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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re: **MARK INNES,** **GENEVIEVE INNES,** **DEBTORS.**	**CASE NO. 95-41486-13** **CHAPTER 13**
MARK INNES, **GENEVIEVE INNES,** **PLAINTIFFS,** **v.** **UNITED STATES DEPARTMENT OF EDUCATION,** **UNITED STUDENT AID FUNDS, INC.,** **NEBRASKA STUDENT LOAN PROGRAM, INC.,** **KANSAS STATE UNIVERSITY,** **DEFENDANTS.**	**ADV. NO. 95-7104**

MEMORANDUM OF DECISION

This proceeding is before the Court for decision following a trial on the merits. The question is whether Mr. Innes's student loan debts are dischargeable under 11 U.S.C.A. §523(a)(8) on the basis of undue hardship. The debtors appeared by counsel Brenda J. Bell. Defendant United States Department of Education appeared by United States Attorney Jackie N. Williams and Assistant United States Attorney Mary Kreiner Ramirez. Defendant United Student Aid Funds, Inc., appeared by counsel Mark J. Schultz. Defendant Nebraska Student Loan Program, Inc., appeared by counsel N. Larry Bork. Defendant Kansas State University appeared by Kansas Attorney General Carla J. Stovall and Assistant Attorney General Christopher F. Burger. The Court has heard the evidence submitted at trial, reviewed some materials submitted after the trial, considered the oral and written arguments of counsel, and is now ready to rule.

FACTS

The Inneses filed a chapter 7 bankruptcy petition in 1995, but converted the case to chapter 13 soon thereafter because they found that they would be unable to retain their two vehicles in a chapter 7 case. They proposed a chapter 13 plan under which they would pay $130 per month to the chapter 13 trustee for fifty-seven months, an amount that would pay debts secured by their vehicles and their washer and dryer, and also pay their attorney's fees and the costs of administering the plan. They continued paying for their home outside the plan. The plan was confirmed. About one year into the plan, they had to increase their payments to $140 per month to cover all the claims they were trying to pay.

Over a number of years before the debtors filed for bankruptcy, Mr. Innes had borrowed more than $45,000 in student loans. He obtained a bachelor's degree in history, but was unsuccessful in his efforts to obtain a master's in the same field. He does not qualify to teach history at the secondary school level. Although the Court was not supplied with a complete accounting of the accrued interest on the loans, by April 2000, interest had added at least another $17,000 to his debt. Mrs. Innes has no legal liability on the student loans. Other than student loans, the debtors listed on their schedules almost $30,000 in unsecured debts, most of which were owed on credit cards. About $2,600 was for medical bills.

When they initially filed for bankruptcy, the Inneses were in their mid-thirties. They had four children and Mrs. Innes was pregnant. She worked for Wal Mart, and Mr. Innes was earning $90 per month. However, a couple of months later, he was totally unemployed. In all, for an eighteen-month period that began before and continued after they filed for bankruptcy, he was not able to find a full-time job. During 1995, the family lived on Mrs. Innes's wages and public assistance in the form of medical cards, food stamps, a school lunch program, and the Women, Infants, and Children program. Their vehicles then had 150,000 and 160,000 miles on them.

During the chapter 13 proceeding, Mr. Innes got a job as a locksmith and general maintenance man with a contractor at Fort Riley military base. The contract is for five years and does not provide for any pay raises. When he became employed, the family became ineligible for public assistance, so the medical and food assistance they had been receiving ended.

By the time of the trial of this proceeding, Mrs. Innes had become a department manager for Wal Mart, earning $13.44 per hour, and she has a gross annual income of $28,149. Mr. Innes currently earns $14.74 per hour, and has a gross annual income of $30,690.32. Both figures include some overtime. Their annual gross income, then, is $58,839.32, and their monthly gross is about $4,900. In their present jobs, the debtors have no reasonable expectations of receiving anything more than cost-of-living wage increases. Both debtors' employment histories indicate they are not likely to move into materially better-paying jobs in the foreseeable future.

Mrs. Innes has a retirement fund at work which, at the trial, she said might be worth as much as $100,000, although the debtors' schedules and other materials they provided to the creditors indicated it was worth only about $26,000 in 1995. No documentation of the fund's components or its actual present value was presented at trial. Neither the family's budget nor Mrs. Innes's recent pay stubs show that any contributions to such a fund are currently being made. Mrs. Innes does have $20 per pay period deducted from her pay for the purchase of stock and her employer contributes an additional $3 per pay period for the same purpose, items that could be involved in a retirement program, but no evidence was presented to indicate that they were in fact retirement contributions.

By the trial date, the Inneses had six children ranging from one to seventeen years of age. A four-year-old and fifteen-month-old were not yet in school, and the other children were in second, sixth, tenth, and eleventh grades. The Inneses' combined gross income exceeds the federal Department of Health and Human Services annual income poverty guideline for a family of eight by about 100%. *See Annual Update of the HHS Poverty Guidelines*, 65 Fed. Reg. 7555, 7555 (2000) (poverty level for family of eight is $28,650). Eligibility for some public assistance programs, for example, Kansas Legal Services, Inc., is set at 185% of the HHS poverty guidelines. The debtors' income is about $5,000 above this threshold. Neither of the debtors has any inheritance expectancy. One of their children worked part-time for Wal Mart in 1999 and earned $4,951.28 before deductions for taxes and social security. From the net, he pays some of his expenses for clothing, auto (including gasoline), and school (except lunches).

