In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

HAROLD M. BRITTEN and DONNA L. BRITTEN — Bankruptcy No. X88-00556S
Debtors. — Chapter 12

ORDER RE: MOTION FOR HARDSHIP DISCHARGE

The court is presented with a motion for hardship discharge. William Britten, Executor of the Gertrude Britten Estate, objects to the motion. Hearing was held on February 14, 1991 in Fort Dodge, Iowa. The court now issues its ruling including findings of fact and conclusions of law. For the reasons hereinafter set out, the court concludes that the motion should be denied.

FINDINGS OF FACT

Harold M. Britten and Donna L. Britten, husband and wife, filed their joint voluntary chapter 12 petition on April 8, 1988. Debtors' "Final Chapter 12 Plan" was confirmed by the court on December 13, 1988.

The plan classified claims into 19 classes. Class 19 consisted of unsecured claims. Debtors proposed to pay to the case trustee at least $1,000.00 per year for three years for distribution to the unsecured class. After deduction of trustee's fees applicable to Class 19 payments, the balance was to be distributed to unsecured creditors on a pro rata basis. According to the plan, the $1,000.00 payments were due on January 1, 1989, January 1, 1990, and January 1, 1991. The day after the entry of the confirmation order, Harold Britten died unexpectedly at the age of 64. Donna Britten has attempted to carry out the provisions of the plan. Since confirmation, she has been able to make nearly all plan payments to administrative, priority and secured creditors. She is presently delinquent to one such creditor--her mother, Theda Stewart, a secured creditor entitled to payments in the approximate amount of $2,991.00 per year through 1998. Donna Britten has not made any of the required payments to the trustee for the class 19 creditors.

As part of their chapter 12 proposal, debtors had contemplated starting a livestock operation. Debtors were already involved in crop farming. Debtors projected substantial income from the livestock business: $19,608.00 in 1989; $66,461.00 in 1990; and $105,790.00 in 1991. Of the two debtors, it was Harold who ran the farm. At the time of confirmation, Mrs. Britten was employed full time as manager of a fabric store. Mrs. Britten was not raised on a farm and had no farming experience. Because of her husband's death, she was compelled to abandon the plans for the livestock operation. She continues the crop farming business with the aid of a man who provides her with farm labor and advice. For this aid, she pays him $1,100.00 per month. Mrs. Britten farms less land than had originally been forecast when the plan was proposed. She and Harold had expected to farm in excess of 600 acres each year after confirmation. Instead, Mrs. Britten farmed only 430 acres in 1989 and 506 acres in 1990. All but 30 acres are leased. No evidence was offered comparing the actual 1989 crop income to the 1989 crop projections. However, in 1990, crop income was reduced substantially from projections. Actual crop income for 1990 was $125,725.00; the plan had projected crop income of

$196,910.00. Expenses were lower, but the changes in the operation, including the abandonment of the livestock business, resulted in the debtor having a net income from farming operations of $11,551.00 as compared with a projected net income of $50,115.00. Non-operating income has also decreased from projections. A substantial reason for the decrease was Mrs. Britten's resignation from her job; she had earned $14,000.00 per year. She quit the job, after Harold's death, in order to stay home with her children who are now ages 6 and 7. Donna Britten has a degree in fashion merchandising. Income from the use of her training could range between $14,000.00 and $20,000.00 a year. However, it is her present intention to be a full time mother to her children rather than to seek full time employment outside the home. At present, most of the family's living expenses are paid with social security survivor benefits. Since the death of Harold Britten, little money has been available from the farm operation to satisfy personal expenses. Mrs. Britten has been able to remain current in the payment of farm operation expenses and most plan obligations by borrowing funds from her mother and an area lender. She presently owes her mother $31,000.00 as the result of a December, 1990 loan which debtor used to make plan payments. Debtor also will be borrowing to plant the 1991 crops. She expects to repay both loans in full at the end of the 1991 crop season. (Exhibit 2, page 2, line 58.)

Debtor received approximately $19,000.00 from life insurance when her husband died. After using some of the money for her husband's funeral, Mrs. Britten used the balance for farm expenses. Debtor also used proceeds from the sales of all exempt farm equipment to keep up with expenses and plan payments.

In 1983, Harold and Donna Britten borrowed nearly $110,000.00 from Exchange State Bank in Collins, Iowa. Gertrude A. Britten, Harold's mother, co-signed the note and secured her accommodation with a mortgage on her farm land. The note went into default, and the lender sued. Before the creditor was able to collect, Gertrude Britten died. The mortgaged farm ground was sold, and Gertrude Britten's estate settled with the lender by paying it $55,000.00, nearly all of which was received through the sale of the farm which took place in March, 1988. Harold Britten and his brother William were co-executors of the Gertrude Britten estate. Because Gertrude Britten had been an accommodation party on the note, it was considered that her estate held a claim for indemnity against Harold and Donna.

