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JAMES E. MCGREEVEY, Plaintiff, vs. DINA MATOS MCGREEVEY, Defendant,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-FAMILY PART UNION COUNTY DOCKET NO. FM-20-01166-07G Civil Action OPINION

Decided: August 8, 2008

Stephen Haller, Esq. and Jenny Osborne, Esq. appearing on behalf of plaintiff, James McGreevey

John Post, Esq.; Loretta Critchley, Esq., and Nicole Casciola, Esq. appearing on behalf of defendant, Dina Matos McGreevey

CASSIDY, P.J.F.P.

In this high profile and high conflict matrimonial matter, this court is now faced with deciding various financial issues of the former first couple of New Jersey, namely alimony, child support and equitable distribution. This matter was tried over eleven days in May and June of 2008. In addition to the parties the following witnesses were called during the trial: Donna Kolsky, an employability expert; Sharon Maggio, C.P.A.; a forensic accountant; and Kalman Barson, C.P.A., a forensic accountant. Subsequent to

the trial, the court received post-trial submissions from both parties on June 30, 2008 as well as certifications of services filed on July 18, 2008.

Despite the short length of the marriage, approximately four years and five months, the relatively small amounts of property owned and their relatively modest income, the parties have raised several significant issues which were unique to them. The court, as part of its decision must address issues of (1) celebrity goodwill, (2) whether the couple's brief tenure as Governor and First Lady and the resulting perquisites such as residency in the governor's mansion should be considered in a determination of their marital lifestyle; (3) whether the plaintiff's behavior constitutes egregious conduct and should be factored in as a consideration for alimony pursuant to the Supreme Court's decision in Mani v. Mani, 183 N.J. 70 (2005); and (4) whether or not the child support guidelines should apply under the circumstances of this case. Each of these issues will be addressed in the context of the relief requested by the parties.

Initially, general findings with reference to the testimony in this case must be addressed. It was apparent to this court that both parties took widely divergent positions and were unwilling to compromise despite significant efforts by the court system to have them resolve their matter out of the spotlight, by utilization of mediation and settlement conferences. Their positions were polarized and as the court will find in detail later, were somewhat disingenuous and unsubstantiated. As was expressed to the parties on numerous occasions, their ability to work together and fashion a financial settlement was clearly in their best interest. No one in a matrimonial case ever wins. Although the posturing in this case suggests that both parties were confident that they would prevail on most, if not all of their issues, rarely is that the case. Especially, in a matter as high profile as this, the court was disappointed that much of the testimony, particularly as it related to public figures within the State of New Jersey, and the dirty laundry associated therewith, needed to be aired in public and in the press. As will become apparent, there are no "winners" in a litigation of this type.

This court has an obligation to consider the evidence presented and the law and statutory factors in rendering a decision. The decision must be objective, fair, reasonable and not be influenced by the hyperbole displayed throughout this case. The

issues here were plain and simple; a couple was married, certain events occurred within their relationship that resulted in their separation and ultimate decision to file for divorce. As a result of the demise of the marriage, fair and impartial determinations must be made in terms of support and the distribution of their property. Despite the unique circumstances in this case, this court must still use this analysis in rendering its opinion and making the necessary decisions.

The McGreeveys clearly had agendas. As previously addressed, their anger seemed to override any ability to testify credibly or to be reasonable. For example, Mr. McGreevey's steadfast position that he was somehow unable to obtain employment contradicted directly with his position that he was actively attending seminary and pursuing a full-time program. Clearly, he cannot do both, but he somehow could not simply say that, instead contradicting himself over and over again. When faced with facts that he could not even support himself on his current salary, let alone both his daughters and possibly his wife, he was unable to provide a cogent explanation. Mrs. McGreevey's demeanor in the courtroom and her position of an entitlement to an extremely generous standard of living reflected her anger and disappointment as to the end of her marriage. Her testimony was designed to generate a greater amount of support based upon circumstances that ended her marriage. The factors she suggested are not supported by the law and evidence.

Additionally, the experts, though qualified by the court to testify, were at a severe disadvantage in proffering their opinions. It was apparent that they were not prepared adequately by counsel prior to the rendering of their reports. Their failure to have complete documentation or access to the parties and/or individuals with relevant knowledge significantly compromised their ability to provide the court with the assistance necessary to render a decision. Though this was not necessarily their fault, as the parties are obligated to cooperate and provide all information in order for them to assist in the rendering of an opinion, it became difficult with the "gaps" in their opinions to rely upon their findings in rendering this decision.

Dissolution of the Marriage

Based upon the residence of the McGreeveys and the allegations contained in their complaint, the court has jurisdiction and venue to decide the issues presented to it in this matter. James McGreevey and Dina Matos McGreevey were married on October 4, 2000. Both parties have pleaded and proved a cause of action for divorce pursuant to N.J.S.A. 2a:34-2(d) and N.J.S.A. 2a:34-2(c). The court will grant the relief dissolving their marriage.

Alimony

N.J.S.A. 2a:34-23(b) provides for the following types of alimony: permanent alimony; rehabilitative alimony; limited duration alimony; or reimbursement alimony. When ordering alimony the court shall consider a non-exclusive list of enumerated factors.

Mrs. McGreevey requests that she be awarded limited duration alimony. She argues that this is required under the circumstances of this case for the following reasons: (1) the standard of living established during the marriage; (2) Mr. McGreevey has the ability to pay and the court should impute income to him; (3) she needs the funds to sustain herself; and (4) the Supreme Court decision of Mani v. Mani applies and under the circumstances outlined therein, alimony should be payable to her.

Mr. McGreevey disputes that alimony is payable to his wife. In sum, he argues that a consideration of the factors does not warrant the award of alimony. Specifically, the marriage was not of such duration that alimony should be considered and the marital lifestyle that was afforded to the McGreeveys by the State of New Jersey while they resided in the Governor's mansion should not be considered. He argues that Mrs. McGreevey is self-supporting, and that the Mani case is not applicable to the circumstances here. Finally, he argues that he does not have the ability to pay alimony in this matter.

An analysis of the factors outlined in the statute, N.J.S.A. 2a:34-23(b), are as follows:

1. The actual need and ability of the parties to pay

Since Dina McGreevey is seeking support, the court must consider what her actual needs are in her particular circumstances. Her testimony revealed that she has established a consistent work history. Though she never received her college degree, she has been employed from the time she was in high school to the present. This continued while she was First Lady as she worked at Columbus Hospital during that time. Up until the time of the marriage she was self sufficient, and though she apparently had no savings, she also did not have any significant debt. She was residing with her parents at the time of the marriage.

Currently, based on Mrs. McGreevey's CIS, she has an enormous amount of debt considering she last earned $82,000 per year. Her mortgage and home equity line debt totals over $400,000 and her unpaid attorney's fees are over $400,000 as well. This extensive debt is what creates her "need" at this time. Without this debt, she would be able to manage even though these expenses, as a homeowner and mother, are higher now than during the beginning of her marriage. Many of her expenses (such as $700 per month for clothes and $700 per month for vacations) are clearly excessive.

Plaintiff also has significant debt as reflected by the large bills for his attorneys and various obligations that remain unpaid, such as child support for his daughter from his first marriage and rent to his partner Mark O'Donnell. Though the court later in this opinion finds that Mr. McGreevey is underemployed, the income imputed to him would still make it difficult to pay spousal support (in addition to child support) in the amounts requested by Mrs. McGreevey.

2. The duration of the marriage

For purposes of this case, the duration of the marriage was four years and five months. The parties agreed for purposes of equitable distribution that the termination date of the marriage was February 15, 2005. It would appear, based on the papers submitted that this date should also be used for the calculation of alimony.

3. The parties' age, physical and emotional health

Plaintiff is 50 years old. The defendant is 41 years old. Neither one of them testified to any physical or emotional issues that effect their ability to earn a living.

4. The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living

From the time they were married in October of 2000 until Mr. McGreevey was elected Governor of New Jersey (November 2001), the parties lived in a small condominium in Woodbridge, New Jersey. Throughout that first year, they were both busy campaigning and many of their traditional expenses were being covered by campaign funds. Based on Mrs. McGreevey's own admission, the parties did not save any money during that year, and much of her disposable money was spent on clothes to wear as she was campaigning. From January of 2002 until April of that year, they continued to live in the condominium until the renovations were completed at Drumthwacket. At that point their lifestyle changed dramatically. Among the perquisites afforded to them were the residence, staff (i.e. cooks, security, landscapers, etc.), drivers to their employment, and vacation homes. Mrs. McGreevey, through her expert, Kalman Barson, estimated that the monthly expenses for this lifestyle amounted to more than $56,000. However, his opinion is marred by a failure to substantiate with any certainty these exact amounts. Mr. Barson "guesstimated" some of the figures such as the $1,625 for food and household expenses from the Census Bureau, costs for the various employees from "public" sources, but not actual figures, and arrived at a rental figure of $8,000 per month for a comparable residence to Drumthwacket without ever seeing it and having no first hand ability to even describe it. His opinion did not rely on actual expenses that this couple incurred during the marriage because he was never supplied with that information. In general, his opinion as to their lifestyle was unsupported by any facts in evidence and was incomplete. He also felt that it was unnecessary to attribute portions of these expenses to a more general use, i.e. the housekeeping manager managed the public portion of the residence as well.

