



Entered on Docket  
May 06, 2008

A handwritten signature in black ink, appearing to read "Mike K. Nakagawa".

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

CHARLES J. CLINTON and CYNTHIA E.  
CLINTON,

Debtors.

BK-S-05-23404-MKN

Chapter 7

CHARLES J. CLINTON and CYNTHIA E.  
CLINTON,

Plaintiffs,

v.

NATIONAL STUDENT LOAN  
PROGRAM; WINDHAM  
PROFESSIONALS, INC., as assignee of  
NATIONAL STUDENT LOAN  
PROGRAM; NELNET, INC.,

Defendants.

Adv. Proceeding No.: 06-01005-MKN

Date: August 28, 2007

Time: 9:30 a.m.

### MEMORANDUM DECISION AFTER TRIAL OF ADVERSARY COMPLAINT

This Memorandum Decision constitutes the Court's findings of fact and conclusions of law entered pursuant to Bankruptcy Rule 7052 incorporating by reference Rule 52 of the Federal Rules of Civil Procedure.

Trial in the above-captioned adversary proceeding was held before the Court on August 28, 2007. This is a core matter pursuant to 28 U.S.C. section 157(a) for which the Court has

1 subject matter jurisdiction pursuant to 28 U.S.C. section 1334. The matter has been referred to  
2 the Court pursuant to Local Rule 1001(b)(1) of the United States District Court for the District of  
3 Nevada. Venue is proper pursuant to 28 U.S.C. section 1406.

#### 4 **BACKGROUND<sup>1</sup>**

5 Charles J. Clinton and Cynthia E. Clinton (“Plaintiffs” or “Debtors”), plaintiffs in this  
6 adversary proceeding voluntarily filed a joint Chapter 7 bankruptcy petition on October 12,  
7 2005. They received a discharge pursuant to Section 727(b) on March 2, 2006. (Dkt# 23)<sup>2</sup>

8 On January 12, 2006, Debtors commenced the instant adversary proceeding seeking a  
9 determination that their obligations for various student loans are dischargeable under Section  
10 523(a)(8) as constituting an undue hardship. The complaint names as defendants the National  
11 Student Loan Program, Windham Professionals, Inc. as assignee, and Nelnet, Inc. An answer  
12 (ADkt# 10) was filed on February 13, 2006, by Educational Credit Management Corporation  
13 (“ECMC”) as holder of all right, title and interest in the subject obligations<sup>3</sup>. Pursuant to a  
14 stipulated order entered on May 16, 2006 (ADkt# 18) and an amended order entered on August  
15 10, 2006 (ADkt# 21), ECMC was substituted into the adversary proceeding as the real party in  
16 interest for the National Student Loan Program.

17 After the complaint and answer were filed, the parties waived a formal discovery plan  
18 (ADkt# 13) and a trial initially was scheduled for November 27, 2006. The bankruptcy case and  
19 adversary proceeding were reassigned, however, and the trial was rescheduled. After numerous  
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21 <sup>1</sup> In the text and footnotes of this Memorandum Decision, all references to “Section”  
22 shall be to provisions of the Bankruptcy Code appearing in Title 11 of the United States Code  
23 unless otherwise indicated. All references to “Rule” shall be to provisions of the Federal Rules  
of Bankruptcy Procedure unless otherwise indicated.

24 <sup>2</sup> References in this Memorandum Decision to “Dkt#” are to documents filed in the  
25 Chapter 7 case while references to “ADkt#” are to documents filed in the adversary proceeding.

26 <sup>3</sup> By a stipulation and order entered February 14, 2006 (ADkt# 12), Windham  
27 Professionals was dismissed from the adversary proceeding but the National Student Loan  
Program was not.

1 continuances, the trial took place on August 28, 2007.

2 At trial, counsel for the parties stipulated to the admission of ECMC's only exhibit, and  
3 also stipulated to the admission of only certain exhibits offered by the Debtors. ECMC's request  
4 for judicial notice of certain materials was granted by stipulation.

5 Debtors presented themselves as the only two witnesses in the case. No witnesses were  
6 offered or presented by ECMC. Without objection, the Debtors' son, Michael Pohlmeier, was  
7 present in a wheelchair at counsel's table throughout the trial. After the close of evidence, final  
8 arguments were presented and the matter was taken under submission.

### 9 APPLICABLE LEGAL STANDARDS

10 Under Section 727(b), a debtor generally is discharged from personal liability for all  
11 debts incurred prior to the filing of the bankruptcy petition. Under Section 523, however, certain  
12 types of debt are excepted from the discharge. Section 523(a)(8) excepts any debt "for an  
13 educational...loan made, insured or guaranteed by a governmental unit, or made under any  
14 program funded in whole or in part by a governmental unit..."

15 This exception from the bankruptcy discharge applies for educational loans "unless  
16 excepting such debt from discharge...will impose an undue hardship on the debtor and the  
17 debtor's dependents." Because "undue hardship" is not defined in the Bankruptcy Code, a test  
18 has been adopted in this circuit requiring the presence of three elements: (1) that the debtor  
19 cannot maintain, based on current income and expenses, a minimal standard of living for himself  
20 and his dependents if forced to repay the educational loan, (2) that additional circumstances exist  
21 indicating that the debtor's state of affairs is likely to persist for a significant portion of the  
22 repayment period of the loans, and (3) that the debtor has made a good faith effort to repay the  
23 loans. See United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1111 (9<sup>th</sup> Cir.  
24 1998).

