1 million disparity—fails to put the parties in roughly equal financial positions because it forces Peter, now age 60, to work until age 70 (if he can) to have any hope of making up the disparity, while

¹ *Marriage of Rockwell* ("Rockwell II"), 157 Wn. App. 449, 452, 238 P.3d 1184 (2010); see also *Marriage of Rockwell* ("Rockwell I"), 141 Wn. App. 235, 248, 170 P.3d 572 (2007).

² *Id.* at 453-54.

Carmen retired comfortably at age 60. Enough is enough. This Court should vacate the remand order and send a strong and unmistakable message to the trial court. It should remand to a different judge who can “start over”³ and make a fair division of the property as this Court has repeatedly directed.

II. ARGUMENT

A. **The Record Shows that the Trial Court Did Not Consider All the Statutory Factors in Making the Overall Division and Thus Failed to Exercise Its Discretion. The Trial Court’s Treatment of Character as Dispositive of the Overall Division Requires Reversal.**

Rather than address Peter’s actual arguments, Carmen attacks a straw man. Peter has never contended that the trial court must divide the estate equally or that it may not consider the character of property in making its division. *See Brief of Respondent (“BR”)* 23-24, 36. As this Court has stated in both published decisions in this case, after a long-term marriage, the court “must put the parties in roughly equal financial positions for the rest of their lives.” *Marriage of Rockwell (“Rockwell II”)*, 157 Wn. App. 449, 452, 238 P.3d 1184 (2010); *Marriage of Rockwell (“Rockwell I”)*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007), citing

³ CP 483.

Sullivan v. Sullivan, 52 Wash. 160, 164, 100 P. 321 (1909).⁴ That does not necessarily mean dividing the estate equally. But the parties must be placed in roughly equal financial positions after considering all the relevant factors, including the character of property. RCW 26.09.080. What the court may not do is what it did here: treat character as dispositive. *Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *Worthington v. Worthington*, 73 Wn.2d 759, 768, 440 P.2d 478 (1968).

Specifically, the trial court presumed to “recognize” that the recharacterization of the pension ordered by this Court “reduces [Peter’s] share of the overall marital estate,” when the recharacterization most certainly did *not* compel such a result. CP 689, Appx. D to *Opening Brief of Appellant* (“BA”). The character of property is only one factor, and the trial court must consider *all* the factors. *Konzen*, 103 Wn.2d at 478. Tellingly, Carmen pretends this statement in the remand order does not exist, failing to address it even though it is the linchpin of Peter’s appeal on this issue. She quotes snippets from the remand order purporting to state that the trial court exercised its discretion, but those perfunctory statements are not borne out in the context of the entire order. Nor did

⁴ Carmen accuses this Court of causing “mischief,” asserting that litigants in other cases have argued that the standard of “roughly equal financial positions” after a long-term marriage renders the character of property immaterial. BR 24 n.9. This unsupported assertion is irrelevant here. That is not Peter’s position.

Judge Doerty make any oral comments that could indicate an exercise of discretion.

Although the trial court addressed factors other than the character of property in dividing the *community* property, it failed to do so when it counted—in making the *overall* division. It is the *overall* division that must put the parties in roughly equal financial positions. The court’s treatment of character as dispositive was contrary to law and a failure to exercise discretion, which is an abuse of discretion. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999); *see also Rockwell II*, 157 Wn. App. at 453-54.

Even if the remand order did not show on its face that the trial court treated the character of the pension as dispositive, which it does, the arguments the parties made to the trial court provide context that illuminates the trial court’s error. *See Rockwell II*, 157 Wn. App. at 452-53. Carmen asserted, contrary to this Court’s remand instructions, that the character of property was dispositive and that the court had no discretion to redivide the pension. CP 493; RP (9/22/2010) 8, 26. The court gave no oral decision at the hearing. A week later, it simply entered an order Carmen had proposed two months earlier, relying upon and accepting her assertions regarding the scope of the court’s discretion under this Court’s remand instructions.