During their chapter 13 case, the debtors paid off their vehicles, but also wore them out and replaced them with other used ones. Mr. Innes makes a one-hundred-mile round trip to and from work every day in a 1985 Honda with 225,000 miles on it. Mrs. Innes drives a 1995 Ford Winstar that had 60,000 miles on it when they got it one year ago. She drives about 30,000 miles per year, mostly to and from work. The debtors are making monthly payments on the Winstar.

The Inneses live in the country in order to have lower house payments than they could have in town. During the chapter 13 case, they were allowed to use part of a tax refund to help them pay to convert their garage into a third bedroom. They got permission to use a portion of another tax refund to help pay for repairs to their septic field, which had been letting raw sewage drain into their yard. Nevertheless, as indicated by the testimony and depicted by a number of photographs in exhibit 24, their home is in need of substantial repairs. They have set up a method of borrowing small amounts to accomplish some repairs, and it is obvious that this will be a continuing process because they do not have the present ability to pay for all the needed repairs.

The debtors used much of their 1999 tax refund for a family vacation to Colorado. According to the testimony, the family ate out infrequently during the vacation in order to save money. For their meals, the family generally economizes by eating canned rather than fresh fruit and vegetables. For meat, they eat hamburger.

The family has health insurance through Mrs. Innes's job. The policy has a $1,000 deductible, and a 20% co-pay requirement for covered services beyond that amount. The co-pay requirement appears to set a maximum annual obligation of $4,450, with 100% coverage over that amount. Of the family, only Mr. Innes has any ongoing medical problems. He has a below-the-knee amputation of his left leg and usually wears a prosthesis, although he sometimes uses a wheelchair. He has a bone spur on the leg-stump that should be surgically removed. His prosthesis must be replaced on an irregular basis at a cost of $5,000, and its use requires disposable sleeves that cost about $1,500 per year. He has been diagnosed as having bipolar disorder, for which Prozac has been prescribed. However, he tries to control his condition without the medication, and was succeeding at the time of trial.

After the trial, the parties tried to determine whether Mr. Innes and his loans qualified for some income-based or other more affordable repayment plan. Though they have not reported to the Court whether any particular program would be applicable, they have supplied possible payment schedules for a variety of repayment plans. Based on a student loan debt of $61,184.68 and an adjusted gross income of $58,856,[1] three payment plans might be available to Mr. Innes, although his actual eligibility for any of them has not been determined. Under the plans, he would have to pay: (1) $459.66 per month for thirty years; (2) $514.60 per month for a maximum of 25 years, with any remaining balance being discharged and treated as taxable debt forgiveness; or (3) $750.45 per month for 10 years. There is also a graduated repayment plan for people who expect their income to steadily increase under which payments would increase every two years to a maximum of one-and-one-half times the standard repayment amount. Mr. Innes has no reason to expect his income to increase, and so would not want to participate in this plan.

The debtors' net take-home pay is $3,842.04 per month. Besides the required deductions for payroll taxes, this net is after deductions are taken from Mrs. Innes's pay for life, disability, health, and dental insurance, and the purchase of Wal Mart stock (about $40 per month). The net also includes a monthly amount for projected income tax refunds.

At trial, the debtors indicated their monthly expenses totaled $4,327.47. They are the following:

Mortgage		284.59
Utilities:		
	Electric	117.58
	Telephone	136.98
	Cable	43.15

[1]The Court was not informed where these precise figures came from. They differ from the figures proven at trial, but the difference is too small to change the monthly payment requirements under the repayment plans by a significant amount.

Trash	15.00	
Food	950.00	includes school lunches
Clothing	235.00	
Laundry/cleaning	. 0.00	included in food budget
Medical-dental	306.00	
Transportation	570.00	includes gasoline and repairs for vehicles
Recreation	185.00	includes band instrument rental, admission to children's sporting events and activities, and parents' bowling once a week
Charity	60.00	
Insurance:		
Homeowners'	48.00	
Life	100.00	(in addition to life insurance deducted from Mrs. Innes's pay)
Auto	115.00	
Taxes	42.00	includes cars and house
Installments:		
Blue Valley Electric	100.00	
Van loan	214.00	
Artificial limb	150.00	estimated since payments have not begun
Credit investment	50.00	payment for household goods
Other:		
work lunches & daycare	476.00	
Sleeves for limb	125.00	
Church school	. 4.17	(originally reported as $50, the annual figure)

By agreement of the parties, a copy of the Internal Revenue Service's "Collection Financial Standards," taken from its Internet Web site, was introduced into evidence. According to this document, the standards:

> are used to help determine a taxpayer's ability to pay a delinquent tax liability.
>
> Allowances for food, clothing and other items, known as the National Standards, apply nationwide except for Alaska and Hawaii, which have their own tables. Taxpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent.
>
> Maximum allowances for housing and utilities and transportation, known as the Local Standards, vary by location. Unlike the National Standards, the taxpayer is allowed the amount actually spent or the standard, whichever is less.