Mr. McGreevey's expert, Sharon Maggio, was also at a disadvantage. She was also missing extensive material for Mr. McGreevey. Her calculations in P11[1] included personal expenses labeled "miscellaneous unknown" which in 2002 totaled over $50,000. Where was this money spent? The plaintiff was unable to provide details of where he spent over $50,000! With that as a backdrop, the court finds that her underlying theme did make sense. The parties could only spend what they earned, and apparently they did just that. They did not save anything despite the fact that their housing expenses and transportation were being paid for, so in essence all they were responsible for was their Schedule C expenses. Being Governor and First Lady, gave them much more disposable income. Therefore, they clearly were able to live an enhanced lifestyle; more extravagant than the typical couple grossing approximately $230,000 annually. However, the standard of living was not what defendant argues, $56,000 per month or $672,000 per year. All of the staff clearly were not solely responsible for the first couple. Their duties included maintaining all of the public portions of the residence, and preparing for public functions. Dina McGreevey's personal assistant was there to assist her with her official duties as First Lady, not, as she sometimes did, to voluntarily care for Jacqueline.

All of these perquisites were temporary, so long as James McGreevey was Governor; they would not have survived had he left office, for example if he had not been reelected.

Even more significant to this analysis is how the courts of this state have treated the standard of living and its significance in a short-term marriage. For the calculation of alimony, a couple's standard of living is generally determined by the income of the parties. In some circumstances, however, other factors usually evaluated independently are incorporated into the standard of living analysis. One of these factors is the duration of the marriage, especially when the couple was together for only a short time.

In Scribner v. Scribner, 153 N.J. Super. 374 (Ch. Div. 1977), the wife enjoyed a higher standard of living during the marriage than she did beforehand. However, the marriage only lasted 18 months. Id. at 375. Denying her request for alimony, the court

[1] Hereinafter, plaintiff's exhibits will be referred to as "P#." Defendant's exhibits will be referred to as "D#." Joint exhibits will be referred to as "J#."

held that after such a short marriage she was no less capable of pursuing a career (she was 40 at time of decision) and earning her own income than she was before the marriage. Id. at 376. The court continued: "There is no serious problem concerning alimony when a short marriage involving young people is litigated. If there is no substantial change in position on the part of the wife because of the marriage, alimony should not be awarded." Ibid. Thus, the couple's standard of living was set aside in determining the alimony obligation because the wife was no worse off than she was before the marriage.

In D'Arc v. D'Arc, 164 N.J. Super. 226 (Ch. Div. 1978) (partially rev'd on issue of equitable distribution, 175 N.J. Super. 598 (App. Div. 1980)), the husband asked for alimony after a 4 year marriage. The couple enjoyed an extremely high standard of living as the wife was an heiress to the Johnson & Johnson fortune and earned over $1,000,000 annually. Id. at 232. Denying the husband alimony, the court pointed out that he was a psychiatrist capable of earning a significant income on his own. Id. at 237. It continued:

> While it is true that he will not be able to maintain the same lavish level of living he enjoyed while married to Miss Johnson, it cannot be said on this record that Dr. D'Arc in the space of approximately 3 1/2 years of marriage has become so accustomed to the style of living he enjoyed while married to her that he is now entitled to be maintained by her in that same style.
> Ibid.

Though both of these cases were distinguished by Hughes v. Hughes, 311 N.J. Super. 15 (App. Div. 1998), in which the court declined to apply their precedent to a 10 year marriage; the duration of the marriage in the case at hand (approx. 4 years) is comparable to the facts of D'Arc and Scribner. That precedent should be applied. Mrs. McGreevey was not with Mr. McGreevey long enough to be entitled to continue that lifestyle. Not only is she still capable of earning an income again after such a short marriage (such as in Scribner), but the period during which the couple enjoyed an extremely high standard of living was inherently temporary. Even without scandal or divorce, the couple eventually would have returned to a much lower standard of living when Mr. McGreevey relinquished his post as Governor. If they had stayed married

and returned to private life, they would not have had personal assistants, housekeeping managers, groundskeepers, and a residence provided for them at no cost. Thus, he cannot be expected to compensate Mrs. McGreevey to match the gubernatorial lifestyle, even on a temporary basis.

5. The earning capacities, educational levels, vocational skills, and employability of the parties

Mrs. McGreevey's history is outlined in factor 1. She is employable. She has a strong work history. She has consistently been employed.

The plaintiff's earning capacity is another story. He has a number of degrees; specifically, a B.A. from Columbia, a J.D. from Georgetown and a Masters in Education from Harvard. He has also consistently worked. He held a number of elected positions, was employed by the State of New Jersey in various capacities, tried cases as an Assistant Prosecutor, and briefly held a job in the private sector at Merck. He now contends that he wishes to continue his seminary studies and that he is unable to find employment over the amount of $48,000 annually.

In support of his position, Donna Kolsky, testified as an employability expert. She concluded that Mr. McGreevey could earn approximately $100,000 in the non-profit sector along with his teaching position at Kean University for a total of $118,000. She also concluded that "[I]t is difficult to assess how the passage of time will impact Mr. McGreevey's future earnings. That is beyond the scope of this report and can best be explored by Mr. McGreevey as the years progress." P9 at p. 14.

In support of her conclusions, and during her testimony, Donna Kolsky's hyperbolic statement that the plaintiff was "radioactive" was the source of much press coverage. However, absent from her analysis was the most important factor in Mr. McGreevey's ability to obtain employment, namely his use of friends and contacts. Mr. McGreevey specifically told her not to pursue that avenue of investigation. "During the research the fact emerged that Mr. McGreevey will have to maintain the small nucleus of contacts that he has, especially if he does not become an Episcopal Priest. He asked that those contacts remain private. Over the years, those contacts diminished." P9 at p. 1. (emphasis added). Instead, Ms. Kolsky "cold called" various organizations,

gave his “profile” and heard “audible gasps” when these employers realized who she was referring to. Unfortunately, Mr. McGreevey never obtained employment in this manner over the course of his work lifetime, and did not even testify that he was using this method to secure employment on his own. Her inability to obtain crucial information from the sources that could have assisted him in obtaining employment is fatal to her analysis.

The facts of this case demonstrate that Mr. McGreevey is not seeking employment because he does not need it to sustain himself. Instead, it was apparent that he can rely on Mark O’Donnell, his partner, to provide for him. Despite the use of promissory notes for rent, Mr. McGreevey’s admission that his rent and tuition costs equal his gross salary, does not explain how he feeds and clothes himself or pays for the lease on this vehicle. His assertion that he wishes to pursue a degree at the seminary to help the inner city poor and prison inmates is commendable, but these goals could also be accomplished without his attendance at seminary, and while he is employed full-time. His breadth of experience in government and various degrees, plus his contacts make him marketable.

Mrs. McGreevey asks for income to be imputed in the amount of $220,251. She asks the court to income average over the past several years. By using this methodology she states that the court will achieve a fair result as provided for in Platt v. Platt, 384 N.J.Super. 418 (App. Div. 2006).

Using the analysis in Dorfman v. Dorfman, 315 N.J. Super. 511 (App. Div. 1996), this court finds the defendant is underemployed. He has admitted as much. He cannot pursue his seminary studies and work full time, nor does he want to.

> Underpinning the basis of every support order is the proposition the payor has the "ability to pay" the amount set, or agreed to. Inherent in a finding of "underemployment" is the notion the obligor is intentionally failing to earn that which he or she is capable of earning. Appendix IX-A to *R.* 5:6A, "Considerations in the Use of Child Support Guidelines", gives recognition to these principles: 12. *Imputing Income to Parents.* The fairness of a child support award resulting from application of these guidelines is dependent on the accurate determination of a parent's net income. If the court finds that either parent is, without just cause, voluntarily

> underemployed or unemployed, it shall impute income to that parent according to the following priorities:…
> [Pressler, Current N.J. Court Rules, Appendix IX-A, "Considerations in the Use of Child Support Guidelines" (1998).] Additionally, this section provides specific rules for imputation of income and factors to consider.
> Id. at 516.