25 The debtor bears the burden of proof of all elements required to obtain a hardship  
26 discharge of a student loan obligation. See Carnduff v. United States Department of Education

1 (In re Carnduff), 367 B.R. 120, 127 (B.A.P. 9<sup>th</sup> Cir. 2007). The required elements must be  
2 established by a preponderance of the evidence. Id. at 128.

### 3 THE EVIDENTIARY RECORD

4 The parties did not stipulate as to any facts prior to trial and the answer filed by ECMC  
5 (Adkt# 10) admitted only that the adversary proceeding is a core matter, that the Plaintiffs are  
6 debtors in a bankruptcy proceeding, and that the Debtors are obligated on certain student loans in  
7 excess of \$67,137.00 and \$28,967.00.

#### 8 1. The Testimony of Witnesses at Trial.

9 As previously noted, only the Debtors testified at trial and ECMC presented no  
10 witnesses to dispute or contradict their testimony.

##### 11 A. Cynthia E. Clinton

12 Cynthia E. Clinton ("Cynthia") testified that she is 44 years old and has a degree  
13 in fashion design that she received in December 1991. Her son, Michael Pohlmeier ("Michael"),  
14 is 24 years old. Cynthia married Charles J. ("Jim") Clinton in 1986 when Michael was around 3  
15 years old. Cynthia and Jim have two other children, a 14 year old son and an 11 year old  
16 daughter.

17 When he was four or five months old, Michael was diagnosed with cerebral palsy  
18 apparently caused by a cyst located in the center of his brain. He has had numerous neurological  
19 and orthopedic surgical procedures. Michael is quadriplegic and is severely mentally retarded  
20 according to most tests.

21 Michael's condition requires him to take a variety of medications including Clonazepam,  
22 Diovan, Cardizam, Tranzine and Carnitine. He receives a liquid diet five times a day plus  
23 additional fluids two times a day. His medications are administered three times a day. Because  
24 he cannot control his bodily functions, Michael wears a diaper that must be changed every two  
25 hours. Over a 24 hour period, his care takes place between approximately 7:00 a.m. and  
26 midnight. It was not clear from Cynthia's testimony whether Michael's diaper must be changed  
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1 between midnight and 7:00 a.m.

2 Michael's care primarily is provided by Cynthia unless there are complications due to  
3 illness. At such times, Jim reschedules his work to help out. Tasks such as changing Michael's  
4 diaper, however, have gotten more difficult as his contractions have gotten worse and also  
5 because he has gotten older and heavier. An aid will assist five days a week, but for only a  
6 limited time - usually a half hour for bathing Michael - but not much more. Jim does most of the  
7 lifting of Michael when Jim is home from work. When he is not working on weekends, Cynthia  
8 testified that Jim helps more with Michael's care or spends time with the other kids doing  
9 scouting activities.

10 In 2005, Cynthia and Jim visited four separate residential care facilities to determine  
11 whether Michael's needs could be met outside of the home. Three of the facilities indicated that  
12 they could not care for anyone with Michael's degree of disability. The fourth facility indicated  
13 that it could do so, but that it did not have any patient that was completely immobile and without  
14 means to communicate verbally. The fourth facility also indicated that it did not have an  
15 available space for Michael.

16 Cynthia testified that even if Michael could be placed in a residential care facility that  
17 would be covered by Medicaid, she would need to be present much of the time since staffing is  
18 not adequate and Michael is unable to verbally communicate his needs. She is concerned that  
19 bedsores would develop, as they have in the past, if Michael's diaper is not changed frequently.  
20 When she visited the four residential care facilities, Cynthia did not see any patients with  
21 personal aids present and she also did not see any patients who were entirely disabled. She  
22 testified that additional attention beyond the capabilities of such a facility is necessary to keep  
23 her son alive.

24 Cynthia also testified that it would cost \$15 to \$20 per hour to hire a person to provide  
25 respite care to Michael for a couple of hours each day or week, such as feedings, changing  
26 diapers, and similar tasks that would not require a registered nurse. She does not believe that  
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1 during the time that respite care could be present, she would be able to work enough hours to  
2 cover its cost.

3 Prior to moving to Las Vegas, Cynthia used her fashion design degree for her own  
4 business making wedding dresses. She worked out of her house where clients would visit.  
5 Some of her clients, however, were uncomfortable around Michael, presumably due to his  
6 medical condition and needs. Cynthia believes that she would need a large influx of cash, which  
7 she does not have, to start a viable business involving fashion design. Because fashion design is  
8 a fast-moving field and she has not worked in it for many years, Cynthia does not believe she  
9 would be able to make a living in the field now.

10 Cynthia does not work and was last employed in 1996 by Monte Carlo Hotel and Casino  
11 in Las Vegas taking room reservations. She and her husband had just moved to Las Vegas and  
12 after one year it became impossible to continue working because she needed too much time off  
13 to take care of Michael. Cynthia has not looked for employment since leaving her job at the  
14 Monte Carlo and she cannot imagine being able to keep a job due to the time constraints, as well  
15 as the physical and emotional drain of taking care of Michael. She acknowledged that she has no  
16 physical restrictions on her ability to work and that she chooses to stay home to take care of her  
17 son. Cynthia testified that she has no income and that the family lives on Jim's earnings and  
18 what Michael receives through Social Security.