Attempting to justify the assertions she made to the trial court, Carmen only digs a deeper hole for herself. She *admits* telling the trial court its discretion “was limited...within the confines of [the Court of Appeals’] prior rulings.” BR 36. This is precisely what this Court admonished the parties *not* to tell the trial court. CP 479-80, 482. Carmen unapologetically cites her response to Peter’s initial motion on remand, where she told the trial court it lacked discretion to award Peter any more assets than it did after the 2005 trial, asserting that this Court had “determined” the assets Peter was entitled to:

Awarding more assets to Peter than the Court of Appeals already ***determined he was entitled to*** would utterly defeat the Court of Appeals’ original decision.

CP 497 (emphasis added). She even refers to the current division as “[t]his court’s property division[.]” BR 30 (emphasis added). This Court never “determined” the assets to which Peter was entitled. Instead, it has repeatedly stated that the trial court has *complete* discretion on remand, including to divide the community property equally as Peter had proposed.⁵ CP 477, 479-80, 482-83; *Rockwell II*, 157 Wn. App. at 453-54.

⁵ If Carmen were correct that this Court in *Rockwell I* “determined” the assets to which Peter was entitled, her argument then admits (1) that Peter is entitled to the 38% share of the overall estate this Court affirmed; (2) that she made arguments contrary to the established law of this case when she argued in *both* remands that the trial court should award Peter *less* than that percentage of the overall estate; (3) that the trial court *twice* failed to follow this Court’s remand orders; and, as a consequence, (4) that Peter should be awarded, at the very least, his fees in this appeal based on Carmen’s intransigence.

The trial court must exercise its discretion. As this Court stated in *Rockwell II*, when this Court remands for “further proceedings,” it expects the trial court to exercise its discretion to decide any issue necessary to resolve the case. 157 Wn. App. at 453. By treating the character of the pension as dispositive, the trial court has again failed to exercise its discretion. The trial court was not *required* to divide the community property equally (and thus achieve a 60/40 overall division), but neither was it required to make the same 67/33 overall division as it did in the first remand, resulting in a \$1 million disparity between the parties’ awards. There would have never been any reason to remand if the trial court had no discretion.

This Court should decline Carmen’s invitation to overlook the treatment of character as dispositive on the basis that, “in the end,” the trial court found the overall division just and equitable. BR 24, purporting to quote *Sullivan*, 52 Wash. at 164. Not only does *Sullivan* not use those words, it does not support such a result, which would render *Rockwell II* a nullity. *Sullivan* actually *condemned* unduly emphasizing the character of property after a long-term marriage. The husband argued the trial court had misjudged the extent of his separate property. 52 Wash. at 164. The Supreme Court affirmed, reasoning that the disputed funds were so commingled with community funds as to be impossible to separate. *Id.*

Important here, the court observed that the character of property after a long-term marriage of 25 years or more is “only a circumstance in the case” and that “the ultimate duty of the court is to make a fair and equitable division under all the circumstances.” *Id.* This rationale does not support treatment of the character of property as *dispositive* after a long-term marriage; it demands the opposite.

This Court should vacate the remand order and remand to a different judge for re-division of the marital estate.

B. Even if the Trial Court Had Exercised Its Discretion, It Abused That Discretion in Making an Overall Division That Failed to “Put the Parties in Roughly Equal Financial Positions for the Rest of Their Lives.”

1. Assuming the 2005 Findings Supported the 62/38 Overall Division, Which Was Affirmed, Those Same Findings Cannot Alone Justify a 67/33 Division, a \$1 Million Disparity.

Even assuming the trial court had not treated the character of property as dispositive of the overall division but had considered all the statutory factors and exercised its discretion, this Court should vacate the remand order because the overall division fails to “put the parties in roughly equal financial positions for the rest of their lives.” *Rockwell II*, 157 Wn. App. at 452; *Rockwell I*, 141 Wn. App. at 248. The parties’ financial positions following the 67/33 division—a \$1 million difference in assets awarded—are nowhere near roughly equal and never will be.

Carmen responds by anemically referring to the trial court's 2005 findings regarding differences in the parties' ages, health, and employability. It is true that the trial court relied on those factors to make an uneven division after the 2005 trial, and this Court upheld the 62/38 overall division as within the trial court's discretion. In other words, this Court ruled that the 62/38 overall division satisfied the requirement to "put the parties in roughly equal financial positions for the rest of their lives." But neither the trial court nor Carmen explains how a 67/33 division—which gives Carmen over \$300,000 more of the overall estate than the previous division and thus makes the total disparity almost \$1 million—could *also* put the parties in roughly equal financial positions.