See Debtors' Exhibit 20, Internal Revenue Service, Collection Financial Standards, *at* http://www.irs.ustreas.gov/prod/ind_info/coll_stds/index.html (apparently printed on Mar. 14, 2000). For transportation, the debtors have lower ownership costs but higher operating costs than the standards, and the total of the two is less than the standards. For a family of eight living where the debtors do and having their gross income, the standards allow $1,113 for housing and utilities, $981 for transportation, and $1,910 for "food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous," a total of $4,004, about $160 more than the debtors' take-home pay. The debtors' total expenses exceed the total of the standards because the standards do not include any amount (except possibly the "miscellaneous" category, itemized only as $175 for a family of four with the debtors' income) for such typical expenses as medical and dental care, recreation, charity, and daycare, and the debtors' atypical (but clearly necessary) expenses for Mr. Innes's artificial limb. Other than their transportation operating costs, the debtors' reported expenses do not exceed the amounts allowed for the items that are included in the standards, and a number of their expenses are substantially less. Because they have been established by the government in its capacity as a tax-debt collector, the Court would expect the IRS standards to set tight family budgets, not generous ones.

After the trial, one of the creditors offered to forgive two small student loans that are in the hands of a collection agent, so that collection procedures such as wage garnishment would not be used against Mr. Innes by that agent. Kansas State University, on the other hand, indicated that it will use all available methods to collect its debt from him if the debt is not discharged.

The debtors have now completed their plan payments and will receive a discharge once this proceeding is resolved.

DISCUSSION AND CONCLUSIONS

Under 11 U.S.C.A. §1328(a), a chapter 13 discharge releases a debtor from all but a few kinds of debts. One kind of debt excepted from the discharge is student loans covered by §523(a)(8). As relevant here, under the version of 11 U.S.C.A. §523(a)(8) that applies to this case,[2] student loan debts are nondischargeable unless "(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." "Undue hardship" is not defined in the Bankruptcy Code or controlling case law, but where appropriate, the Court will use the analytical framework established by the leading decision applying this provision, *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). In that case, the Second Circuit adopted a three-part test for resolving the undue hardship question:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id. at 396. This test provides a method for assessing the level of hardship nondischarge would impose on a debtor and his or her dependents, but leaves significant questions unanswered. The first part of the test does not define what constitutes the minimal standard of living that should be allowed a debtor, or what income and expenses are to be considered. The second part does not specify what constitutes "additional circumstances" that might justify a discharge or how much is a "significant portion of the

[2]When the debtors filed, student loan debts were also dischargeable seven years after they first became due, but Congress amended §523(a)(8) in 1998 to eliminate this seven-year limitation on nondischargeability, making the change applicable only to cases filed after enactment of the amendment. *See* Higher Education Amendments of 1998, Pub. Law. No. 105-244, §971(a) & (b), 1998 U.S.C.C.A.N. (112 Stat.) 1581, 1837.

repayment period." The Circuit did explain that the additional circumstances must be "strongly suggestive of continuing inability to repay over an extended period of time." *Id*. at 396. The lower court had offered the following elaboration on this point:

> Predicting the future, however, is never easy. Minimum necessary future expenses may be ascertained with some precision from an extrapolation of present needs, but unpredictable changes in circumstances such as illness, marriage, or childbirth may quickly wreak havoc with such a budget. Even more problematic is the calculation of future income. It is the nature of §523(a)(8)(B) applications that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power. They may, like appellee, have had difficulty in securing employment immediately after graduation. Extrapolation of their current earnings is likely to underestimate substantially their earning power over the whole term of loan repayment.

46 B.R. 752, 754-55 (S.D.N.Y. 1985). In the present case, however, the Court notes that most of the five-year period of the debtors' chapter 13 bankruptcy case has passed since they filed this proceeding, providing a more substantial demonstration of Mr. Innes's actual employment prospects. The third part of the *Brunner* test does not explain what repayment efforts amount to good faith efforts.