19 Social Security provides \$603 per month for Michael's care. Cynthia testified that those  
20 monies do not cover all expenses that are required, including oxygen, more absorbent diapers,  
21 wipes, medications, visits to orthopedic specialists, and higher utility bills. She testified that  
22 additional formula for Michael costs \$150 per case and six cases are required each month.  
23 According to Cynthia, these additional items are not covered by the monthly benefit. She also  
24 testified that a van, including a lift device, is required to transport Michael to various medical  
25 appointments.

26 Because of the cost and time taken for Michael's care, Cynthia testified that certain  
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1 activities with her other two children are not affordable, e.g., a trip to Disneyland. She does not  
2 believe it is possible to further reduce the family budget without depriving her other two children  
3 of their basic needs.

4 Cynthia testified that in 1996 she took out a loan to consolidate previous student loans.  
5 She could not recall many details, but knew it was not a grant or scholarship and that the  
6 consolidation loan was for more than a 10 year term. Cynthia testified that she and her husband  
7 did make student loan payments when they could, but did not recall whether any payments were  
8 made at the time of or after the 1996 loan consolidation. She recalled that the last notice she  
9 received was that a \$400 payment was required on her loan, but does not know what the current  
10 loan payment would be.

11 She testified that she and her husband investigated alternative loan payment programs,  
12 but were informed in 1998 that the programs would not apply to their situation. She recalled  
13 speaking to her lender after obtaining a forbearance on loan payments, but was informed that a  
14 \$100 monthly payment would make no difference. Cynthia testified that they never applied for  
15 an alternative payment program.

16 When presented with a copy of a loan consolidation worksheet, admitted as ECMC's  
17 Exhibit "A", Cynthia testified that she had seen the document before and was aware of the  
18 William D. Ford Federal Direct Loan Program. She discussed an income contingent payment  
19 plan with her husband and did not believe it to be a realistic alternative because of uncertainties  
20 over whether the payments would continue and whether they would increase. She did not  
21 believe that the family could ever make payments totaling \$43,920.34 as stated on Exhibit "A"  
22 even though she was aware that any unpaid balance at the end of 25 years would be discharged.  
23 She read into the record footnote 1 from Exhibit "A" which referred to estimated monthly  
24 payments under a graduated payment plan, as well as footnote 2 which referred to payments  
25 under the income contingent payment plan. Based on these footnotes, only the latter of which  
26 applies to income contingent plans, Cynthia reiterated her belief that the alternatives were too  
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1 uncertain and that she and her husband did not apply for the program. Moreover, she also  
2 testified that the other payment options on Exhibit "A" - a Standard Plan, an Extended Plan, and  
3 a Graduated Plan - were simply out of the question because the required minimum payments  
4 were too much.

5 **B. Charles J. ("Jim") Clinton**

6 Jim testified that he graduated from the University of Nebraska in 1990 with a  
7 degree in business administration. Since that time, he has worked in the field of finance, and  
8 currently is licensed by the State of Nevada to sell life and health insurance and variable annuity  
9 policies. Jim also holds various licenses to sell securities. He described his occupation as  
10 providing investment advisory services to individuals, i.e., he advises clients regarding  
11 investment, retirement and insurance needs. He is self-employed and operates through entities  
12 known as Independent Planning Associates, LLC, and Receiving Abundance, Inc. Apparently,  
13 Jim also has an interest in or relationship with National Planning Corporation, a separate entity  
14 that hold his securities licenses. He testified that Independent Planning Associates uses funds  
15 from National Planning Corporation to meets its operating expenses.

16 Prior to operating his own business, Jim worked with American Express Financial  
17 Advisors as an independent contractor. When he and Cynthia moved to Nevada in 1996, he  
18 went into a partnership that lasted until 1999<sup>4</sup>, and then formed Independent Planning  
19 Associates, LLC, in 2000 with another member. The other member of Independent Planning  
20 Associates withdrew in 2006 and Jim owed \$50,000 to the former member as a result of  
21 retaining the balance of the interest in the business. Jim testified that his obligation to the former  
22 member was discharged by the current bankruptcy.

23 Jim testified that he is self-employed because his ventures with other partners or  
24 members never worked out. He testified that he needs to be available to assist in the care of

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26 <sup>4</sup> He also testified that he worked for Sun America from 1997 to 1999. It is unclear  
27 whether the partnership he formed worked on an independent contractor basis for Sun America,  
28 or whether the name of the partnership entity itself was Sun America or some variation thereof.



1 Michael and therefore needs to be able to control his own schedule with clients, time to travel,  
2 and hours at his workplace. Jim indicated that he and Cynthia both attend medical appointments  
3 involving Michael in order to discuss and absorb information regarding their son's needs.

4 Jim testified that he works from 55 to 65 hours per week, including nights and weekends  
5 when he is not assisting in Michael's care. He testified that he cannot service his clients by  
6 working only 40 hours. However, he does not believe that putting more than 65 hours into his  
7 job would produce significantly greater income. Jim testified that any increase in his income  
8 from putting in such hours would not be worth the time taken away from Michael and his other  
9 two children. He acknowledged that because Cynthia must spend so much time with Michael, he  
10 needs to spend more time with the other children. On direct examination, Jim volunteered that  
11 "It's not a normal life."