Carmen focuses specifically on the 2005 finding that Peter, then age 54, was employable and could come out of retirement and earn \$70,000 annually for several years to make up the \$685,000 difference in the 2005 awards. BR 29-30. Despite the difference in the awards now being almost \$1 million, the trial court and Carmen cite this same finding without explaining how this division can possibly put the parties in roughly equal financial positions for the rest of their lives. As explained in the Opening Brief, to make up the difference at \$70,000 per year, Peter would have to work until age 70, ten years longer than Carmen. Whereas Carmen has the certainty of assets in hand plus guaranteed pension

payments, Peter bears the uncertainty of being able to maintain lucrative employment well past the typical retirement age. These are manifestly not roughly equal financial positions.

Carmen points to evidence that Peter earned over \$100,000 annually in 2007 and 2008. But the trial court made no findings regarding that evidence, and certainly never found that Peter could average a six-figure income annually over several years. The trial court predicted that Peter could average \$70,000 per year. In reality, due to the recession, age discrimination, and other factors, Peter earned far less than that in some of the five years since the decree.⁶ As Carmen points out, Peter earned a total gross income of about \$300,000 since 2005. *See* CP 899-910. That works out to an average of only \$60,000 per year—\$10,000 less per year than the trial court predicted. When evaluated against the facts, Carmen's logic thus falls miserably short of proving that Peter can make up a \$1

⁶ After being laid off in 1999 at the age of 48, Peter spent over two years actively seeking employment before becoming effectively retired at age 51 in 2002, while the parties were still married and not long before Carmen retired at age 60. Due to the trial court's division of assets decreed in August 2005, Peter was forced to seek employment once again.

After working in real estate and searching for other employment for fifteen months, in late 2006 Peter was reemployed in his prior field of technical sales. CP 452-53. Although he excelled in his new position and won a sales award in January 2008, he was laid off in April 2009 due to the impact of the recession. CP 453. Peter found new employment, but it paid only commissions and no salary. CP 453. He earned only about \$30,000 in 2009 and \$5,500 in the first eight months of 2010. CP 899-910. Peter continued to search for more lucrative employment in 2009-10, but the job market was depressed and Peter experienced age discrimination. CP 453-54.

million deficit by working, especially when he is now age 60 and has his own significant health concerns. CP 177, 454.

When this Court adopted the requirement to “put the parties in roughly equal financial positions for the rest of their lives” after a long marriage (25 years or more), presumably it did so in recognition of the fact that parties develop legitimate expectations based on their respective contributions over such a long duration. Significantly, this Court first expressly adopted that rule *in this case*, where Peter and Carmen started with few assets but worked and planned throughout their 26-year marriage to both have a comfortable retirement.

Carmen’s continued federal employment and advancement were essential to the growth of the pension, which Peter enabled by deferring to Carmen’s career, twice moving to advance her career while giving up the possibility of moving to advance his own career. 1RP 22-26; 3RP 76, 99-105, 178-79. As a result, the pension was paying over \$84,000 per year as of 2005 when it otherwise would have paid only \$6,000 per year if Carmen had left government employment in 1978 and followed Peter’s career. CP 86, 92. Meanwhile, Peter made a substantial income, accrued substantial retirement accounts, and managed the family finances. 1RP 174; CP 82. The increase of the couple’s fixed assets from \$100,000 to \$1.1 million was mostly due to his efforts. 2RP 135; 3RP 78; CP 82.

Nevertheless, Carmen now insists on a division that puts the parties in grossly disparate financial positions, which the “roughly equal” standard was meant to preclude.

In his proposals on remand, Peter acknowledged the trial court’s original intent, based on various factors, to make a roughly 60/40 overall division, awarding the greater share of assets to Carmen. He proposed two alternatives that would have resulted in a division similar to that previously affirmed by this Court: one involving a judgment against Carmen, CP 440-41; RP (9/22/2010) 11, and one involving no judgment but awarding some of Carmen’s separate property interest in the pension to Peter,⁷ CP 662; RP (9/22/2010) 23. The trial court was not required to accept either of those alternatives, and could have devised any number of ways to divide the property. It *was* required, however, to “put the parties in roughly equal financial positions for the rest of their lives.” It failed to do so.