The factors used to determine imputation of income are listed in the New Jersey Court Rules, Appendix IX-A:

> In determining whether income should be imputed to a parent and the amount of such income, the court should consider: (1) what the employment status and earning capacity of that parent would have been if the family had remained intact or would have formed, (2) the reason and intent for the voluntary underemployment or unemployment, (3) the availability of other assets that may be used to pay support, and (4) the ages of any children in the parent's household and child-care alternatives. The determination of imputed income shall not be based on the gender or custodial position of the parent. Income of other household members, current spouses, and children shall not be used to impute income to either parent except when determining the other-dependent credit. When imputing income to a parent who is caring for young children, the parent's income share of child-care costs necessary to allow that person to work outside the home shall be deducted from the imputed income. For further information on imputing income, see Gertcher v. Gertcher, 262 N.J.Super. 176 (Ch.Div. 1992), Bencivenga v. Bencivenga, 254 N.J.Super. 328 (App. Div. 1992), Thomas v. Thomas, 248 N.J. Super. 33 (Ch.Div. 1991), Arribi v. Arribi, 186 N.J.Super. 116 (Ch.Div. 1982), Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979), Mowery v. Mowery, 38 N.J.Super. 92 (App. Div. 1955). Ibid.

The facts in the case clearly established Mr. McGreevey's earning capacity since he left the Governor's office. His "radioactivity" was most likely at its peak immediately after he resigned, and will continue to diminish as time passes. He is underemployed because of his desire to return to school. He has no other assets to pay for support and he has a young child which he must continue to support, for at least an additional twelve years, more if she were to continue her education.

Applying the factors of Appendix IX-A, Mr. McGreevey's income should be imputed. He is extremely well-educated and has held positions of attorney, mayor, and ultimately the Governor of New Jersey. Needless to say, he has the potential to earn more than he would as an Episcopalian minister, which is what he plans on doing after he finishes seminary school.

For the facts and reasons set forth above, the court will impute income to Mr. McGreevey in the amount of $175,000 per year. As Governor his statutory salary was $175, 000. He voluntarily reduced that amount to $157,000 for political and budgetary reasons. Since he left office and without the book revenues, he has earned $157,000 in 2004, $166,000 in 2005, $428,833 in 2006 ($294,666 without the book proceeds) and $185,000 in 2007 (he stopped working full time in September 2007). He still works with the same employer, but now on a part time basis. The documentary evidence shows that he was able to generate significant consulting income, even right after his resignation. The primary reason for his diminution of income is his decision to go to seminary, not that he is unable to find employment. He did not present any substantive evidence that he has actually looked for a job. Taking into account his earnings history, it would appear reasonable that he could earn $175,000 going forward.

6. The length of absence from the job market of the party seeking maintenance

Dina Matos McGreevey testified that on May 31, 2008 her employer, Columbus Hospital, would be closing its doors and she would be unemployed as of that date. However, the court is not considering her potential future unemployment as a factor in this alimony determination.

7. The parental responsibilities for the children

Based on the couple's custody agreement, both parties will have significant responsibilities for parenting their daughter and therefore, this will not be a significant factor one way or the other in determining alimony.

8. The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the opportunity for future acquisitions of capital assets and income

This factor is addressed in the prior discussions.

9. The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities

Both parties contributed financially to the marriage, however, all their income was spent. They did not acquire any property or accumulate any savings. They both provided non-financial support during the election campaign. Though Mrs. McGreevey campaigned for almost an entire year; it is hard to calculate how her efforts compared to the thousands of people who also contributed to Mr. McGreevey's election. She argues that the marriage took place solely to improve Mr. McGreevey's image and to make him more "electable", however not only is this disputed by the plaintiff, but is difficult to quantify.

10. The equitable distribution of property and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair

Equitable distribution will be discussed later in this opinion, however the parties have insignificant assets and therefore this factor will not bear on the court's decision with regard to alimony.

11. The income available to either party through investment of any assets held by that party

Based on the information provided during trial the parties do not have sufficient assets to generate any income.

12. The tax treatment and consequences to both of any alimony award including the designation of all or a portion of the payment as a non-taxable payment

Not applicable.

13. Any other factors which the court may deem relevant

There are several other factors which must be considered. The impact of marital fault, the request to modify the *pendente lite* award, and the income generated from their books.

The Supreme Court's decision in Mani v. Mani, 183 N.J. 70 (2003), is the leading case on the issue of marital fault. Justice Long, in her opinion, made the following important commentary with regard to how this decision should be interpreted:

> [B]y delimiting the kinds of fault that may be taken into account in an alimony calculus, we have not only created a template for uniformity and predictability in decision-making but have relieved matrimonial litigants and their counsel from the need to act upon the nearly universal and practically irresistible urge for retribution that follows on the heels of a broken marriage.
> Id. at 91 (emphasis added).

Mrs. McGreevey argues that the fault analysis in Mani is appropriate under the circumstances in this case. She asks this court to find that Mr. McGreevey's resignation severely impacted their economic life as it damaged "his human capital and in addition caused substantial negative impact on the lifestyle enjoyed by each party." Defendant brief at p. 23. She argues that since the defendant's counterclaim allegations were proven during the trial, and he testified that his reputation is irretrievably damaged and he now has an inability to be employed, she has established the fact that their economic situation was severely tarnished. Therefore, she states that this fault must be factored into an award of alimony.

In response, Mr. McGreevey states that the Mani case should be interpreted very narrowly and that the examples presented by Justice Long and the facts established in this case, are not analogous.

The court finds that defendant's argument is in fact her "irresistible urge for retribution."

Justice Long in the Mani decision provided an extensive survey of the law on alimony dating back to early England. However, after a complete analysis of the issues bearing on fault, the Mani decision came to the conclusion that marital fault should only be used in the most exceptional circumstances. Specifically, the Court referred to Kinsella v. Kinsella, 150 N.J. 276 (1997), which stated that "the focus of the decision

regarding alimony is generally on the financial circumstances of the parties; (the practical consequences of succeeding on fault based grounds are minimal) and marital fault rarely enters into the calculus of an alimony award." Id. at 314-315. Mani, affirming this approach, directed lower courts to review the twelve alimony factors first. These factors clearly deal with the economic status of the parties. They reaffirmed that that is the primary focus of alimony.

However, in circumstances where the economic status of the parties is negatively affected, the court as part of the last factor, can consider marital fault. Importantly, Justice Long stated the following:

> The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margins of nearly every case and therefore those grounds should not be interjected into an alimony analysis. To do so would distort the application of the principles the Legislature has adopted to secure economic justice in matrimonial cases. Moreover, without concomitant benefit, considering non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship. Not only is non-economic fault nearly impossible to factor into an alimony computation, but any attempt to do so would have the effect of generating complex legal issues regarding the apportionment of mutual fault, which is present in nearly all cases. That, in turn, would result in the protraction of litigation and the undermining of the goals of no-fault divorce, again without a corresponding benefit. Thus we hold that to the extent that marital misconduct affects the economic *status quo* of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.
> Mani at 91.

Given the circumstances in this case, the court finds that the marital fault alleged has no residual economic consequences. First, given the very short term nature of this marriage, and the fact that even Mrs. McGreevey argues that at most she would be entitled to limited duration alimony, there are really no residual economic consequences.

Second, defendant argues that the fault attributed to the diminution of their marital life-style by virtue of the fact that Mr. McGreevey left his office early and therefore they could not share in the benefits of the "gubernatorial life-style." This recovery is rejected elsewhere in this opinion. Therefore, the court will not consider the change in Mrs. McGreevey's lifestyle to be in the nature of severe economic consequences presented in Mani.

Third, Mr. McGreevey's admission in his papers to an affair with Golan Cipel is not in and of itself fault which would rise to the level of egregious conduct set forth in Mani. Unfortunately, extra marital affairs with the member of the same sex and opposite sex forms the basis of a large percentage of divorce matters and should not, in and of itself be considered in the context of an alimony determination. The Supreme Court addressed this behavior in the context of the payee spouse, not (as in this case) of the payor spouse. Specifically they held that it would "violate the social contract" were a spouse who committed some egregious fault have the benefit of alimony being paid to them as was discussed in Gugliotta v. Gugliotta, 164 N.J. Super. 139 (App. Div. 1978) or Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979). Those factors are not present in this case.

Another issue raised by the plaintiff is his request to retroactively modify the unallocated *pendente lite* award. In February of 2005 the parties entered into an agreement regarding temporary unallocated support. Mr. McGreevey was to pay $3,000 per month, without prejudice. This was modified after a motion was filed to $2,500 per month in September of 2007.

The issue of retroactive modification has been addressed in both the context of child support and alimony. For example, N.J.S.A. 2A:17-56:23a (2008) lays out the rules under which child support orders may be modified. It reads as follows:

> No payment or installment of an order for child support, or those portions of an order which are allocated for child support established prior to or subsequent to the effective date of P.L.1993, c.45 (C.2A:17-56.23a), shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification…
> Ibid.