12 Jim also testified that he has not looked to work for someone else since 1996 (when he  
13 worked for American Express Financial) and is not interested in bringing on another partner. He  
14 has not employed a "head hunter" to find other work nor has he applied for unemployment  
15 benefits. Because he cannot afford it, Jim does not advertise for his financial services and relies  
16 on referrals for more clients. He testified that if he went to work at a "wire house"<sup>5</sup> such as  
17 Merrill Lynch, UBS, Morgan Stanley, or Paine Webber, he would have to triple his gross  
18 earnings to net what he currently makes. He explained that individuals are compensated at a  
19 reduced commission of between 30 to 45% at a wire house, while his commissions are at the  
20 88% level on his current self-employed basis. Moreover, if he went to work for a wire house, he  
21 would be responsible for getting his own clients unless he made arrangements to share  
22 commissions with an existing producer. Jim testified that he hopes he will be able to increase his  
23 income, but has no concrete expectations of an increase.

24 He testified as to his family's expenses by reference to the budget set forth in Exhibit  
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26 <sup>5</sup> The Court assumes that a "wire house" is a reference to a brokerage firm that is linked  
27 to multiple branch offices.

1 "31" which also appears on page 11 of certain interrogatory responses admitted as Exhibit "4".  
2 He testified that a grocery expense of \$1,000 includes non-food items such as toilet paper,  
3 detergent and other cleaning supplies, pads and ointments for Michael's care, purified water for  
4 Michael and a beverage called Propel used when Michael encounters problems with his  
5 gastrointestinal tract. The list of expenses also includes a \$54 item for satellite television and a  
6 \$150 item for other expenses with the children.

7 Clothes are purchased at department and discount stores such as Kohl's, Penneys,  
8 Walmart or Sam's Club, and at 4 to 6 month intervals for the minor children. Jim believes that  
9 the gasoline and food expenses will increase. Although the children currently are home  
10 schooled, he believes that clothing and transportation expenses will increase when they enroll in  
11 the available public high school. Jim believes that his family will need to purchase books for use  
12 at home since assigned text books are not available for students to take home at the high school.  
13 He does not know whether his children would qualify for a school lunch program or subsidized  
14 transportation expenses.

15 Jim testified that he is concerned with transportation expenses because the family van is a  
16 1994 model with over 208,000 miles. He indicated that repair costs are high and a breakdown  
17 while transporting Michael may cause serious problems if it occurs during summer months in  
18 Las Vegas. Jim testified that he can do basic home maintenance himself, but did not testify as to  
19 whether he can maintain the van himself.

20 Jim testified that he took out a number of student loans between 1979 and 1983 before he  
21 obtained his degree. He consolidated his student loans in 1996 at the same time Cynthia  
22 consolidated hers. Through the consolidations, the maturity dates of the obligations were  
23 extended and payments were lowered. He also testified that he had made sporadic payments on  
24 the student loans and that most of his loans were on forbearance before he met Cynthia. Jim  
25 further testified that after the loans were consolidated in 1996, he and his wife made perhaps a  
26 half dozen payments. When asked on cross-examination whether he had copies of any cancelled  
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1 checks, he testified that he did not but could obtain copies of his bank statements. Jim testified  
2 that he does not recall the amount of the monthly payments, but thinks that the monthly payment  
3 on his consolidated loan would be \$325.00. He does not know what the amount of Cynthia's  
4 monthly loan payment would be today. He stated that he did make student loan payments  
5 whenever he was able to do so rather than putting money into a 401(k) or IRA for retirement  
6 purposes. Jim stated that he presently has no funds set aside for retirement.

7 Jim testified that he was primarily responsible for making inquiries regarding  
8 alternative payment plans for the student loans. He last contacted a lender prior to 2000,  
9 apparently in 1998, at which time he was informed that making payments of \$100 to \$115 per  
10 month would not prevent the consolidated loans from going into default, and that a forbearance  
11 agreement would be the recommended option. After 2000, he remembered receiving collection  
12 calls seeking payments of \$700 to \$800 per month, which Jim and his wife simply could not  
13 afford. Based on his current income and circumstances, Jim does not believe he will have the  
14 ability to repay a substantial portion of the consolidated loans over their remaining terms.

15 He also was questioned about the options appearing on the loan consolidation worksheet  
16 admitted as ECMC's Exhibit "A". Jim was familiar with the options set forth, but testified that  
17 the income contingent option was not workable since even an \$800 monthly payment would not  
18 cover accruing interest on a debt of \$118,622. Although the initial monthly payment figure of  
19 "\$0.00" appearing on Exhibit "A" was attractive, Jim testified that he had never been offered  
20 such a payment plan. If he had been offered a guaranteed monthly payment of zero dollars for 10  
21 years, Jim testified that he might take it. He also expressed concern over changing  
22 circumstances and increases in costs of living that might suddenly give rise to a much larger  
23 payment. Apparently referring to a Graduated payment plan, Jim also testified that paying  
24 \$335,000 over a 30 year period would require him to make payments until he was 76 years old.  
25 The crux of his testimony was that the alternative payment options had not been pursued because  
26 he and Cynthia believed they were too uncertain.

27 **2. The Documentary Evidence Admitted at Trial.**

1 Plaintiffs' Exhibit "1" includes a copy of Schedules "I" and "J" filed by the Debtors on  
2 October 12, 2005, and Amended Schedule "F" filed on February 23, 2006. Schedule "I" shows  
3 Jim having self-employed gross monthly income of \$8,556 and Cynthia having no monthly  
4 income as full-time care giver for her son. It also shows \$507 in Social Security income for  
5 Michael, for total gross monthly income of \$9,063. Schedule "J" shows monthly expenses  
6 totaling \$9,507.67, which includes business expenses of \$5,206.67. Schedule "J" does not show  
7 any budgeted amount for student loan payments. Amended Schedule "F" shows various  
8 unsecured debts owed by the Debtors as of the commencement of the case.

9 Plaintiffs' Exhibit "2" includes a copy of a 2003 corporate income tax return for  
10 Receiving Abundance showing total income of \$75,867 and expense deductions of \$74,755.  
11 Also included is a copy of a 2004 partnership income tax return for Independent Planning  
12 Associates, LLC, showing total income of \$47,002 and expense deductions of \$72,963. Also  
13 included is a copy of a 2004 corporate income tax return for Receiving Abundance showing total  
14 income of \$41,764 and expense deductions of \$40,371. Also included is a copy of a 2005  
15 individual income tax return for Jim and Cynthia that shows gross income of \$24,737.

16 Plaintiffs' Exhibits "3" and "4", respectively, consist of Cynthia's and Jim's responses to  
17 common interrogatories propounded by ECMC. Plaintiffs' Exhibits "5" and "6" consist of their  
18 responses to common requests for documents propounded by ECMC. Plaintiffs' Exhibits "7"  
19 and "8" consist of their responses to requests for admissions propounded by ECMC.

20 Plaintiffs' Exhibit "31" is a monthly budget of the household expenses. Plaintiffs'  
21 Exhibit "32" is a copy of a Ninth Circuit slip opinion in a case entitled Lorna Kaye Nys v.  
22 Educational Credit Management Corporation (In re Nys), filed April 26, 2006. Plaintiffs'  
23 Exhibit "33" is a copy of certain "National Standards for Allowable Living Expenses" published  
24 by the Internal Revenue Service.

25 ECMC's Exhibit "A" is a printout of the loan consolidation worksheet, entitled Direct  
26 Consolidation Loan - Loan Calculator, showing total student loans consolidated of \$118,622.00  
27 and an interest rate of 8%. It also shows an adjusted gross income figure of \$22,989 and a  
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1 family size of five people. It also sets forth various repayment plan categories, specifying the  
2 number of payments, initial monthly payment amounts, and the total of all payments.<sup>6</sup>

### 3 DISCUSSION

4 Based on the evidence presented, the Court examines the required elements for a  
5 hardship discharge below.

#### 6 1. Debtors' Ability to Pay the Student Loans.

7 Cynthia is not employed and takes care of Michael full time. While she  
8 "chooses" to take care of her son rather than work, she has no viable options given her  
9 diminished skills and knowledge in the area of fashion design. While she once took room  
10 reservations for a local hotel, Michael's needs prevented her from keeping her position. She also  
11 attempted to work part-time at Jim's office as an administrative assistant, but Jim's then-partner  
12 apparently objected. See Exhibit "3", Interrogatory Response 14. She had no separate income  
13 in 2005, see 2005 individual income tax return included in Exhibit "2", and she was not working  
14 at the time of trial. Cynthia has no income with which to pay her consolidated student loan  
15 obligation.

16 Jim is self-employed as a financial adviser. According to Schedule "I" filed at the  
17 commencement of the bankruptcy case, Jim's gross monthly income was \$8,556. Schedule "I"  
18 also shows receipt of an additional \$507 per month in Social Security benefits for Michael. The  
19 testimony at trial, however, was that \$603 is received per month in such benefits. According to  
20 Jim's responses to interrogatories signed on July 13, 2006, the total gross household income for  
21 the twelve month period through July 13, 2007, was expected to be \$101,000 from National  
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23 <sup>6</sup> ECMC also requested that the Court take judicial notice of various materials, to which  
24 Plaintiffs did not object. Items 1 through 13 consist of copies of provisions of the Code of  
25 Federal Regulations and of Title 20 and Title 26 of the United States Code. Item 14 is a copy of  
26 the Ninth Circuit opinion in Merkel v. Commissioner of Internal Revenue, 192 F.3d 844 (9<sup>th</sup> Cir.  
27 1999). Item 15 consists of the 2004 Poverty Guidelines for the U.S. Department of Health and  
28 Human Services. Item 16 consists of a copy of "A Borrower's Guide to Direct Consolidation  
Loans" apparently issued in connection with the William D. Ford Federal Direct Student Loan  
Program.

1 Planning Corporation, \$7,236 from Social Security, and \$4,000 from various insurance  
2 companies. See Exhibit "4", Interrogatory Response 19. Assuming a total figure of \$112,236  
3 for the 12-month period, Debtors' monthly average gross income would be \$9,353 through July  
4 13, 2007.