This Court should vacate the remand order and remand to a different judge for re-division of the marital estate.

⁷ Carmen asserts incorrectly that Peter proposed this second alternative after the trial court had made its decision. Peter did so orally at the hearing on the parties’ cross-motions, before the court made any decision, RP (9/22/2010) 23, and then again in writing before the trial court formally entered its orders, CP 662.

2. This Court Should Ignore Carmen's Misleading Attempts to Skew the Percentages.

Carmen makes three assertions in an attempt to argue that the disparity between the property awards is not what it seems. All are incorrect, misleading, and trivial. They should be ignored.

First, vacating the pension overpayment portion of the January 2009 judgment did not make the overall division 66/34 rather than 67/33. After vacating that portion of the judgment, the court required Peter to overpay the remaining judgment by \$9,086 (including \$7,200 in postjudgment interest on the vacated portion of the judgment), CP 692, 748-51; Appx. C to BA, and to pay \$6,066 to “encourage him not to delay further proceedings,” CP 325, 690; Appx. C to BA. Ultimately, then, the overall division remained 67/33 notwithstanding that part of the January 2009 judgment was vacated. *See* Appx. C to BA.

Second, Carmen's pension survivor benefit is not a worthless “phantom” asset. BR 32. The survivor benefit is an additional pension amount one spouse will receive following the other's death. The trial court determined that Carmen's survivor benefit had a present value of \$326,400 based on an actuarial expert's extensive testimony and awarded that amount to her. CP 38, 45, 257. The court similarly determined that Peter's survivor benefit had a present value of \$253,289 and awarded that amount to him. CP 39, 45, 257. Carmen points to the trial court's finding

that Carmen more probably than not will predecease Peter, based on testimony there was a 57% probability she would die first. CP 39; 2RP 80. But there is still a 43% chance that Peter will die first, and the chance is increased by Peter's more recent health problems. See CP 177, 454.⁸ Moreover, the trial court did not view Carmen's survivor benefit as worthless or it would not have accepted the actuary's valuation and included it in the award.

Third, if a portion of the survivor benefit awarded to Peter was Carmen's separate property, that does not impact the fairness of the division. See *Marriage of Griswold*, 112 Wn. App. 333, 348, 48 P.3d 1018 (2002) (“[A] court need not find exceptional circumstances to justify awarding a portion of one spouse's separate party to the other spouse.”).⁹

⁸ If Peter died first, Carmen would receive 100% of the basic annuity (more than the total annuity amount being paid to both parties now), and Peter's heirs would receive nothing from the pension, the largest asset of this 26-year marriage. 2RP 80; CP 86-87. If Carmen died first, Peter would receive only 55% of the basic annuity. CP 87. This huge difference in the survivor annuity income benefit explains why the fixed value of Carmen's benefit is greater than Peter's.

⁹ Carmen's assertion in footnote 6 in her statement of facts, at BR 14, that Peter has an expectancy in a trust should also be ignored. The evidence at trial was that the trust was paying distributions to Peter's stepmother, and that Peter had a one-third interest in the remainder, if any, upon her death. 3RP 180-82. The possibility of an inheritance from this trust was so speculative that the trial court did not consider it, and it remains irrelevant. Furthermore, it would be unfair to penalize Peter for this inheritance he may never receive when he received no separate property credit for inheritances he actually received during the marriage.

C. Carmen Concedes Peter's Overpayment of the January 2009 Judgment, Entitling Peter to Restitution under RAP 12.8.

Carmen does not dispute, and thus concedes, that Peter overpaid the January 2009 judgment by \$9,086.¹⁰ *See State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (failure to respond regarding an appeal issue concedes the point). Simple math demonstrates the overpayment. The total January 2009 judgment was \$77,957. The trial court then vacated the “pension overpayment” portion of the judgment, a total of \$42,806. CP 667-68, Appx. D to BA. This left a remaining judgment of \$35,151, *i.e.*, the attorney’s fee portion of the judgment. Peter had paid \$44,258 toward the judgment, an overpayment of \$9,086. CP 748-51. The trial court erred in denying restitution under RAP 12.8. *See* BA 38-39.