However, in Mallamo v. Mallamo, 280 N.J. Super. 8 (App. Div. 1995), the court addressed the issue of whether or not *pendente lite* orders can be reduced retroactively notwithstanding N.J.S.A. 2A:17-56:23a. The court reasoned that changing the *pendente lite* order with a final judgment was not actually a retroactive "modification" prohibited by the statute as *pendente lite* is an emergency measure and the court is much better equipped to accurately formulate a child support obligation after trial. See Id. at 13; see also Jacobitti v. Jacobitti, 263 N.J. Super. 608 (App. Div. 1993), aff'd 135 N.J. 571 (1994). As the court's final judgment in child support was lower than the *pendente lite* obligation, it reduced the husband's arrears from the *pendente lite* order accordingly. Id. at 16; see also Schiff v. Schiff, 116 N.J. Super. at 562-63 (App. Div. 1971) (holding that *pendente lite* orders may be modified upon a showing of changed circumstances); Capodanno v. Capodanno, 58 N.J. 113, 120 (1996) (holding supports same principle).

Mallamo holds that a credit for overpayment is available after a final judgment to reduce the *pendente lite* obligation, because otherwise a party would have an incentive not to pay *pendente lite* support with hopes of later having their obligations reduced. The courts have consistently held that since child support payments are considered to go from parent to child rather than from parent to parent and the child's best interest is always the primary concern, a parent will not be able to recoup expenses already incurred towards the child on the grounds of their former spouse's "unjust enrichment." See Pascale v. Pascale, 140 N.J. 583, 591-92 (1995), see also J.S. v. L.S., 389 N.J. Super. 200 (App. Div. 2006) (refusing to reimburse party for previous child support payments even though he was subsequently determined not to be the child's biological father).

Certain factors must be considered here. Obviously, the abrupt change in Mrs. McGreevey's status occasioned by the plaintiff's resignation undoubtedly caused the agreement in February of 2005. It would appear that Mrs. McGreevey was in need of transitional support, much as she is asking for now in the form of limited duration alimony. Though the agreement was without prejudice, it appears that at the time it was necessary for her to be supported in this matter in order to "get on her feet." She was

the primary custodial parent and Jacqueline was in her custody to a far greater extent than is currently the case. Additionally, in September of 2007, the court, after reviewing their financial circumstances at the time, reduced this support.

It is also important to note that Mr. McGreevey had a greater income after their separation until he entered seminary. He clearly had the ability to pay during this transitional time. In fact, if one were to just determine his child support obligation using his income in 2005, 2006 and 2007, his support for Jacqueline alone would be in the range of $260 per week in 2005, well over $318 for 2006 (because the net income goes well beyond that allowable to apply the guidelines), and $279 per week for 2007. These calculations were made using a sole parenting worksheet and the parties income for those respective years.

Thus, although Mr. McGreevey's obligations under the *pendente lite* Order may be retroactively reduced, he will not be awarded credit for past overpayment. It does not matter whether the *pendente lite* support was agreed upon between the parties or ordered by the court. Instead, for the reasons set forth above, it would appear that this support was necessary to assist in the transition of his family, and he clearly had the ability to afford the support at the time.

One final consideration needs to be taken into account in this analysis, namely the income generated by both parties from the "tell all" books. It was established at trial that Mr. McGreevey received $250,000 as an advance for his book, The Confession, and Mrs. McGreevey received $275,000 for Silent Partner. Both testified that after taxes, paying the fees associated with agents, etc., the rest of the proceeds were used to pay the enormous debt incurred by them, primarily to litigate this case. This additional income, however, cannot be overlooked. This large amount of money could have been used towards their living expenses, to pay support, and to pay down their debt unrelated to this litigation. It apparently was not. This is one important example of how this litigation and its costs have affected these parties, and placed them in the unenviable situation that they are now in. However, if this case had not taken the direction it did, this money was able to provide them with the ability to achieve a lifestyle commensurate with an upper middle class lifestyle.

For all of the above reasons, taking into consideration the factors, law and

circumstances of the parties, the court is not awarding the defendant alimony. The court does find that the plaintiff is underemployed and will factor this in as part of the child support analysis. He has paid significant support to defendant for over three and one half years. Mrs. McGreevey is able to earn a living. Her ability to support herself is hampered by her accrual of significant debt even though she received over $275,000 from a book detailing her experiences with the plaintiff. She is not entitled to a lifestyle commensurate with that of the First Lady of New Jersey. Even limited duration alimony is not appropriate under these circumstances.

Child Support

The Child Support Guidelines are used to assist the court in determining a proper allocation of child support. The guidelines factor in the parties' income, child expenses, taxes, and other financial needs. The guidelines should be utilized when the parties' income is under the maximum net amount determined in the rules.

R. 5:6A provides for the following:

> Child support guidelines:
>
> The guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court. The guidelines may be modified or disregarded by the court only where good cause is shown. Good cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and b) the fact that injustice would result from the application of the guidelines. In all cases, the determination of good cause shall be within the sound discretion of the court.
>
> A completed child support guidelines worksheet in the form prescribed in Appendix IX of these Rules shall be filed with any order or judgment that includes child support that is submitted for the approval of the court. If a proposed child support award differs from the award calculated under the child support guidelines, the worksheet shall state the reason for the deviation and the amount of the award calculated under the child support. R. 5:6A.

The first issue to be decided is the amount of income to be utilized for each of the parties. In the case of the defendant, as outlined earlier in this opinion, she has been a consistent W-2 earner and the court will use her income from 2007 in this computation ($82,000). Though, as of the writing of this opinion she is unemployed, temporary unemployment is not a factor to decrease her income for purposes of establishing child support. Bencivenga v. Bencivenga, 254 N.J. Super. 328 (App. Div. 1992).

With regard to Mr. McGreevey, his income was previously addressed as part of the alimony factors and will not be repeated here. The court is imputing income to him in the amount of $175,000.

One New Jersey case sets forth the criteria used to determine child support when the combined net income of the parties is above the designated number listed in the New Jersey Court Rules. "Our rules require that the trial court apply the child support guidelines (the guidelines) when considering child support; however, the court may modify or disregard the guidelines where good cause is shown. N.J. Court R. 5:6A." Caplan v. Caplan, 182 N.J. 250, 264 (N.J. 2005).

In this particular matter, plaintiff argues that the child support guidelines apply to these circumstances and the court should utilize them in affixing support for Jacqueline. Defendant argues that this case is above the guidelines for child support purposes. Defendant makes a claim that plaintiff's income should be imputed at $220,251 annually. As the court has imputed to plaintiff's income in the amount of $175,000 gross annually, the guidelines would apply.

Appendix IX-F of the New Jersey Court Rules determines child support awards according to the combined weekly net income of the parents. The Appendix only makes an exact determination when the net income is less than $3,600 per week. When the combined annual net income is over $187,200 the guidelines cannot be used. Id. at Sec. 20 (b)).

In the event that the annual net income is over $187,200 and the weekly net income is over $3,600, the court is to use the applicable child support award at $3,600 to be the minimum basic award. The court will add a discretionary amount to the

minimum award based on the factors specified in N.J.S.A. 2A:34-23. Appendix IX-F explicitly states that the schedules are not to be extrapolated for a weekly net income higher than $3,600. N.J. Court R. Appx. IX-F.

Since defendant's yearly income is calculated to be $82,000 and plaintiff's is $175,000, the guidelines will be used, since their net income does not exceed $187,200. Their net weekly salaries are: $1,132 for defendant and $2,051 for plaintiff. The totals are, therefore, $3,183 per week or $165,516 annually. Both parties agreed to use the shared parenting worksheet because of their custody arrangement.

Considering the rules and factors stated above, with plaintiff's income imputed to $175,000 and defendant's income at $82,000, the shared parenting worksheet has been completed and calculated. Defendant is the parent of primary residence as she provides the residence for Jacqueline while she is in school and for slightly more than half of the annual overnights. Mr. McGreevey is not entitled to the "other dependent deduction" as he admittedly is not paying his child support obligation for Morag, N.J.Court R. Appx. IX-B. The child support awarded to defendant when the above-mentioned incomes are utilized is $152 per week. In addition, pursuant to the worksheet, plaintiff would pay 66% of Jacqueline's needs not encompassed by the guidelines and defendant shall pay 34% .