I. Minimal Standard of Living

A. The Debtors' Expenses

Most of the creditors' objections attack the debtors' standard of living, the first part of the *Brunner* test. The creditors have joined in each other's arguments, so the Court will not attempt to attribute any argument to any specific creditor. Their primary argument is that Mr. Innes is not entitled to a hardship discharge of his student loans because all of Mrs. Innes's income, and perhaps even her retirement assets, should be dedicated strictly to providing the bare essentials needed for the family's support, thus giving Mr. Innes the ability to pay the loans. They also suggest some of her income and retirement assets should be devoted directly to paying the loans. They assert a number of secondary arguments as well: (1) the debtors' auto and other loans will be repaid in several years, freeing up money they can then use to pay the student loans; (2) the debtors should not make a $60 monthly charitable contribution, but use the money instead to pay the student loans; (3) the debtors should use less daycare, and apply the resulting savings to the student loans; (4) the debtors should not pay $4.17 per month for religious training for their children; (5) the debtors were surviving on less income when they filed for bankruptcy, and should return to that five-year-old budget by: (a) reducing their food budget by $300; (b) reducing their clothing expense; (c) reducing their transportation costs from $570 to $300 per month; and (d) reducing their telephone expense to the 1995 level; (6) the cost of Mr. Innes's replacement prosthesis should not be included in their budget because it may be paid for by insurance; (7) the monthly ledgers of the debtors' expenses submitted as part of exhibit 22 shows they have disposable income of $447 per month; (8) the ledgers do not support a monthly medical expense of $306; (9) the debtors should not purchase life or disability insurance; (10) the debtors should spend less or no money for recreation or entertainment; (11) the earnings of the debtors' minor children should be used to defray part of the family's monthly expenses so more of the debtors' income could be used to pay the student loans; (12) the debtors' children will soon start reaching the age of majority and start leaving home, quickly and substantially reducing the family's expenses; (13) the debtors should have used Mrs. Innes's retirement account to pay for their vehicles; (14) the $40 per month that Mrs. Innes has deducted from her pay to buy Wal Mart stock should instead be applied to the student loans; and (15) none of Mrs. Innes's income should be spent on items such as recreation or entertainment that are not absolute necessities. The Court will first consider the issues (one through ten in the list) concerning the Innes family's budgeted expenses, then the issues (eleven and twelve) about the children's income and approaching adulthood, and finally, the primary and related issues (thirteen through fifteen in the list) about Mrs. Innes's income and assets.

1. Loan payoffs

The debtors now make payments on loans for a vehicle and home improvements. The creditors contend the money spent on these items will be available, apparently forever, once the current loans are paid off. This first argument is partly based on the absurd assumption that the debtors' vehicles will last indefinitely, with no increase in maintenance costs, even though they must be driven many miles annually and already had 225,000 and 90,000 miles on them by the time of the trial in April 2000. It also ignores the testimony and exhibits that showed the debtors' home needs many additional repairs. The Court concludes that these expenses will be ongoing and will not diminish in the foreseeable future.

2. Charitable contributions

The second of the creditors' contentions is that the debtors should not donate $60 per month to charity, but instead apply the money to Mr. Innes's student loans. While this case was pending, Congress passed the Religious Liberty and Charitable Donation Protection Act of 1998 (the "RLCDPA"), amending various provisions of the Bankruptcy Code for pending cases as well as new ones. *See* Pub. L. No. 105-183, §5, 1998 U.S.C.C.A.N. (112 Stat.) 517, 518-19. Among other things, that Act amended §1325(b)(2)(A) to provide that income that is reasonably necessary to be expended for the support of a debtor and his or her dependents includes charitable contributions up to 15% of the debtor's annual gross income, thereby excluding such contributions from the "disposable income" that must be paid to creditors in a chapter 13 case. *See id.* at §4(a), 1998 U.S.C.C.A.N.

(112 Stat.) 518. Although this provision is not directly applicable to the question of undue hardship under §523(a)(8)(B), at least one court has relied on it as grounds for rejecting the argument the creditors are making here. *See Lebovits v. Chase Manhattan Bank (In re Lebovits)*, 223 B.R. 265, 273 (Bankr. E.D.N.Y. 1998). Another court has disagreed, ruling that the RLCDPA has no effect on the undue hardship provision of §523(a)(8). *See Educational Credit Management Corp. v. McLeroy (In re McLeroy)*, 250 B.R. 872, 879-82 (N.D. Tex. 2000). That court apparently believed that tithing can be considered a reasonably necessary expense under §523(a)(8) only if the debtor's church requires it as a condition of receiving services or benefits. *See id*. at 878-79. A third court subsequently agreed with *McLeroy* about tithing. *See Ritchie v. Northwest Education Loan Ass'n (In re Ritchie)*, 2000 WL 1683314 (to be published at 254 B.R. 913) (Bankr. D. Idaho 2000). While this Court would agree that the RLCDPA's specific percentage protection for contributions is probably not applicable under §523(a)(8), the Court is convinced it would be incongruous to exclude all voluntary religious or charitable contributions from the undue hardship test when Congress has adopted such a generous standard for the disposable income test under §1325(b)(2)(A). At least some minimal contribution must be permissible under §523(a)(8). The Inneses contribute slightly over 1% of their income, and the Court believes this is not an unreasonable expenditure.

3. Daycare

The third of the creditors' arguments is that the debtors can presently reduce their daycare costs and that such costs will be less in the future. No evidence was presented to show how the debtors could reduce their daycare expenses now. Both of the debtors work, their older children are in school, and they have a child under two and another who is about to start elementary school. It is true that their daycare expenses will end at some point in the future, but there is no evidence that the expenses will substantially diminish for a number of years. It is also likely that as the younger children grow and the daycare expenses decrease, the children will require increased expenditures for clothing, food (including school lunches), and other necessities.