This Court should direct the trial court to restore the overpayment of \$9,086 to Peter. Accordingly, this Court should also vacate the award of \$4,000 in attorney’s fees to Carmen relating to a motion on this issue. CP 71.

¹⁰ This overpayment had nothing to do with the trial court’s requirement that Peter pay his share of the monthly pension payment to Carmen until the Office of Personnel Management implemented the new division, which Carmen does address at BR 32-34. That requirement did not take effect until the remand order and Court Order Acceptable for Processing (COAP) were formally entered on October 22, 2010. CP 687-88, Appx. D to BA (Remand Order); CP 890-96 (COAP). The overpayments were made in June-August 2010. CP 452, 663, 668-669.

D. The Trial Court's Depriving Peter of His Share of the Pension Payments until the Federal Government Implemented the New Pension Division Cannot Be Justified.

The trial court vacated the pension overpayment judgment as part of its division on remand, finding that Peter “shall not be obligated to repay the amount of the pension that he was overpaid while the first appeal was pending.” CP 687-89, Appx. D to BA. Carmen then acknowledged satisfaction of the remaining portion of the judgment. CP 697-98. She does not dispute that, as of that time, Peter owed her *nothing*. Paragraph 5 of the 2010 remand order, requiring Peter to pay his entire share of the monthly pension payment to Carmen pending OPM's implementation of the new COAP, thus cannot be rationalized as merely “recogniz[ing] that [Peter] had already received more than he was entitled to while the first appeal was pending.” BR 33. Either Peter owed money to Carmen or he did not. The trial court ruled and Carmen acknowledged that Peter owed nothing.

Carmen does not dispute that the amount Peter paid under paragraph 5 was completely arbitrary. The amount was unknown to the trial court and the parties when the 2010 remand order was entered because it depended on how long the federal government took to implement the COAP, and no one knew when that would happen. Where a court has conditioned the final division of assets on events outside the

parties' control, it has failed to exercise its discretion to determine that the division is fair and equitable. A failure to exercise discretion is an abuse of discretion. *Bowcutt*, 95 Wn. App. at 320; *see also Rockwell II*, 157 Wn. App. at 453-54.

Carmen makes no attempt to address Peter's argument that the purported justification for paragraph 5—"to encourage him not to delay further proceedings" by depriving him of the financial means to file motions, CP 325, 788-89—was a violation of his First Amendment right to petition the government for redress in a blatant and improper effort to circumvent his right to appeal. Carmen requested this remedy just fifteen days after this Court issued its decision in Peter's favor in July 2010. CP 324-25. She subsequently faulted Peter for causing delay by filing a motion for continuance in the trial court and a motion to publish in this Court—both of which were *granted*. CP 788-89, 396-97, 613. Peter never used delay as a litigation tactic, and the trial court never found that he did.

This Court should vacate paragraph 5 of the remand order as an abuse of discretion. Accordingly, this Court should also vacate the award of \$1,000 in attorney's fees to Carmen relating to a motion for reconsideration on this issue. CP 851.

E. The Trial Court Was Required to Apply the Lodestar Method to Carmen's Fee Requests.

Carmen does not dispute that the trial court did not apply the lodestar method when it awarded \$4,000 and \$1,000 in attorney's fees relating to Peter's motion for entry of judgment and motion for reconsideration, respectively. This Court therefore must vacate those awards even if it does not otherwise vacate the orders in which the awards were made.

Carmen asserts the fees were justified by intransigence, BR 34, but the trial court did not find Peter was intransigent. *See Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006) (rejecting post-hoc justification of intransigence where trial court did not find intransigence). She cites *Marriage of Van Camp*, 82 Wn. App. 339, 340, 918 P.2d 509 (1996), for the proposition that the lodestar method does not apply in dissolution proceedings. But *Van Camp* involved a fee award under RCW 26.09.140 based on need, ability to pay, and equity. *Id.* The fees at issue here were not awarded under RCW 26.09.140, nor did the trial court consider need, ability to pay, or equity. The court simply awarded Carmen fees "for having to respond" to Peter's motions. CP 791, 851. Carmen does not attempt to distinguish *Marriage of Bobbitt*, 135 Wn. App. at 30, which reversed a fee award supported only by a nearly

identical finding. *Id.*; see BA 42-43. This Court should reverse the fee awards.