Mr. Post's guidelines (Exhibit B to defendant's written summation), determined support to be $150 per week. His calculation included certain items that this court is not including, namely, alimony and payments to Morag. He then argues that his client is entitled to $1,750 per month in additional child support in order to permit her lifestyle to be comparable to Mr. McGreevey's and also to permit plaintiff to have an adequate standard of living. Defendant argues that twenty-five percent of most of her CIS Schedule A, B, and C expenses should be attributed to Jacqueline, with some credits applied. This would amount to $3,119 per month. If her father's child support is subtracted, she is still "in the red" $2,468 per month. She is asking the plaintiff to pay $1,750 per month to cover this shortfall. As a result of these calculations, defendant argues that the court should utilize the factors in Appendix IX-A note 12. "When a court 'finds that the guidelines are inappropriate in a specific case, it may either disregard the guidelines or adjust the guidelines-based award to accommodate the needs of the

children or the parents' circumstances." Appendix IX-A at 2217. Lozner v. Lozner, 388 N.J. Super. 471, 480 (App. Div. 2006).

The plaintiff cites Isaacson v. Isaacson, 348 N.J. Super. 560 (App. Div. 2002), to explain the calculation of child support in families with net income exceeding $187,200 annually. Plaintiff's assertion that the imputed income of the parties here will not exceed $187,200 is accurate. He thereafter argues that the holding in Isaacson is distinguishable. The income of the parties in that case is much more than that of the parties here. In Isaacson, the child's need was the overriding variable. Id. at 581. Thus, at a combined income level of $250,000 per year, the parties' child had grown accustomed to certain luxuries not enjoyed by all children, and these luxuries, the court held, would not be excluded from the child support calculations because they are not universally considered "basic needs" for children. Children are entitled to their parents' financial achievement, which is reflected in the child support award. Id. at 580. Therefore, in those specific circumstances, support may go beyond the child's "basic needs" to cover other benefits the child is accustomed to enjoying, such as private school tuition and vacations. Id. at 582-83.

However the court also stated:

> [J]udges must be vigilant in providing for "needs" consistent with lifestyle without overindulgence. As one court observed in dealing with high income support, "[p]ractitioners dealing with situations such as this sometimes refer to the 'Three Pony Rule.' That is, no child, no matter how wealthy the parents, needs to be provided more than three ponies.
> Id. at 583.

Using this analysis the Isaacson court raised the base amount of child support from $2,400 per month to $3,500 per month, plus additional expenses (private school, camps, medical expenses, etc.) that would bring the total obligation to around $42,000 annually. Id. at 589.

It would appear that defendant is making a similar argument here. For example, while Jacqueline was living in the Governor's mansion, defendant argued that her lifestyle was quite lavish. However, this standard of living did not benefit a child who was, at the oldest, only two and one-half years old. This standard of living only amounted to better, more expensive toys, and domestic help, which a child at this age

could not grasp nor enjoy. It is not probable that a small toddler could fully appreciate the lavish lifestyle that came with her father being Governor. This argument is not particularly persuasive.

What did impact the court during the pendency of this case was the ability of the plaintiff to provide his child with many "extras" such as lavish birthday parties, proposed vacations to Europe and Australia, and her own fully decorated room and bathroom, etc. Cleary, based on her current economic situation, the defendant is not able to "compete" and provide these types of things for Jacqueline. This has created an extreme amount of tension between mother and father, as Mrs. McGreevey feels that her father is trying to "buy" her affection. It is within this context that the court feels compelled to review the modification of the basic support award.

If the Court is seeking to alter the amount provided for in the guidelines, the court must use the aforementioned factors found in N.J.S.A. 2A:34-23, which are listed below along with the court's findings:

(1) Needs of the child;

Jacqueline is adequately provided for. There is a disparity in the two households, but both can provide for her basic needs. The disparity is in what additional expenses are lavished on this child.

(2) Standard of living and economic circumstances of each parent;

Mrs. McGreevey is living a upper middle class lifestyle in an upper middle class community. Mr. McGreevey has a more upper class living situation, a large 17 room mansion, and many amenities being provided to him.

(3) All sources of income and assets of each parent;

This is outlined elsewhere in this opinion. An additional discussion concerning Mr. O'Donnell's contribution to the household is discussed later in this opinion.

(4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the

cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;

This has been addressed elsewhere in this opinion.

(5) Need and capacity of the child for education, including higher education;

As a first grader it is difficult to determine Jacqueline's capacity for higher education, though both parents are anticipating that she will go on to college.

(6) Age and health of the child and each parent;

Jacqueline is 6, and is healthy.

(7) Income, assets and earning ability of the child;

None, other than a Uniform Gift to Minors Act (UGMA) for her future use.

(8) Responsibility of the parents for the court-ordered support of others;

Though Mr. McGreevey has a consensual obligation to pay his first child $1000 per month, he is not currently making those payments.

(9) Reasonable debts and liabilities of each child and parent;

This was addressed elsewhere in this opinion.

(10) Any other factors the court may deem relevant.

For purposes of addressing the issue of Mr. McGreevey's ability to provide additional support, the court will now turn to his current living situation and the resources he has with Mark O'Donnell.

At one time another spouse's income could be considered as "all sources of income and assets of each parent," (factor 3), however this was subsequently changed by an amendment to the guidelines. Prior to that change, the court was able to use another spouse's income as part of the computation of support. See, Ribner v. Ribner, 290 N.J. Super. 66, 75 (App. Div. 1996) ("good cause" for deviation upheld in a situation

where a new spouse's income was used to calculate child support, by adding in the new spouse's income to the mother's income).

Although the child support guidelines were changed after the Ribner decision to exclude income for other household members who are not legally responsible for the support of the child, New Jersey Court Rules, Appendix IX-B, the case remains good law. Additional income in the household may be considered by the court; "[O]f course, we do not suggest that plaintiff's spouse had a duty to support her children from a prior marriage. However, we do hold that funds given by the spouse to plaintiff constituted income which was not exempt from consideration in determining plaintiff's support obligation to her children." Ibid. Another case which was decided two years later, outlined the factors to consider when determining child support for college tuition, but it also reiterated this holding in Ribner.

> Thus any analysis under Ribner, whether applying the guidelines or not, requires a careful balance between consideration of the current spouse's income and not obligating that spouse to support a parent's child from a former marriage. Superimposed on this balance is the consideration that "[c]hildren are entitled to have their 'needs' accord with the current standard of living of both parents, which may reflect an increase in parental good fortune." Zazzo v. Zazzo, 245 N.J. Super. 124, 130, 584 A.2d 281 (App.Div.1990), certif. denied, 126 N.J. 321, 598 A.2d 881 (1991); Hudson v. Hudson, 315 N.J. Super. 577, 582-583 (App.Div. 1998).

The Hudson case further points out that the new spouse's income is still very relevant.

> The new guidelines exclude from consideration of a parent's gross income, 'income from other household members' including a current spouse who is 'not legally responsible for the support of the child for whom support is being established.' Pressler, Current N.J. Court Rules, Appendix IX-B, pp.2031-32. To the extent that the second prong of Ribner mandates an inclusion of the income of a current spouse in calculating a parent's income under the Guidelines, Ribner has been superseded by the new guidelines. However, the exclusion of the current spouse's

> income does not alter the opportunity to disregard the new guidelines if an injustice would result in a particular case. 'The determination of whether good cause exists to disregard or adjust a guideline-based award in a particular case shall be decided by the court." Id. at Appendix IX-A, p.2005.
> Ibid.

Although Mark O'Donnell is not a spouse, he is clearly a household member of Mr. McGreevey's and his role is very similar to a spouse. Mr. O'Donnell and Mr. McGreevey cohabitate and Mr. O'Donnell helps support Mr. McGreevey financially. The testimony was clear that Mr. McGreevey could not pay for any of his day-to-day necessities by virtue of his $48,000 gross income and expenses which far exceeded that amount. The court cannot overlook that not only is Mr. O'Donnell providing food, clothing, and shelter to plaintiff, but Mr. O'Donnell is, for the most part, providing everything for the child while she is at their residence. The court is not, by any means, imposing a child support obligation on Mr. O'Donnell, however, it cannot ignore the realities. "By the application of this rule, we honor the principle that a current spouse has no obligation to support someone else's child while accounting for the reality that the current spouse may provide economic resources to the household." Id. at 584.

Mr. O'Donnell's income can be considered in deviating from the guidelines award. At his home, Mr. McGreevey throws Jacqueline lavish birthday parties; he takes her on trips, and provides things Mrs. McGreevey cannot afford. This supports the analysis that Mr. O'Donnell obviously provides significant financial support for Mr. McGreevey, and therefore this frees up more of Mr. McGreevey's money, which can then be utilized to support Jacqueline. The standard of living at Mr. O'Donnell and Mr. McGreevey's house is considerably higher than that of Mrs. McGreevey's home.