5 According to Schedule "J", Jim had business expenses of \$5,206.67 per month, and total  
6 monthly expenses for the entire household of \$9,507.67. The average monthly business  
7 expenses set forth on Schedule "J" do not appear to be inconsistent with the expenses set forth in  
8 the 2005 individual income tax return. The remainder of the non-business expenses shown on  
9 Schedule "J" do not appear to be excessive or unreasonable.<sup>7</sup>

10 Debtors' Schedule "J" was filed on October 12, 2005. In response to ECMC's  
11 interrogatories on July 13, 2006, Jim provided an itemization of average monthly amounts paid  
12 by the household over the prior six months. See Exhibit "4", Interrogatory Response 18. At  
13 trial, an updated budget summary was provided as Exhibit "31" and testimony was provided by  
14 Jim as to the breakdown of various expense items, particularly the \$1,000 expense item for  
15 groceries. Cynthia testified as to many expenses that are not covered by Michael's Social  
16 Security benefit and which must be included in the general household expenses, presumably the  
17 grocery category.

18 There is a large discrepancy between the average monthly payments on the first and  
19 second mortgages identified on Schedule "J" and Interrogatory Response 18 (\$1,379 and  
20 \$1,304.31, respectively) and the total amount of the monthly mortgage and property tax payment  
21 set forth on Exhibit "31" (\$2,066.00). The discrepancy was not clearly explained by either Jim  
22 or Cynthia. There also is a substantial difference between the medical and dental insurance costs  
23 shown on Schedule "J" (\$150) and Interrogatory Response 18 (\$125) and the amount shown on

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24  
25 <sup>7</sup> Exhibit "33" is a copy of the National Standards for Allowable Living Expenses  
26 published by the Internal Revenue Service. Although it was admitted into evidence, neither the  
27 Debtors or ECMC suggest how the living expense allowances therein could or should be applied  
28 to a household where a majority of the gross income apparently is expended on self-employed  
business expenses.

1 Exhibit "31" (\$625). Assuming the lowest figures for the monthly mortgage payments  
2 (\$1,304.31) and the medical and dental insurance costs (\$125), and excluding an estimated figure  
3 for a replacement van (\$700.00), however, the current, total average monthly expenses appearing  
4 on Exhibit "31" is \$10,591.98<sup>8</sup>.

5 Apart from the Debtors' testimony, no evidence was introduced by ECMC as to the  
6 reasonableness of Debtors' budget or as to whether the budget matches the Debtors' actual  
7 expenditures. At closing argument, ECMC lamented the absence of receipts being introduced  
8 into evidence, but the Court is aware of no requirement that the Debtors do so. Moreover, it  
9 appears that ECMC requested the Debtors to produce documents supporting their interrogatory  
10 responses, including their budget of monthly expenses. See Exhibit "3", Interrogatory Response  
11 23, and Exhibit "4", Interrogatory Response 23. There is no apparent reason why ECMC could  
12 not have obtained the receipts for use in impeaching the Debtors' testimony. Debtors' testimony  
13 as to the reasonableness and necessity of their budget was credible.

14 Based on the budget presented by the Debtors, the vast majority of which consists of  
15 Jim's business expenses and costs for Michael's care that are not covered by Social Security, the  
16 Court concludes that there currently are no funds available from the gross household income to  
17 make any payments on the student loan obligations of Cynthia or Jim<sup>9</sup> while maintaining a  
18 minimal standard of living for themselves and their dependents.

19 **2. Additional Circumstances Regarding Debtors' State of Affairs.**

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21 <sup>8</sup> This total includes minor amounts on Exhibit "31" that are nominally different from the  
22 figures on Schedule "J" or Interrogatory Response 18. For example, it includes a cell phone  
23 expense of \$90 that appears on in neither previous budget, a clothing expense of \$200 that is less  
24 than the Schedule "J" amount of \$300, an electricity and heating expense of \$280 rather than  
25 \$260 on Schedule "J", an automobile expense of \$470 rather than a transportation expense of  
26 \$300 appearing on Schedule "J", and outside meals of \$150 that do not appear on Schedule "J".

27 <sup>9</sup> Debtors also face certain tax obligations for 2002 and 2003 that were not discharged by  
28 their 2005 bankruptcy proceeding. See Exhibit "4", Interrogatory Response 20, and Debtors'  
Schedule "E" attached to the Complaint.



1 Debtors have sought alternative arrangements for Michael's care. Debtors  
2 testified that residential care facilities may be covered by Medicaid. The residential care  
3 facilities investigated by the Debtors, however, apparently cannot adequately provide for  
4 Michael's care for several reasons. First, they do not have staffing levels sufficient to constantly  
5 monitor a non-ambulatory, non-communicative resident. Second, they have no experience with  
6 residents suffering from Michael's acute conditions. Third, none of the facilities visited had any  
7 openings at the time. Even if there was a residential care facility that could take him, Cynthia  
8 testified that none would have staffing sufficient to be able to change Michael's diaper often  
9 enough to prevent bedsores or respond to his nonverbal signals. As a result, Cynthia expressed  
10 her belief that she would have to spend so much time at the care facility that she would not be  
11 able to retain a paying job.