4. Religious training

The creditors point out that the debtors corrected their reported budget at trial to reflect that they pay $50 to "CCD" annually, rather than monthly, for their children's religious training. The Court has already adjusted this expense to $4.17 per month. If any of the creditors mean to suggest that no amount for this item can be a reasonable expense, the Court cannot agree. At least one court, in making an undue hardship determination, has allowed substantial expenses for private schooling of minors to be included in the reasonable expense category. *See Lebovits v. Chase Manhattan Bank (In re Lebovits)*, 223 B.R. 265, 272 (Bankr. E.D.N.Y. 1998) ($100 per month for parochial school education and/or daycare per minor child, seven in all, was reasonably necessary for support). The Inneses' expense of less than $1 per month per child is minimal and not unreasonable.

5. Current expenses that should be reduced to past levels

In the fifth-listed argument, the creditors do not question the debtors' assertions of the amounts they currently spend on food, clothing, transportation, and telephone, but simply suggest the fact that the debtors got by on less in the past shows they can reduce the amounts they spend now. To a large extent, this assertion overlooks various changes in the debtors' circumstances. When they filed for bankruptcy, they were receiving substantial public assistance and were living below the poverty level. They have also added two children to their family. Mr. Innes was not working then, and so did not need to drive one hundred miles per day to and from work. There is no evidence that the debtors' expenses in any of the specified categories are unreasonable.

a. Food

The $950 per month expense that the debtors' labeled as "food" includes not only edible groceries, but also school lunches, laundry, dry cleaning, soap and personal items. According to the testimony, the debtors use canned rather than fresh fruit and vegetables, and use hamburger as their meat source. Again, no evidence was presented to show that the expense is unreasonable. The creditors' assertion that the debtors should spend $300 per month less for food is unconvincing since no examination or other evidence was presented to support it. Other courts have held that food expenses similar to or even higher than the debtors' were reasonable and part of a minimal standard of living. *See, e.g., Lebovits*, 223 B.R. at 272-73 (in 1998, $1,600 food budget for family of 9 that eats all meals at home). The IRS collection standards allow almost as much for food alone for a family of four with the debtors' gross income (they do not give a separate food total for families larger than four) as the creditors suggest the Inneses should spend for their family of eight on food *and* the other items noted above. The Court is not convinced the debtors are spending too much on this item.

b. Clothing

The court recalls no examination of witnesses or other evidence about the composition of the less than $30 per person per month the family spends on clothing. The budgeted amount does not seem excessive for a family that includes one child in diapers, five other growing children, and two working adults.

c. Transportation

The debtors' transportation costs may be high compared to those incurred by many families. However, they live in the country and drive older cars long distances to work, circumstances that can be expected to generate large expenses for vehicle maintenance and gasoline. The creditors even ask the Court to discount these expenses because gasoline prices have reached historical highs in recent months. The Court will not declare the debtors' transportation costs to be unreasonable simply because the creditors wish they were lower.

d. Telephone

The creditors' complaint about the debtors' telephone expense is based solely on the fact that it has increased over the five years the debtors have been in bankruptcy. Their suggestion that the debtors should be required to maintain the expense at its 1996 level ignores two important facts: (1) the debtors' children are four years older now and consequently have more need and desire to use the phone than they did four years ago; and (2) the family lives in a place where nearly all calls incur long distance charges. While it may be that some of the calls could be curtailed or eliminated, the creditors presented no evidence that any specific calls or charges are unreasonable, and made no inquiry about the reason for any of the calls that produced the debtors' monthly phone bills.

6. Replacement prosthesis

The sixth of the creditors' arguments is that the debtors' $150 per month expense for Mr. Innes's replacement artificial limb should not be included in their budget because it might be paid by insurance. The insurance company has initially denied coverage, and the Court has not been informed whether any of the expense will be paid. However, as discussed below, the debtors' reasonable expenses currently exceed their take-home pay even without this expense item. The Court believes that it can resolve the hardship discharge question without including the item in their budget, and need not await further action by the insurance company.

7. $447 per month in disposable income

The seventh of the creditors' arguments is that the debtors have $447 per month in disposable income. They base this conclusion on a $3,544 total of the debtors' monthly expenses that they obtained by adding $500 for gasoline, $950 for food, and $235 for clothing to the monthly average of $2,259 in non-cash expenditures listed in the ledger the debtors maintained for ten months. The creditors made a $400 addition error. The sum of the figures is actually $3,944, only $47 less than the $3,991 that the creditors calculated the debtors' monthly net income to be. Furthermore, besides the math error, the creditors excluded a $70 cash item for auto repairs and $66.67 for loan repayment without explaining why they should not be considered. When these items are included in the creditors' calculations, the debtors actually have a net deficit every month, not substantial disposable income. The Court notes that under this calculation, adjusted to correct these errors, the deficit exists without including the potential expense for Mr. Innes's new prosthesis.