In addition, financial debt should also be considered when altering the guidelines; "Moreover, in instances where the guidelines do not apply, N.J.S.A. 2A:34-23(a) requires the court in establishing 'the amount to be paid by a parent for support of the child,' to consider among several other items the '[r]easonable debts and liabilities of each child and parent.' Id. at (a)(9)." Lozner v. Lozner, 388 N.J. Super. 471, 480 (App.Div. 2006) Mr. McGreevey has not demonstrated that he has a responsibility for

repayment of much of the debt that he has incurred. Though he has signed promissory notes for his rental obligation, he has not undertaken that obligation for all of the other debt paid for by Mr. O'Donnell (attorney's fees, parties for Jacqueline, food, car payments, etc.). It appears that plaintiff's financial liabilities are much less than the defendant's.

For the aforementioned reasons, the court finds that good cause has been shown to modify the child support award. After analyzing the statutory factors and the relevant case law the court will augment the guidelines number, to account for the findings made above. Mr. McGreevey shall pay a total of $250 per week in child support. Mr. McGreevey shall also pay for 100% of Jacqueline's extra curricular activities. Jacqueline is also covered under Mr. O'Donnell's health insurance policy and Mr. McGreevey shall provide for 100% of Jacqueline's medical insurance. These two expenses are not factored into the guidelines because the court has not been provided with definitive numbers for Jacqueline's medical nor extra curricular activities.

Equitable Distribution

In making an equitable distribution of property, the court shall consider, but not be limited to, the following factors pursuant to N.J.S.A. 2A:34-23.1:

> a. The duration of the marriage or civil union;
>
> b. The age and physical and emotional health of the parties;
>
> c. The income or property brought to the marriage or civil union by each party;
>
> d. The standard of living established during the marriage or civil union;
>
> e. Any written agreement made by the parties before or

during the marriage or civil union concerning an arrangement of property distribution;

f. The economic circumstances of each party at the time the division of property becomes effective;

g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

h. The contribution by each party to the education, training or earning power of the other;

i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

j. The tax consequences of the proposed distribution to each party;

k. The present value of the property;

l. The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

m. The debts and liabilities of the parties;

n. The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

o. The extent to which a party deferred achieving their career goals; and

p. Any other factors which the court may deem relevant.

In every case, the court shall make specific findings of fact

> on the evidence relevant to all issues pertaining to asset eligibility or ineligibility, asset valuation, and equitable distribution, including specifically, but not limited to, the factors set forth in this section.
>
> It shall be a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the party was married.
> Ibid.

Fortunately, for purposes of the instant analysis, the parties in this proceeding do not have extensive assets. However, like every other issue in the financial portion of this case, they have been unable to compromise on the division of these assets. Both parties argue that the others' property was not premarital, and that they are entitled to their share. Unfortunately, the court notes, there was very little testimony and evidence supporting these allegations. For the most part, the parties relied on the filed Case Information Statements (CIS) to support the status of the property. Very little time was spent at trial establishing the status of the property for the court other than self-serving statements that the items were "premarital." The values of some of the assets were left to the amounts on the CIS. For some items, there was no testimony (defendant's jewelry and clothing); therefore there was no support for the court to make adequate findings. For example, both parties' requested in almost every instance that the court draws inferences from the CIS's filed and that money in various accounts be deemed pre-marital. The "proof" that the item was premarital consisted of the party saying it was premarital without any back-up documentation. In most cases, the court would expect bank records, or a similar type of documented transaction showing the depositing of funds. No such evidence was presented in this case. In fact, the summations of counsel request that the court infer certain accounts were premarital without any substantive proof. Extensive documents were admitted into evidence. However, it is difficult, especially in light of the voluminous bank account statements, for the court to determine with any specificity the path of these funds and where deposits came from.

In addition, the parties also accuse each other of failing to comply with discovery requests for bank statements, credit card statements, etc. They claim that this is the

reason for the failure to have the requisite proofs. With all the motion practice that this case involved, it is remarkable that this was never the subject of an application.

With that as a backdrop, certain findings will be made. In Painter v. Painter, 65 N.J. 196 (1974) the Supreme Court stated the following:

> Clearly any property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will not qualify as an asset eligible for distribution. As to this the statute is explicit. We also hold that if such property, owned at the time of the marriage, later increases in value, such increment enjoys a like immunity. Furthermore the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse. The burden of establishing such immunity as to any particular asset will rest upon the spouse who asserts it. Ibid. (emphasis added).

The case above, along with the statute, requires the court to make specific findings based on the evidence with regard to these assets. Many of the factors listed above have previously been addressed in the alimony and child support analysis and will not be repeated here. Only those that are appropriate will be discussed. Furthermore, the parties have stipulated that for purposes of equitable distribution the operative date is February 15, 2005.

Based upon the evidence presented, the court will now address each of the items requested to be distributed by the respective parties.

1. Mr. McGreevey's pension through the State of New Jersey

By stipulation, the parties have agreed that this pension shall be divided equally between the parties from the date of the marriage through February 15, 2005. Counsel shall determine the coverture fraction and prepare any and all documentation the pension plan may require to effectuate this transfer.

2. Dina McGreevey's 401 K plan from Columbus Hospital

By stipulation, the benefits that accrued from the date of the marriage through February 15, 2005 shall be divided equally between the parties. Counsel shall determine the coverture fraction and prepare any and all documentation the plan may require to effectuate this transfer.

3. Dina McGreevey's home in Springfield, New Jersey

By agreement, this is exempt from equitable distribution.

4. Jim McGreevey's Bank Accounts as follows:

(a) Wachovia business checking account (x0900) (P23)(D23);

Mrs. McGreevey is not asking that this account be equitably distributed. Post summation at p. 50.

(b) Wachovia custom checking account (x3138) (D24);

In J1, Mr. McGreevey asserted that this account was pre-marital and exempt from equitable distribution because it contained the proceeds from the sale of the Gill Lane condominium. The only documents containing any information on this account were provided by the defendant. The plaintiff provided nothing. The actual records appear to show that this account was not entirely premarital. First, there is no documentation to substantiate a deposit into this account after the Gill Lane property closed. Second, it appears from the deposits and checks admitted into evidence, that this was his personal checking account and the money was used for personal expenses (car payments, utility bills). The court finds that plaintiff did not establish that these were premarital funds and therefore, the amount of the funds in the account on February 2005 ($54,835.33) will be subject to equitable distribution.

(c) Wachovia Securities account (x9359)(P26)(D26)

Once again, J1 lists this account as totally premarital and consisting of the proceeds of the Gill Lane sale. The defendant provides one statement from February 2005 evidencing a balance of $25,088.91. Plaintiff provides statements from February

2004 to June 2007. Though the statements show the opening of the account with a $25,000 deposit there is no evidence as to where this money came from other than Mr. McGreevey's testimony. This is not sufficient to establish that these funds were premarital. The court is left to infer this information, without any additional factual basis. For example, it would have been helpful if the plaintiff showed the "trail" of the money; i.e. after the closing where the closing proceeds were deposited, and at least where this money came from (for example the check) so it could be traced back to the original receipt of the funds. Saying it is premarital is insufficient. Therefore the court finds that these funds are subject to equitable distribution.

(d) Fidelity Investment Account (x599)(D27)(P27)

This account listed in J1 also provides that these funds were totally premarital and consisted of the proceeds of the Gill Lane sale. P27 reflects that plaintiff opened this account on December 23, 2003. He actually opened three accounts, one for each of his daughters, and one in his name. He deposited $25,000 into his own account and $10,000 was placed in accounts for each of his daughters (see (5) below). Since once again the plaintiff has not satisfied his obligation to prove these funds were premarital, (see paragraph (c)) above, this account will also be subject to equitable distribution.

The court also feels compelled to provide some general comments regarding the bank accounts listed above. First, the amounts in the various Case Information Statements and evidence are in conflict with one another. Mr. McGreevey stated that he received $119,000 in net proceeds from the sale of the condominium in 2003. The HUD form from the closing (J11 in evidence) confirms this amount. The accounts listed in J1, all of which provide that the funds are all from the proceeds of the condominium, had total assets in February of 2005 of $123,075; more than he received at closing. Since he argues that the funds in the Fidelity Account are from the sale of Gill Lane, so are the funds that he put in the UGMA for his daughters. If that $20,000 is deducted from the accounts in J1 he has even more assets that are not attributable to the Gill Lane proceeds. Additionally, plaintiff also testified that some of the closing proceeds were used to pay off debt. He never produced proof of how much was actually paid in

that regard. Just using simple arithmetic, it would appear that funds in his possession on February 15, 2005 were not all premarital. The plaintiff has the obligation pursuant to Painter to prove the immunity of the asset. The discussion above demonstrates that he has not. The court has no choice but to find that the funds specified above are, therefore, subject to equitable distribution.

5. Valic Account

The Valic account is listed in J1 as an asset of Mr. McGreevey's with a value of $113,666. For some unknown reason, subsequent CIS filings J2 and J3 do not contain this entry. He contends that this is a retirement fund. He provides no proof. He also states in J1 that this account is primarily pre-marital but did not provide any information concerning what portion would be pre-marital. The court was not provided with a single document to substantiate the existence of this account or its dissipation. Since Mr. McGreevey did not provide any information to the court to establish what portion of this account was pre-marital as required, the defendant is entitled to receive equitable distribution of these funds.