12 At closing argument, ECMC characterized Cynthia's testimony as "self-serving" even  
13 though ECMC had offered no evidence whatsoever demonstrating that there are qualified  
14 facilities available currently or in the future to adequately provide for Michael's care.  
15 Notwithstanding that the testimony of a party invariably is designed to serve the interests of that  
16 party, Cynthia's testimony was credible and fully consistent with the Court's observation of  
17 Michael's situation during trial.

18 According to Cynthia, the Debtors would have to pay respite care workers \$15 to \$20 per  
19 hour to come to her home to tend to Michael. During the times when respite care workers were  
20 present, she testified that she could not work enough hours outside the home to net income to  
21 match what she would have to pay the care workers. If Cynthia were relieved of having to care  
22 for Michael, her chances of obtaining employment in the area of fashion design would depend on  
23 her ability to update her training. It also would depend on the hiring needs of potential  
24 employers. If she were to open her own business, she questions whether she would have the  
25 working capital to do so. No evidence was introduced by ECMC as to the availability of  
26 employment opportunities for persons having Cynthia's current skills, of the time and cost of  
27 retraining, or of the costs associated with starting a new business. Cynthia's testimony was  
28



1 credible.

2 Jim has not sought to work for anyone else, has not engaged a “head hunter” to look for  
3 potential employers, and does not believe that he could net on a commission basis with a “wire  
4 house” what he makes now. His average work week ranges from 55 to 65 hours and Jim does  
5 not believe that working additional hours would generate significant income. Comparing the  
6 average monthly income set forth in Schedule “I”, the Debtors’ 2005 individual income tax  
7 return, and Jim’s twelve month income projection through July 2007, with the average annual  
8 business expenses set forth in the same tax return and the budget of average monthly expenses in  
9 Exhibit “31”, the Court concludes that the increases in Jim’s income roughly approximate the  
10 increases in his business expenses. No inference can be drawn that Jim is underemployed.

11 In an ideal world, most parents can expect that their offspring will no longer be  
12 dependent upon them for financial and physical support when they reach adulthood. There is  
13 nothing in the record to suggest that the Debtors’ other minor children cannot achieve at least  
14 financial independence after they become adults in the not too distant future. However, no  
15 evidence was presented that Michael’s condition will ever improve or that the physical and  
16 financial burden of his care will decrease as he becomes older. The only evidence presented  
17 regarding Michael’s condition, as well as the physical difficulties imposed by his care, was  
18 Cynthia’s testimony. The Court’s observations of Michael in the courtroom provide no reason to  
19 doubt her testimony.

20 Not surprisingly, no evidence was introduced by either side - the Debtors or ECMC -  
21 regarding Michael’s life expectancy.<sup>10</sup> As of the time of trial, Michael was 24 years old and had  
22 been diagnosed with cerebral palsy before he was even a year old. Although he is quadriplegic  
23 and severely retarded mentally, no evidence was introduced that Michael cannot be expected to

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24  
25 <sup>10</sup> It is equally unsurprising that Cynthia believes that Michael would not survive in a  
26 residential care facility unless he is under constant or nearly constant supervision. The Court  
27 finds credible her belief in this regard since it is based on her experience when Michael has been  
28 hospitalized in the past.

1 live for an additional 24 years or more with proper care.

2 It is not clear from the record whether the Debtors' consolidation loans in 1996 matured  
3 in ten years or thirty years. According to Exhibit "A", however, a Standard repayment plan is 10  
4 years, Extended and Graduated plans are for 30 years, and an Income Contingent plan is for 25  
5 years. Assuming the consolidated loans mature in the year 2226, i.e., 30 years after execution, it  
6 does not appear that the Debtors' situation will change during the balance of such a term due to  
7 Michael's chronic condition. If the consolidated loans mature in a shorter period, then there is a  
8 greater certainty that the Debtors' state of affairs will not change during the maturity period.

9 While the cruelest argument would be that the Debtors will have more funds and earning  
10 capacity available if Michael predeceases them, the reality is that he is alive and is completely  
11 dependent on the Debtors for his survival for the foreseeable future.

12 Under these circumstances, the Court concludes that the Debtors' state of affairs is likely  
13 to persist for at least a significant portion of the repayment period for their consolidated student  
14 loans.

15 **3. Debtors' Efforts to Repay Their Student Loans.**

16 Jim testified that payments were made both before and after the loans were consolidated  
17 in 1996. Cynthia testified that payments were made whenever she and her husband could do so.  
18 While the Debtors did not produce copies of any cancelled checks at trial, ECMC also did not  
19 produce any evidence to show nonpayment, by way of loan payment histories, copies of  
20 collection demands, or testimony from persons knowledgeable of the accounts.<sup>11</sup> The only  
21 "evidence" offered by ECMC was the direct consolidation loan worksheet admitted as Exhibit  
22 "A".

23 Both Debtors testified that they had obtained a forbearance or deferment of their loans at  
24  
25

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26  
27 <sup>11</sup> ECMC's trial statement (ADkt# 31) listed as a trial exhibit a loan detail and loan  
28 history of the Debtors' notes, but it was never offered into evidence at trial.

1 certain times, and admitted in discovery that they had contacted “UNIPAC”<sup>12</sup> to explore options  
2 to lower monthly payments or interest rates on their loans. See Exhibits “7” and “8”, Request  
3 for Admissions Responses 10. Debtors apparently were informed that they could not get another  
4 consolidation loan because they had one previously. Id.