8. Monthly medical expenses

Again relying on the ten-month ledger the debtors kept, the seventh of the creditors' contentions is that the debtors' projected medical expenses of $306 per month are overstated. The Court has reviewed the ledgers and determined that the medical expenses reported there average about $270 per month. It appears the debtors' maximum annual deductible and co-pay liability under Mrs. Innes's family health insurance policy is $4,450, so the family could have to pay up to about $370 per month for services covered by the policy. The evidence did not indicate whether office visits, prescription drugs, and other medical expenses the family might incur are covered by the policy, or would be additional amounts they would have to pay. Of course, medical needs can vary significantly for any individual over time, making an accurate forecast of expenses for a family of eight very difficult. It is possible that the last two months of the year otherwise covered by the debtors' ten-month ledger would have disclosed expenses raising the monthly average for that year. The Court concludes $306 per month is a reasonable estimate of the family's out-of-pocket medical expenses.

9. Life and disability insurance

The ninth-listed argument the creditors make is that the debtors should substantially reduce their life and disability insurance expenses, or perhaps eliminate them entirely. While such expenses are voluntarily incurred, the Court is convinced that it is reasonably necessary for the parents of six minor children to make some provision for their continued support in the event one or both the parents die or become disabled. Other courts have reached similar conclusions. *See, e.g., Brown v. Salliemae Servicing Corp. (In re Brown)*, 227 B.R. 540, 543 (Bankr. S.D. Cal. 1998), *aff'd in part, rev'd in part on other grounds*, 239 B.R. 204 (S.D. Cal. 1999). The evidence indicated that the life and disability insurance payments deducted from Mrs. Innes's pay provide about $175,000 in coverage for her life, $15,000 for Mr. Innes's life, and $150,000 in accidental death and dismemberment coverage, probably just for her. No evidence was presented about the face value of the life insurance they purchase out of their net take-home pay. While the Court might consider some substantial amount of life and disability insurance to be excessive, the evidence presented here did not indicate that the debtors were buying too much.

10. Recreation or entertainment

The creditors' tenth-listed argument is that the debtors should reduce or eliminate their recreation or entertainment expense. The debtors testified that the $185 they reported for this item consisted of $30 per month for rental of the children's band instruments, $22 each time the family attended school sporting events, and one night of bowling per week for the debtors. While the Court can agree that $185 for recreation or entertainment would ordinarily sound excessive, that is only because few of the cases the Court sees involve a family as large as the debtors'. For a family of eight, spent as the debtors' indicated, it is a reasonably necessary amount.

B. Summary About the Debtors' Expenses

In sum, the Court is convinced the Inneses' projected expenses are reasonable and necessary for their family's support. The Inneses have demonstrated a need for the items included in their budget, and the creditors have not convinced the Court that any of the items should be deleted. Certainly, there are no luxury items in the budget. Even if insurance will pay for Mr. Innes's replacement prosthesis and Mrs. Innes's entire income is available for paying the student loans, their combined net incomes do not currently exceed their projected reasonable expenses at all, much less by anything close to the $460 or more per month that would have to be paid to service the debts. There is no reason to expect this situation to change significantly until at least three of the debtors' children have left home and become self-supporting. If the contested items deducted from Mrs. Innes's pay are properly allowable, the family would even more clearly suffer undue hardship if the student loans must be repaid. Families are not required to live at a poverty level or to obtain public assistance in order to service student loans; a modest budget without frivolous expenditures is sufficient to establish that student loans should be discharged. *Elmore v. Massachusetts Higher Education Assistance Corp. (In re Elmore)*, 230

B.R. 22, 26 (Bankr. D.Conn 1999); *Lebovits v. Chase Manhattan Bank (In re Lebovits)*, 223 B.R. 265, 271 (Bankr. E.D.N.Y. 1998); *Correll v. Union Nat'l Bank (In re Correll)*, 105 B.R. 302, 305-06 (Bankr. W.D. Pa. 1989).

C. The Debtors' Children

11. Child's earnings

The eleventh of the creditors' arguments concerns the earnings of the Inneses' oldest child. The Court is aware of no case requiring a minor child's earned income to be included in determining the debtors' family's disposable income under any provision of the Bankruptcy Code. Any expenses the child actually pays should not be included in the parents' budget, of course, but the Court does not believe the child's income can otherwise be deemed to be available to help pay the family's reasonable and necessary expenses so that a parent's student loans can be paid. Nothing presented to the Court has shown that the debtors included in their budget expenses that their son actually paid for from his earnings.

12. Children reaching age of majority

The twelfth-listed of the creditors' contentions is that the debtors' children will all instantly become completely self-supporting the moment they turn 18, the age of majority in Kansas. However, the Court does not believe the end of the state-imposed legal obligation to support one's child always marks the end of the child's actual dependence on the parents. In the related context of determining under §1325(b) who is a "dependent" whose support should be excluded from the debtor's "disposable income" because it is reasonably necessary for the debtor to provide the support, at least one court has indicated the existence of a legal obligation to provide support is not the hallmark for deciding who is a dependent. *In re Gonzales*, 157 B.R. 604, 609-10 (Bankr. E.D. Mich. 1993). The court said, "[S]ociety is prepared in this day and age to accept the notion that a 19-year old and a 21-year old undergraduate college students [sic] are still their parents' dependents." 157 B.R. at 610. Other courts have also indicated reasonably necessary expenses for the support of dependent children, even adults, may be deducted in determining disposable income. *E.g.*, *In re Meyers*, 173 B.R. 419, 426 n. 7 (Bankr. D. Kan. 1994) (disposable income under §1225(b)(2)). This Court agrees with these cases, and believes this insight has some bearing on the undue hardship question as well.