6. Fidelity Accounts UGMA x738 and x746(P27) (D27)(D28)(D29)

These accounts are in the custodial name of James McGreevey for the benefit of his two daughters. The court has one statement from 2005 evidencing both daughters had approximately $10,000 in each of their accounts. In October 2006 there was a deposit by Mr. McGreevey into Morag's account in the amount of $30,000. Given these proofs, and the fact that Mrs. McGreevey is not requesting a distribution, these funds will not be equitably distributed to the defendant. Mr. McGreevey does, however, have a continuing obligation to provide Mrs. McGreevey with yearly updates as to their daughter Jacqueline's account.

7. Merck Stock

This stock, valued at $80 can be retained by the plaintiff. Insufficient evidence was provided to the court to support its distribution.

8. Plaintiff's Life Insurance Policy with Nationwide Insurance Company of America.

The court finds that the defendant is entitled to the increase in value of this asset during the period of the marriage on a 50/50 basis. The arguments posed by both sides are troublesome. Mr. McGreevey argues that since Mrs. McGreevey is not providing a valuation she should not be entitled to anything and Mrs. McGreevey is indicating that since Mr. McGreevey did not provide any evidence that the entire amount is pre-marital, she should receive fifty percent. The equities and evidence would appear to demonstrate, that portions of the cash value of this account were clearly pre-marital and portions increased in value during the marriage. Therefore, Mrs. McGreevey will be entitled to her share of the increase during the marriage.

9. The Gill Lane Condominium

The plaintiff maintains that the defendant is not entitled to an equitable share from Gill Lane. Painter sets out general guidelines, which include "contribution of each spouse to acquisition of marital property, including contribution of a spouse as homemaker" and "duration of the marriage." Ibid. In Mol v. Mol, 147 N.J. Super. 5 (App. Div. 1974), the court overturned an award of 40% of the value of the marital estate to the wife after it was determined that the increase in value was caused by inflation and other economic factors unrelated to her efforts. The parties also cite Valentino v. Valentino, 309 N.J. Super. 334 (App, Div. 1998), where a woman was awarded 10% of the gas station owned by her husband after occasionally working for it, running errands for it and doing some cleaning. This was over the course of a 12 year marriage. The plaintiff attempts to distinguish this from Mrs. McGreevey's efforts by claiming that her efforts to improve the condominium were minimal and did nothing to increase its value. Also, the short term of the marriage is repeatedly stressed.

The defendant cites Painter in response, claiming that the plaintiff must establish which assets are solely his and exempt from equitable distribution. Painter, supra, at

214. She argues that plaintiff cannot establish that the money in his bank account is in fact the proceeds from the sale of the condo. Furthermore, they detail several repairs the defendant allegedly made and funded herself, including replacing the carpet, fixing leaks and painting. Although this may be comparable to the wife's work on the gas station in Valentino, in that case the court noted that she further contributed by caring for the children and the marital home and thus freed her husband to run the station. Valentino, supra, at 340.

As reflected in the paragraphs above, the plaintiff is unable to establish what proceeds remained from the condo on February 15, 2005. Even if the court were to accept his arguments that he is in possession of those funds, he cannot prove, as outlined above, what funds exist. Therefore the court cannot make a determination as to what is available for distribution, and cannot award any money to plaintiff in that regard.

10. Mr. McGreevey's car and personal furnishings

Mr. McGreevey's car is leased, so it is not subject to equitable distribution. Based on the closing arguments of defendant it appears she is not requesting any personal furnishings and therefore those items will not be subject to distribution.

11. Assets Titled to Defendant (J12)

(a) Certificate of Deposit of $2,000.

(b) Savings account of $500.

(c) Checking account of $500.

These accounts were separate and not held jointly. Defendant acknowledges that the plaintiff would be entitled to fifty percent of these balances. Again, the court had no documentation to substantiate the value of these accounts, however, defendant concedes that they may be equitable distributed.

12. Defendant's jewelry of $15,000.

No testimony concerning the value of this property or the extent to which it was pre-marital was provided. Mrs. McGreevey listed it on her CIS as "partially premarital."

The parties failed to address the issue at trial. Therefore, the court finds that it is inappropriate to award plaintiff any recovery.

13. Mrs. McGreevey's clothing

Mr. McGreevey argues that since his wife spent over $40,000 per year on clothing, he should be compensated for its current value. Since he did not provide proof of the clothes current value, the court will not award him a recovery on this issue.

14. Defendant's Ford Taurus

As it was conceded that the defendant purchased this vehicle prior to their marriage, and plaintiff provided no information as to its value, the court finds defendant may retain whatever that vehicle is worth.

15. Celebrity Goodwill of the Defendant

Mrs. McGreevey argues she is entitled to "an equitable share of the celebrity goodwill enjoyed by plaintiff due to his circumstances as Governor and recognizable persona." Post summation at p. 55. In support of this proposition, she proffered the testimony of Kalman Barson. His report, (D30), values this goodwill at $1,456,000. This amount was comprised of not only potential compensation as an attorney, but also for speaking engagements and book deals. Mr. Barson had never prepared a report on this issue prior to this trial.

Mr. Barson's report and testimony relied upon assumptions. Specifically he assumed that celebrity goodwill existed in this case. In calculating his final figures he relied on a number of factors that were provided by Mr. Post, counsel for Mrs. McGreevey. His analysis began with Mr. McGreevey's ability to be compensated as an attorney. Though he reviewed the Memorandum of Understanding with the Weiner Lesniak firm, Barson was also given numbers by Mr. Post to assume for billable hours, hourly rates, etc. He performed no independent verification of these figures. His projected annual income based on these assumptions was $400,000. He could point to no verifiable, independent source when he concluded that Mr. McGreevey would have a base income of $150,000 and a differential of "celebrity goodwill" of $250,000.

Mr. Barson acknowledged that this case presented a unique circumstance, considering that Mr. McGreevey's prior employment was as a political figure, and therefore Mr. McGreevey could have no "historical earnings" attributable to celebrity, such as in the Piscopo case. Mr. Barson admitted to not having read the Piscopo case or performing any analysis as to how the factors outlined therein could be translated into the present circumstances. His opinion concerning potential future book deals and speaking engagements were also devoid of substantiated facts.

Finally, though his report was rendered in August of 2005, he did not receive or rely upon any discovery during the subsequent years to see if any of his assumptions had been realized.

Sharon Maggio, the plaintiff's expert on this issue was faced with similar challenges. Though she had prepared reports on this topic before, she also acknowledged the difficulties under the circumstances of this case. She challenged the assumptions made by Mr. Barson as not based in fact. She indicated that one of the core principles in determining celebrity goodwill were the enhanced earnings of the person over the course of the marriage. In this case, those enhancements could not have existed as the plaintiff had a set salary as Governor. She therefore opined that it was possible that no politician could ever have celebrity goodwill.

This theory, as expected, was challenged by Mrs. McGreevey in that numerous political figures upon leaving office went on to establish lucrative careers. The simple answer to that argument is that every case rises and falls on its own facts. Not every politician can parlay a political career into future lucrative employment. Therefore, this case must be looked at pursuant to its facts and the applicable law.

New Jersey's foremost authority on celebrity goodwill as a marital asset comes from Piscopo v. Piscopo, 232 N.J. Super. 559, 560 (App. Div. 1989). The decision expands Dugan v. Dugan, 92 N.J. 423, 426 (N.J. 1983) (initially establishing goodwill as a marital asset for a professional corporation on the assumption that an earned reputation will lead to probable future earnings) beyond the professional realm into that of show business. Conceding that celebrity goodwill was a divisible marital asset on appeal, the plaintiff (husband) argued that pursuant to Dugan his future "possible earnings" could only be considered an asset (as opposed to "probable

earnings") because of the volatility of show business. Piscopo at 563. The court disagreed and allowed Piscopo's celebrity goodwill to be assessed regardless of such difficulty in an exact determination. Id. at 561 (describing accountant's calculation of Piscopo's celebrity goodwill); see also Dugan at 430 (describing calculation of general good will).

The trial judge in the Piscopo case cited Golub v. Golub, 527 N.Y.S.2d 946 (N.Y. Sup. Ct. 1988), the leading New York celebrity goodwill case. There, the court ruled celebrity status was no different than anything other than special skill used as an income generating asset. Id. at 950. However, on appeal the case was distinguished as New York goodwill law considers a professional license a divisible marital asset *per se*, which New Jersey does not. Piscopo at 564.

In Seiler v. Seiler, 308 N.J. Super. 474, 475 (App.Div. 1998), the court further explained that goodwill does not belong to the individual, but rather his employer. Thus, goodwill can only be considered a divisible asset for someone if they are self employed. See id. Celebrity or not, if they are acting as an employee for someone else they do not have divisible goodwill. See Brodeur v. Brodeur, Sup. Ct. App. Div. Docket A-1665-05T1 (2007). (emphasis added). Here, a famous professional hockey player did not have goodwill as he was employed by his team.

There can be no dispute that Mr. McGreevey was an employee of the State of New Jersey. Therefore any goodwill generated by his time as Governor can be argued belongs to New Jersey and not him. Additionally, he could not have enhanced earnings during that employment. This court next must determine if it should take the "leap" and find that his position as Governor created an ability for future enhanced earnings and whether that would be awardable as part of equitable distribution. This court does not need to address that proposition, as the expert proffered by Mrs. McGreevey could not sustain that principle in his report. The court finds that Mr. Barson's report was not factually based and filled with assumptions that were never verified. Mr. Barson's calculations as to earning capacity at a law firm, through speaking engagements and future book deals were totally unsupported. If the court were to consider Mr. McGreevey's future enhanced earnings his analysis falls short of supporting that

proposition. Therefore the court will not award the defendant a financial recovery for celebrity goodwill.

16. Proceeds from "The Confession"

Mrs. McGreevey argues that she is entitled to a portion of the $250,000 book advance received by Mr. McGreevey for the book The Confession. She bases the argument on the fact that he was anticipating writing this book prior to February 15, 2005; though it is acknowledged by all that his book deal did not culminate in a contract until July 21, 2005. She bases her argument on a hearsay statement made by a book publicist. This publicist apparently offered Mr. McGreevey $1,000,000 immediately after his resignation to write such a book. She also indicates that plaintiff's admission that he may have written some portions of a book, in September or October 2004 was enough evidence to permit her to receive 30% (or $48,000) of the net proceeds that he derived from his memoir.

The court finds that the mere generation of some notes and conversations concerning a potential book deal, are inadequate for the court to consider any award of equitable distribution for The Confession. The insignificant nature of the testimony in this regard is insufficient for this court to make any finding that she would be entitled to any percentage let alone 30% of his book deal.

The parties agreed that February 15, 2005 would be the date for any equitable distribution cut-off, and it is clear that the contract was not signed until well after that time period.

Counsel Fees

Counsel fees may be awarded in a matrimonial case. R. 5:3-5 (c) sets forth the factors to consider when determining whether counsel fees should be awarded. This rule states:

> (c) Award of Attorney Fees. Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time,

> equitable distribution, separate maintenance, enforcement of interspousal agreements relating to family type matters and claims relating to family type matters in actions between unmarried persons. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained: (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award. N.J. Court R. 5:3-5

On July 18, 2008 both attorneys forwarded voluminous submissions setting forth their specific request for counsel fees in compliance with R. 4:42-9. The plaintiff, who has had three different attorneys (two firms and one sole practitioner), has amassed fees totaling $498,000. Of this amount, only $169,478.97 has been paid. Mr. Haller's firm incurred fees of over $205,000 from January 1, 2008 up until present.

Mrs. McGreevey has had one firm for the entire case. She has incurred fees of $526,468.66. Of that amount she has paid $50,500.

Both attorneys are asking that the court assess fees against the other party for various reasons, primarily the "bad faith" they assert motivated their adversary.

In reviewing the factors outlined above the court finds the following: Id.

(1) The financial circumstances of the parties;

Neither party has the financial resources to pay the amounts requested. Their earnings are not sufficient, nor do they have assets available to them. Their circumstances are outlined in greater detail throughout this opinion.

(2) The ability of the parties to pay their own fees or to contribute to the fees of the other party;

Given the large amount of fees, both have insufficient funds to pay their own attorneys, let alone those of their former spouse.

(3) The reasonableness and good faith of the positions advanced by the parties;

As outlined extensively in the opinion, the court finds that both parties took unreasonable positions, some of them in response to what they considered unsupported or legally deficient positions proffered by the other side. This does not necessarily mean bad faith.

In Kelly v. Kelly, 262 N.J. Super. 303 (Ch. Div. 1992), the court outlined the effect of bad faith and unreasonableness in considering an award of counsel fees:

> [W]here one party acts in bad faith, the relative economic position of the parties has little relevance. The purpose of the award is to **protect the "innocent" party** from unnecessary costs and to punish the 'guilty' party. The court should afford protection and impose punishment regardless of the assets available to the innocent party. Accordingly, the need to produce economic information lessens as the 'bad faith' of the party against whom fees are sought increases; conversely the court may not award fees in the absence of disclosure demonstrating economic disparity unless the moving party shows 'bad faith'.
> Id. at 307. (emphasis added).

Under this theory, neither Mr. nor Mrs. McGreevey acted "innocently." Consequently, there is no need to protect them from economic harm. Each party took positions which prolonged this litigation. Mr. McGreevey refused to negotiate on any financial issues until the custody case was resolved. Cleary, the financial issues (other

than child support) could have been addressed and hopefully resolved, saving both parties the cost of this litigation. Mrs. McGreevey was alleged to have been intractable in her position on custody up until the last minute, when that portion of the case settled. Mr. Haller provides details in his certification of numerous situations that required motions to be filed to address his client's concerns. In addition, both attorneys point out that the other party failed to provide complete discovery. They argue this hampered their ability to prepare for trial. If the attorneys wish to be awarded fees based upon incomplete discovery, their position is unreasonable, as it was not raised as an issue before the litigation.

The fact that each party took positions that were in response to what they perceived were unsupported allegations by the other party, created unreasonable negotiating tactics at times making each party blameworthy. Kelly distinguishes between a "mistaken or frivolous position," which will not warrant an award of fees" and a "maliciously motivated position," which will warrant such an award. Id. at 309.

Borzillo v. Borzillo, 259 N.J. Super. 286 (Ch. Div. 1992) lists specific conduct that should be considered bad faith. This includes an unwillingness to comply with court orders and voluntary agreements, abusing process or intentionally misrepresenting facts to evade such obligations, or "…[S]eek[ing] relief which one knows or should know that no reasonable argument could be advanced in fact or law in support thereof." Id. at 293-94.

The facts in this matter do fit within the categories of those outlined in Borzillo or in Yueh v. Yueh, 329 N.J. Super. 447 (App. Div. 2000), where the court, in remanding for a determination of counsel fees, recited the various factors that should be considered in such an application.

Although during these proceedings things have become contentious at times and both parties have taken positions that have been unsuccessful, their conduct has not escalated to bad faith nor reached the level of malice demonstrated by these cases to constitute bad faith. Neither party has misrepresented facts or intentionally defied a court order. The parties have filed Orders to Show Cause, motions, and made what the court determined to be unsuccessful arguments which could have been resolved by

communication, bringing the issues to the parenting coordinator, or other forms of negotiations. Accordingly, neither party should be awarded counsel fees under a theory of unreasonableness.

(4) The extent of the fees incurred by both parties;

Mr. McGreevey: $498,000

Mrs. McGreevey: $526,468.66

(5) Any fees previously awarded;

The court previously assessed fees against Mr. McGreevey for an Order to Show Cause brought in November 29, 2007 stating that "defendant shall be awarded counsel fees in connection with Mr. Post's attendance at oral argument." However, Mr. McGreevey has not yet paid these fees.

(6) The amount of fees previously paid to counsel by each party;

Mr. McGreevey has paid the following: (1) Wilentz, Goldman and Spitzer: $28,423.90 of $144,423.90 billed, (2) Matthew Piermatti $124,498.60 (total bill), and (3) Einhorn Harris, et. al. $44,980.37 of $205,016.37 billed.

Mrs. McGreevey has paid Post Pollack $50,500 of $526,468.66 billed. She also received a "Courtesy Discount" of $128,711.01.

(7) The results obtained;

Neither party was successful overall. In some instances they prevailed on their arguments, but for the most part, neither was completely successful.

(8) The degree to which fees were incurred to enforce existing orders or to compel discovery;

Not applicable.

(9) Any other factor bearing on the fairness of an award.

Not applicable.

Considering the factors listed above, neither party will be awarded counsel fees. The financial circumstances of both parties are insufficient to pay fees of this magnitude. Ms. Matos was earning $82,000 per year, and the court has imputed annual income to Mr. McGreevey of $175,000. Though each party is obligated to pay their own counsel fees, the fees incurred are so great that both parties will have difficulty using their own resources to fully pay their own attorney, let alone, be able to pay for the other's counsel fees. For the aforementioned reasons the requests for counsel fees for both parties are denied.

Conclusion

The Court has prepared a Judgment of Divorce incorporating the decisions addressed herein. It is being submitted to the counsel along with this opinion.