5 Both Debtors testified that they did not apply for an income contingent repayment plan  
6 because they believed that all of the plans, including the Income Contingent plan, were  
7 uncertain. Cynthia’s uncertainty, however, apparently was based in part on footnote 1 on the  
8 first page of Exhibit “A”, which applies only to a Graduated payment plan rather than an Income  
9 Contingent plan. Jim’s uncertainty also appears to have been based in part on his belief that he  
10 could not work until his is 76 years old to pay \$335,000 over a 30 year period. That amount and  
11 length of time, however, would be for a Graduated payment plan rather than an Income  
12 Contingent plan. At closing argument, Debtors’ counsel suggested that her clients could not  
13 apply for an Income Contingent plan as long as an adversary proceeding was pending under  
14 Section 523(a)(8).<sup>13</sup> Because a complaint to determine undue hardship under Section 523(a)(8)  
15 is not subject to the deadlines imposed by Section 523(c), however, there appears to have been  
16 no legal reason why the adversary proceeding could not have been dismissed without prejudice  
17 to permit the Debtors to apply.

18 A debtor’s pursuit of an income contingent repayment or other plan is a factor to consider  
19 in determining good faith.<sup>14</sup> See, e.g., Educational Credit Management Corporation v. Mason  
20 (In re Mason), 464 F.3d 878 (9<sup>th</sup> Cir. 2006)(good faith lacking where the debtor was not working  
21

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22 <sup>12</sup> The Court assumes that “UNIPAC” was an original lender or education finance  
23 provider on one or more of the Debtors’ student loans. See Anderson v. UNIPAC-NEBHELP  
(In re Anderson), 179 F.3d 1253, 1254 (10<sup>th</sup> Cir. 1999).

24 <sup>13</sup> Counsel apparently had been told this by ECMC’s counsel.

25 <sup>14</sup> The precise role that income contingent repayment plans do or should play in the good  
26 faith analysis is subject to debate. See Terrence L. Michael and Janie M. Phelps, “Judges?! –  
27 We Don’t Need No Stinking Judges!!!”: The Discharge of Student Loans in Bankruptcy Cases  
28 and the Income Contingent Repayment Plan, 38 Tex.Tech.L. Rev. 73 (2005).

1 full time, had not considered work outside of her field, and failed to seek an income contingent  
2 repayment plan); Pennsylvania Higher Education Assistance Agency v. Birrane (In re Birrane),  
3 287 B.R. 490 (B.A.P. 9<sup>th</sup> Cir. 2002)(good faith lacking where the debtor was employed on a part-  
4 time basis, was unwilling to work outside his field, was unwilling to take a second job, was  
5 unwilling to retake an examination required to secure employment in his field, and refused an  
6 offer of an income contingent repayment plan). The Court does not believe, however, that  
7 failure to pursue such a repayment plan is dispositive; rather, it must be considered along with all  
8 other facts reflecting upon the debtor's good faith effort to repay. See, e.g., Educational Credit  
9 Management Corporation v. Mandighomi (In re Mandighomi), 2007 WL 1663676 at \*2 (9<sup>th</sup> Cir.  
10 2007)(good faith found where husband worked 70 hours per week, wife was required to care for  
11 four children, husband did defer student loan payments, and alternative payment options beyond  
12 ability to repay, even though husband did not apply for repayment alternatives)<sup>15</sup>; Mendoza v.  
13 Educational Credit Management Corporation (In re Mendoza), 2007 WL 1795721 at \*3  
14 (Bkrcty.N.D. Cal. 2007)(good faith found where the debtor worked 40 hours per week, had  
15 irregular payment history, had applied for student loan deferments, and lived as inexpensively as  
16 possible, but did not pursue loan consolidation options).

17 Notwithstanding Debtors' failure to apply for an Income Contingent repayment plan, the  
18 uncontradicted testimony is that the Debtors did make payments on the loans when able, both  
19 before and after consolidation. Additionally, Debtors did obtain forbearance agreements or  
20 deferment arrangements, and did contact their lenders to explore alternative payment plans.  
21 Cynthia is unable to generate income, inside or outside the field of fashion design, due to  
22 Michael's needs. Jim works 55 to 65 hours per week as a financial advisor, an occupation suited  
23 to his formal education. He cannot reasonably be expected to work more hours, given the  
24 necessity to assist in Michael's care and to attend to the needs of the other two children.

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26  
27 <sup>15</sup> The circuit's unpublished memorandum decision in Mandighomi is cited under Ninth  
28 Circuit Rule 36-3(b) as an example rather than as precedent.

Debtors' budget reflects no extravagant expenses and no evidence has been offered to suggest that budgeted items are unnecessary or that the amounts spent are unreasonable.

Under the circumstances, the Court finds that the Debtors have sufficiently attempted to maximize their income, minimize their expenses, and to seek alternative repayment plans. See In re Mason, supra, 464 F.3d at 884. Debtors therefore have made a good faith effort to repay their consolidated student loans.

### CONCLUSION

For the reasons stated above, the Court concludes that Debtors have demonstrated by a preponderance of the evidence each of the elements required to establish that excepting their student loan obligations to ECMC from discharge would impose an undue hardship within the meaning of Section 523(a)(8).

A judgment declaring that the subject student loan obligations are discharged under Section 727(b) has been entered concurrently herewith.

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