In this case, the Court believes it would be unreasonable to pretend that all six of the Inneses' children will achieve self-sufficiency at eighteen, and will instead assume it is likely that the debtors will have to continue to provide at least some of their support for another year or two, and possibly even more. Although an argument (that this Court would not find very convincing) might be made that Mr. Innes should stop supporting them the moment they turn eighteen because he owes student loans he should repay, no such argument can be asserted about Mrs. Innes, and she provides about half of this family's income. Furthermore, no matter how much Mr. Innes's spending for the children's support should be restrained, Mrs. Innes ought to be able to help them pay for any higher education they may wish to pursue, especially so that they might be less likely to wind up in Mr. Innes's present predicament. It certainly makes no sense to this Court to force the children to finance their educations with student loans in order that Mr. Innes might repay his student loans.

At some point, assuming the children will all eventually become capable of supporting themselves, it might no longer be reasonable for the debtors to provide support for them to the detriment of their creditors, but a child's reaching the age of majority is simply not the absolute boundary the creditors suggest it is. Furthermore, the Court notes that many of the debtors' expenses will not be reduced just because one of their children leaves home; only food, clothing, and recreation seem certain to go down.

D. Mrs. Innes's Income and Assets

The Court now turns to the question whether a debtor who owes student loans can be denied a hardship discharge because his spouse who does not owe the loans chooses to spend her discretionary income for food, clothing, education, insurance, recreation, and other non-luxury items, and to make a small contribution toward retirement. By far the majority of reported cases hold that the income of a non-debtor spouse must be considered when determining undue hardship. *See, e.g., White v. United States Dept. of Education (In re White)*, 243 B.R. 498, 509 & n. 9 (Bankr. N.D. Ala. 1999) (citing almost 50 cases doing so). The Court agrees generally with this proposition. The real question, though, is the extent to which the non-debtor spouse must subordinate his or her freedom of choice and the family's well-being to avoid jeopardizing the debtor spouse's undue hardship claim. Can the non-debtor spouse pay a fair share of the family's basic expenses for food, clothing, shelter, and so forth, and then use the remainder for what would ordinarily be considered to be appropriate, non-luxury expenditures, such as investing for retirement income? Or must the non-debtor spouse apply all his or her income to the family's basic necessities so that the debtor spouse's income can be applied to the student loan debt to the maximum possible extent? Here, the Court believes the case law does not give a clear answer.

Where the non-debtor spouse has a substantial income that supports a comfortable lifestyle or significant discretionary purchases of luxury items, courts have sometimes considered more of that spouse's income to be available to supply basic necessities, making more of the debtor's income available to pay the student loans. *See White*, 243 B.R. at 508-14. Another court has suggested (in the context of determining whether a pension benefit was reasonably necessary for the support of the debtor and dependents so that it would be exempt under §522(d)(10)(E)) that a spouse's income should only be considered to the extent of one-half the couple's common expenses and all that spouse's personal expenses to avoid depriving the debtor's creditors of an appropriate share of the debtor's income and to avoid making a self-sufficient debtor into a dependent of the spouse. *In re Velis,* 123 B.R. 497, 512 (D.N.J.), *rev'd in part on other grounds sub nom. Velis v. Kardanis,* 949 F.2d 78 (3d Cir. 1991).

The Court believes that the non-debtor spouse's income should be applied to that spouse's fair share of the family expenses. In addition, luxury items should be excluded from the expense equation. Support of non-minors, however, can be included in allowable expenses, depending on the circumstances. *Gonzales*, 157 BR. at 609-10.

The creditors also suggest Mrs. Innes should use her retirement savings to enable Mr. Innes to pay his student loan debts. The Court believes an analysis similar to that applied to the non-debtor spouse's income should apply here as well, although it is more difficult to say when retirement assets have exceeded the reasonably necessary stage. In this case, any analysis is made more difficult by the lack of evidence presented about Mrs. Innes's retirement plan. Typically, money cannot be withdrawn from such plans before about age 60 without incurring a substantial tax penalty. Some, but by no means all, plans allow money to be borrowed against the participant's interest, although failure to repay timely can again incur a withdrawal tax penalty. For present purposes, the Court will assume Mrs.

Innes's interest in the plan is worth $100,000, as she testified it might be. Both debtors are now about forty years old. The Court does not believe $100,000 is an excessive amount for a married couple that age to have in retirement savings. Absent unusual investment luck, the Court would not expect that sum to grow sufficiently to support the debtors in luxury in their retirement years. Mrs. Innes has no other assets that might be considered to be luxuries that she should be expected to contribute to help defray the family's reasonably necessary expenses. The Court can conceive of circumstances that would convince it such sacrifices should be made, but concludes they do not exist in this case.