Yet, when Harold and Donna filed their bankruptcy in April, 1988, they failed to list the Gertrude Britten estate as a creditor. Nor was the estate listed on the mailing matrix, and thus it did not receive notices from the bankruptcy court regarding the Brittens' bankruptcy. Harold discussed his chapter 12 bankruptcy with his brother, and William testified he learned about it at the approximate time the Brittens filed. William says that he discussed the Brittens' debt to the estate with his brother and that Harold had told him that he would attempt to pay it back but that he couldn't pay it back right away. There is no evidence as to when that conversation took place. William discussed the debt with Donna eight to nine months after Harold died. She told him she would try to take care of the debt after the bankruptcy was completed.

Of the 19 classes in debtors' plan, several classes of priority or secured claims have remaining balances. The final plan payments to the creditors contained in class I were to be made in January of 1991. These payments were to total $7,718.00. The class II creditor, Mutual Benefit Life Insurance Co., is entitled to payments of $3,936.00 per year over 30 years. The class IV creditor, Northern Trust Co./Deseret Farms, Inc., is to receive annual payments of $7,676.00 through January of 1993. The class VIII creditor is Extra Special Products; it is entitled to annual payments of $2,091.00 through January, 1991. The class IX creditor is Citizen State Bank of Boone, Iowa. Payments to Citizens are to be made annually through 1993 in the amount of $1,159.00. The Class XVII creditor is Theda Stewart. The unpaid balance of her secured claim is $17,000.00. She is entitled to annual payments of $2,991.00 through 1998. All of the foregoing creditors, with the exception of Northern Trust Co., are impaired under the plan. The case trustee's five per cent fee would be applicable to the payments to the creditors with impaired claims. 2 8 U. S. C. S 58 6 (e) (1) (B) (ii)(I) ; In re Hactensick, 73 B.R. 710, 714 (Bankr. N.D. Iowa 1987). Because the payments to the class I and class VIII creditors are to be completed in

1991, the 1992 and 1993 payments to the class II, IV, IX and XVII creditors would total approximately $15,762.00.

DISCUSSION

Debtors[(1)] seek hardship discharges of unsecured claims pursuant to 11 U.S.C. 1228(b). This section provides:

> At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--
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> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
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> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
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> (3) modification of the plan under section 1229 of this title is not practicable.

A discharge under 1228(b) discharges the debtor from all unsecured debtors provided for by the plan or unsecured debts disallowed under S 502 of the Code. It would not, however, discharge the debtors from debts described in S 523 (a) of the Code. Notice of the motion has been given to all creditors and parties-in-interest. The only objector is the estate of Gertrude Britten, a creditor not listed in the bankruptcy schedules.

Debtors contend that the Gertrude Britten estate lacks standing to object to the motion for hardship discharge because the estate failed to file a proof of claim although it had knowledge of the bankruptcy case in time to do so. The court agrees. Harold Britten told his brother about the chapter 12 case at or about the time it was filed. The estate's claim against the Brittens existed at that time. Nonetheless, the Gertrude Britten estate failed to file a proof of claim within the time permitted--the deadline for filing was July 25, 1988.

Distributions by the trustee are made in accordance with the plan. 11 U.S.C. S 1226(a), see also, Fed.R.Bankr.P. 3021. Debtors' plan provided for distribution to unsecured creditors with allowed unsecured claims. (Plan, section 3.19, page 11.) Filing of a proof of claim was a condition precedent to allowance pursuant to section 1.02 of the plan. Having failed to file a claim, the Gertrude Britten estate is not entitled to any distribution as a class 19 unsecured creditor. Because it is not so entitled, it cannot be harmed by the granting of a hardship discharge. Absent injury traceable to the proposed hardship discharge, the Gertrude Britten estate lacks standing to object to the pending motion. Belles v. Schweiker, 720 F.2d 509, 513 (8th Cir. 1983).

Regardless of the estate's standing to object, this court has an independent duty to determine whether a hardship discharge may be granted. Fed.R.Bankr.P. 7055(b)(2); cf. In re Weldin-Lynn, Inc., 79 B.R. 409, 410. The burden of proof is on debtors to show the entitlement to a hardship discharge. Cf. In re Schleppi, 103 B.R. 901, 903 (Bankr. S.D. Ohio 1989). All the requirements of S 1228(b) must be met.

Debtors have met their burden of proof as to the "best interest test" requirement for hardship discharge. The evidence supports the debtors' contention that as of the effective date of the plan (the confirmation date), property distributed to unsecured creditors (which was zero) is not less than such creditors would have received had the estate been liquidated under chapter 7 on the date of confirmation. This distribution also would have been zero.

As to Harold M. Britten or his probate estate, movant has shown that his failure to complete payments under the plan was due to circumstances for which neither he nor his estate should be held accountable. Harold was the operator of the farming business. Upon his death, his labors were lost. His inability to make payments under the plan were a direct result of his death and lost labors. It would be unjust to hold either him or his estate accountable for the failure to make plan payments to his unsecured creditors. Inasmuch as the confirmed plan depends for its success on post-confirmation earnings, normally the death of Harold could require dismissal of his case. Fed.R.Bankr.P. 1016. However, Donna Britten has continued to make all plan payments satisfying not only her own obligations under the plan but also Harold's. Her efforts make continuation of Harold's bankruptcy case possible.

Donna Britten must also prove that her failure to make plan payments in behalf of unsecured creditors are due to circumstances for which she should justly not be held accountable. Based on the evidence, the court cannot so find. The plan required payments of $1,000.00 per year for three years to satisfy unsecured claims. There is no question that income from the farming operation dropped well below plan projections because of Harold's death. For this, Donna Britten should not be held accountable. There is no evidence to show that any decrease in farm income or any increase in farm expense was due to her lack of care or prudence. However, after Harold's death, she made a decision to quit a job which paid her approximately $14,000.00 a year. These wages could have been used to satisfy the required payments to the Class 19 creditors. She quit her job in order to be a full time mother to her children. This court casts no aspersions on that decision. From a family standpoint, it was understandable. Yet that decision had an effect upon her ability to make plan payments. It is not unfair to hold her financially responsible for that decision. In this day and age, many parents are forced to make a decision as to whether the family's financial situation requires them to work outside the home and thus to spend less time with the children. It is unfortunate that such decisions have to made. But this court cannot say that it is unfair to hold Donna Britten financially accountable for the decision to forego the income in order to stay home. The court, therefore, concludes that Donna Britten has failed to show that her inability to complete payments to unsecured creditors was due to circumstances for which she should not justly be held accountable.

Debtors must show that modification of the confirmed plan is not practical. Movant argues that she Was financially unable to replace Harold's labor and management, and she does not have access to the funds to improve farm operations to the point where the payments to unsecured creditors could be made. Movant's own exhibits indicate that modification of the plan is practical. A debtor may request modification of a confirmed chapter 12 plan to extend the time for payments. 11 U.S.C. S 1229(a)(2). Debtors' exhibit no. 2 shows that debtor will break even on the farm operation at the end of 1991, the third year of the three-year plan. There would be $26,660.00 available to pay secured claims. There would be no money for a payment to unsecured creditors, and no funds committed to chapter 12 trustee's fees. Yet by the close of -1991, it is expected that all other plan payments would be current, and debtor would have repaid her short term loan obligations. However, after 1991, it is reasonable to assume that the operation would continue as forecast in 1991. Therefore, $26,660.00 may be projected as available for plan payments for the end of 1992 and 1993. Yet the amount of the required plan payments to secured and administrative creditors would have decreased significantly. For 1992 and 1993, only $15,762.00 in annual payments to secured creditors would remain. This would include payments to Mutual Benefit Life Insurance Co., Northern Trust Co., Citizens National Bank, and Theda Stewart. The case trustee's fee on distribution to the creditors holding impaired claims would be approximately $404.00. This is calculated by projecting a five per cent trustee's fee to be applied to the 1992 and 1993 payments to Mutual Benefit Life Insurance Co., Citizens National Bank and Theda Stewart. Thus, plan payments to secured creditors after 1991, including trustee's fee, would total $16,166.00. Thus in 1992 and 1993, debtor might expect a $10,000.00 net cash flow after chapter 12 debt service. The availability of this money makes practicable modification of the plan by extension.[(2)]

CONCLUSIONS OF LAW

Debtors are not entitled to hardship discharges under 11 U.S.C. 1228(b).

ORDER

IT IS ORDERED that motion of the debtors for entry of hardship discharge is denied.

SO ORDERED ON THIS 8TH DAY OF APRIL, 1991.

William L. Edmonds
Bankruptcy Judge

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1. Donna Britten seeks hardship discharges for both her and her deceased husband. The appropriate party-in-interest to seek such a discharge in the case of Harold Britten would be the administrator of his estate. There has been no proof that the fiduciary is Donna Britten, but the court will so assume.

2. So finding does not mean the debtors are required to extend the time for plan payments. Such an extension remains voluntary. The court finds only that such modification is practicable.