F. This Court Should Award Fees on Appeal to Peter, Not to Carmen.

As discussed above, in denying she misled the trial court, Carmen only proves Peter's point. She admits telling the trial court its "discretion was limited...within the confines of [the Court of Appeals'] rulings" and that it was precluded from making a particular division. BR 36-37. Again, this is precisely what this Court admonished the parties *not* to tell the trial court. CP 479-80, 482. When Carmen argued to this Court that the trial court could not divide the community property equally, this Court disagreed, emphasizing that the trial court should would have complete discretion on remand and should "start over."¹¹ CP 479-80, 483. In addition, Carmen essentially concedes her own intransigence when she concedes by silence that Peter overpaid the January 2009 judgment by \$9,086, when she vigorously argued to the contrary in the trial court. *See, e.g.*, CP 758-59. This Court should award Peter his appellate attorney's fees.

There is no basis to award attorney's fees to Carmen based on intransigence. No court has found Peter intransigent, nor does any basis

¹¹ *Robinson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005), cited at BR 37, is inapposite because this Court never held that the trial court's discretion was limited.

for such a finding exist. Carmen seeks to divert this Court's attention from her own conduct. Peter did not request an equal division of the entire estate without regard to the character of assets, as Carmen alleges. BR 36. He proposed two alternatives to achieve an overall division closer to the 60/40 division originally envisioned by the trial court and affirmed by this Court. CP 440-41, 662, RP (9/22/2010) 11. The trial court declined Carmen's request for an award of attorney's fees in the second remand (other than a total of \$5,000 "for having to respond" to two motions, as discussed above). CP 690, Appx. D to BA.

Nor has Peter demonstrated intransigence in bringing this appeal. The appeal has several legitimate bases. This Court should ignore Carmen's references to settlement offers; this Court cannot evaluate the (un)reasonableness of her offers because the details of the offers are not in the record, nor are the offers made by Peter. Peter denies that Carmen has the need for an award of attorney's fees under RCW 26.09.140 and that he has the ability to pay. He will respond to Carmen's financial affidavit, if any, at the appropriate time.

This Court should award fees on appeal to Peter based on Carmen's intransigence, and deny fees to Carmen.

G. This Court Should Remand to a Different Judge.

The only consideration Carmen raises against remanding to a different judge is efficiency due to the previous judge's familiarity with the case. As mentioned in the Opening Brief, remand to a different judge has the best chance of reducing the likelihood of further appeals. *See* BA 46, citing *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). Moreover, Carmen is not in a position to champion efficiency, when it is her repeated, misleading assertions to the trial court that have caused great inefficiency and wasted resources. The trial court has unfortunately proven unable or unwilling to ignore those assertions and discern and apply this Court's rulings.

The first paragraph of the preamble to the Code of Judicial Conduct states:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an ***independent, impartial, and competent*** judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

In *Marriage of Sievers*, 78 Wn. App. 287, 879 P.2d 388 (1995), cited by Carmen, this Court rejected a claim of bias where the trial court's findings

were “straightforward” and its decisions “thorough, rational, dispassionate, judicially sound summaries of the trial court’s unbiased view of the evidence and its application of the law.” *Id.* at 314. In *Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985), also cited by Carmen, the Supreme Court affirmed a property division where the record demonstrated the trial court had “carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision.” *Id.* at 810. Here, there is no indication that the trial court exercised its discretion or that its analysis was thorough, careful, or thoughtful. The trial court has expressed none of its own reasoning; it simply entered Carmen’s proposed orders.

Indeed, during this seven-year litigation, including after an appeal in which Peter prevailed, all sixteen substantive orders entered by the trial court, comprising 70 pages, were prepared by Carmen’s attorneys and entered without any revision except to deny attorney’s fees in three instances. *See* Appx. A to *Reply Brief*. These orders included the original findings of fact and conclusions of law, the decree, and the orders on remand. This does not demonstrate thorough, careful, and thoughtful decision making. A judge is supposed to serve as an impartial decision maker, not as a rubber stamp for orders prepared by one party’s counsel, especially when that party has made arguments and assertions that are not

only legally wrong but contrary to this Court's explicit directions. Remand to a different judge is needed to preserve the appearance of fairness and in the interest of maintaining the public's confidence in the legal system.

III. CONCLUSION

This Court should reverse all the 2010 orders, remand for further proceedings before a different judge, and award Peter his attorney's fees on appeal.

DATED this 6th day of July, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By: 
Jason W. Anderson, WSBA No. 30512
Attorneys for Peter Rockwell, Appellant

Orders Entered by Judge Doerty in *Marriage of Rockwell*
 (procedural orders, e.g., continuances, omitted) (Case no. 04-3-03334-2)

<u>Date</u>	<u>Order</u>	<u>Drafted by</u>	<u>Pages</u>	<u>Judge's Revisions</u>	
08/25/05	Decree	Carmen	5	None	CP 44-49
08/25/05	Findings	Carmen	8	None	CP 36-43
08/25/05	Court Order Acceptable for processing (COAP)	Peter	3	None	Supp. CP __ (Sub No. 71)
08/31/05	COAP -Amended	Carmen	3	None	Supp. CP __ (Sub No. 75)
12/20/07	Order and judgment for appellate fees	Carmen	2	None	Supp. CP __ (Sub No. 101)
01/23/08	Order to Set Aside 20 Dec 2007 order	Peter	3	Deny Legal Fees	Supp. CP __ (Sub No. 117)
02/14/08	Order denying 10 Dec 2007 motion ¹	Stipulated	2	None	Supp. CP __ (Sub No. 122)
12/17/08	Order on remand	Carmen	4	None (att'y hand-correctns)	CP 185-188
12/17/08	COAP – Amended	Carmen	6	None	CP 294-299
01/27/09	Denial of motion for reconsideration	Carmen	2	Deny Legal Fees	CP 281-282
01/27/09	Final order on remand	Carmen	4	None	CP 277-280
01/27/09	COAP - Amended	Carmen	6	None	CP 306-311
09/29/10	Order on Remand	Carmen	4	Deny Legal Fees	CP 563-566
09/29/10	COAP – Amended	Carmen	7	None	CP 556-562
10/22/10	Final Order on remand	Carmen	4	None	CP 824-827
10/22/10	COAP – Amended	Carmen	7	None	CP 830-836
10/22/10	Order releasing registry funds	Carmen	4	None	CP 838-841
11/16/10	Order denying overpayment of 2009 judgment	Carmen	2	None	CP 790-791
11/29/10	Denial of motion for reconsideration	Carmen	2	None	CP 850-851

Orders Drafted by Carmen

Total orders 16

Total pages 70

Details: Judge Doerty made **no revisions** in 16 orders except to deny legal fees in 3 orders (covering two different matters). The 16 orders included all orders regarding division of marital property.

¹ Judge Doerty issued conflicting orders in December 2007 – one granting a \$34K judgment primarily for appellate legal fees, even while Peter's Petition for Review was pending. He signed a second order, on the same day, continuing the hearing on the same matter until the following month. The order to set aside in January 2008 was made necessary by this issuance of conflicting orders in December 2007. Ultimately Judge Doerty denied the entire motion about appellate legal fees on February 14, 2008, after granting it outright just 8 weeks earlier.

No. 66269-4-I
(consolidated with No. 66363-1-I)

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

In re the Marriage of:

CARMEN ROCKWELL n/k/a
PALOMERA,

Respondent,

v.

PETER G. ROCKWELL,

Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of *Appellant's Reply Brief* and this *Certificate of Service* to be served upon counsel of record on the date below, as follows:

Cynthia B. Whitaker 1200 Fifth Ave., Suite 2020 Seattle, WA 98101-3132 P: (206) 382-0000 F: (206) 624-0809 Email:	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other
Catherine W. Smith Smith Goodfriend PS 1109 First Ave., Suite 500 Seattle, WA 98101-2988 P: (206) 624-0974 F: (206) 624-0809 Email: cate@washingtonappeals.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other
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DATED this 6th day of July, 2011.

Patti Saiden

Patti Saiden, Legal Assistant