Certainly, the case law indicates that Mrs. Innes should not be required to pay more than her proportionate share of the family's expenses so that Mr. Innes might be able to pay his student loans. As long as the family is not spending money frivolously or unnecessarily, and has a modest budget, Mrs. Innes cannot be expected to pay more than her share of the expenses. To require her to do more would essentially force her (or her children) to pay debts for which she is not liable and support Mr. Innes while being denied the right to apply some of her income to reasonable non-luxury items, such as the children's education, and a modest retirement fund. Furthermore, the Court must reiterate that the Innesses cannot currently afford to pay the required monthly payments on Mr. Innes's loans in any event. It will be more than six years before that might become a possibility, and it seems unlikely even then.

II. Additional Circumstances Indicating Persistence of Condition

The *Brunner* decision did not specify what "additional circumstances" might be relevant to show that the debtors' condition of maintaining only a minimal standard of living would be likely to last for a significant portion of the repayment period, but indicated the court had in mind circumstances that suggest the debtor's inability to pay will continue for a long time. A number of decisions have expressed views that are pertinent to the Inneses' situation. The Court is convinced a burden of debt that can never realistically be repaid constitutes an undue hardship. *See Coats v. New Jersey Higher Education Assistance Authority (In re Coats)*, 214 B.R. 397, 403 (Bankr. N.D. Okla 1997); *Elebrashy v. Student Loan Corp. (In re Elebrashy)*, 189 B.R. 922, 926-28 (Bankr. N.D. Ohio 1995). It is not reasonable to require a debtor to pay all projected disposable income for life to retire student loans. *Brown*, 227 B.R. at 545. A court should also be hesitant to impose a spartan life on family members who do not owe the loans, particularly children, in order to secure repayment of the loans. *Windland v. United States Dept. of Education (In re Windland)*, 201 B.R. 178, 182-83 (Bankr. N.D. Ohio 1996).

Here, the Inneses will, for much of the forseeable future, probably have reasonably necessary expenses equal to or greater than their incomes. Meanwhile, interest on Mr. Innes's student loan debts will continue to accrue at between $4,000 and $5,000 per year. The evidence indicated that the Inneses are not likely to experience anything more than cost-of-living wage increases in the future. By the time their children have grown up and become self-supporting, the debts, already large, will have grown substantially. Even at the lowest monthly payment rate now available, assuming he could qualify for it, Mr. Innes could not repay the loans before he reaches retirement age. In any event, the Inneses cannot currently afford even that lowest payment, and will probably not be able to afford it before several of their children have become independent. In fact, by the time their expenses might fall sufficiently for them to pay $460 or more per month toward the loans, the debt to be serviced will be approaching $100,000. It will be six years before three of the Inneses' six children have reached the age of majority, and will probably be at least that long before the youngest of those three is self-supporting. Consequently, it will also be at least that long before the Inneses would even possibly be able to begin making the required payments on the loans. Their ability to pay the loans then will exist, if at all, only if they are still married, healthy, and employed, and only if all of Mrs. Innes's income is devoted to helping Mr. Innes retire the student loan debts. While they might be able to make payments on the loans at that point if Mrs. Innes were willing to pay more than her fair share of the family's reasonably necessary expenses, they would likely have to continue doing so for most or all the rest of their lives. They would certainly still be paying when they reached the age at which they could begin drawing Social Security retirement benefits. It is obvious that they cannot currently service these loans or even the interest accruing on them. The Court cannot say when, if ever, their income and expenses will enable them to make meaningful payment on the loans. The Court is convinced the debtors' situation constitutes additional circumstances indicating that their financial status will not improve for a significant portion of the extremely long period during which Mr. Innes might be required to repay his student loans.

III. Good Faith Payment Effort

An inability to pay satisfies *Brunner*'s requirement of a good faith effort at payment. *Lebovits*, 223 B.R. 274-75; *Clevenger v. Nebraska Student Loan Program (In re Clevenger)*, 212 B.R. 139, 145-46 (Bankr. W.D. Mo. 1997); *Coats*, 214 B.R. at 404-05; *Brown*, 227 B.R. at 546-47. The evidence demonstrated that the Inneses have not had sufficient income to enable Mr. Innes to make the required payments on his student loan debts since they filed for bankruptcy and for some time before that. Mr. Innes was in the midst of an eighteen-month period of unemployment when he and his wife filed for bankruptcy. While their chapter 13 case has been pending, he has found work and their financial condition has improved considerably. Nevertheless, they still have nowhere near enough income to pay $460 or more per month on Mr. Innes's student loans while maintaining their minimal standard of living. Mr. Innes's inability to make the required payments on his loans satisfies the good faith payment efforts part of the *Brunner* test.

IV. Conclusion

For these reasons, the Court finds that excepting Mr. Innes's student loan debts from his chapter 13 discharge would impose an undue hardship on him and his family. Consequently, the debts are dischargeable under the applicable version of §523(a)(8).

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of December, 2000.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE