In the United States Bankruptcy Court

for the Northern District of Iowa

BEVERLY FAYE OGREN	Bankruptcy No. 95-12116KC
Debtor.	Chapter 7

BEVERLY FAYE OGREN
Plaintiff

vs.

UNITED STATES OF AMERICA
Defendant.

ORDER

On September 26, 1996, the above-captioned matter came on for trial pursuant to assignment. Plaintiff/Debtor Beverly Ogren appeared in person pro se. Defendant Illinois Student Assistance Commission ("ISAC") appeared by Attorney David J. Hershman. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

STATEMENT OF THE CASE

Debtor filed her Chapter 7 petition on October 31, 1995. She commenced this proceeding to determine the dischargeability of her student loans under 523(a)(8). Debtor claims that excepting her student loans from discharge will impose an undue hardship on Debtor and her dependents.

ISAC asks that Debtor be denied a discharge of her student loans. It denies that Debtor's payment of her student loans would impose an undue hardship on Debtor or her dependents.

STATEMENT OF FACTS

Debtor Beverly Ogren graduated from Concordia College, Moorhead, Minnesota in 1978. She attended the University of North Dakota College of Law, and received her J.D. in 1986. After graduation from law school, Debtor practiced law in Fargo, North Dakota, with a sole practitioner. Initially she was paid hourly for her services, but after eight months entered into a percentage arrangement.

Debtor divorced in 1988. She obtained joint custody of her two children, Letia and Alida Ogren-Gunderson. In August 1988, Debtor consolidated her undergraduate and law school student loans into the loan that Debtor now seeks to discharge.

In 1989, seeking a steady source of income, Debtor obtained employment with Guaranty Bank and Trust in Cedar Rapids, Iowa. During her six month probationary period, Debtor was hospitalized twice for an asserted diagnosis of "translocation stress syndrome". After the probationary period ended, Debtor's employment with Guaranty Bank terminated.

In 1990, Debtor took the Iowa Bar Examination, and began a work arrangement with a Cedar Rapids attorney to handle his overflow work. Debtor apparently received little work out of this arrangement, and discontinued it to teach legal courses at Kirkwood Community College. Debtor received $200 bi-weekly from teaching, which she eventually discontinued stating that she was barely able to break even. She next procured temporary employment with I.D.S. Financial Services doing tax work.

Debtor was diagnosed with clinical depression in 1990. According to her physician, Debtor's clinical depression is readily treatable except when Debtor is under severe stress. When Debtor experiences severe stress, the prescribed medication does not work well.

Debtor contracted with another Cedar Rapids attorney for overflow work in 1991. This arrangement did not produce sufficient income to meet the expenses of her law practice. Debtor opened her own law office in Cedar Rapids' Ground Transportation Center in 1991, which continued until 1992. Debtor worked with C.C.H. during the 1992 tax season. After tax season, Debtor entered into a working relationship with another Cedar Rapids association of sole practitioners. By the end of 1992, Debtor had exhausted her financial resources, and terminated her arrangement with this association.

Debtor began work at C.C.H. again during the 1993 tax season. However, her depression deepened during this time, forcing her to leave before the end of the tax season. Debtor rented out part of her home for income. In November, 1993, she obtained a position at Legal Service Corporation of Iowa which continued until April, 1994.

Debtor next began working for Berthel Fisher part-time in 1994. She took classes to receive her D.B.E. certification. She received income through land acquisition work in 1994. She also held a position with a telemarketing firm for $5.00 per hour. Debtor's attempts at finding a replacement renter for part of her home were unsuccessful.

Debtor obtained a position with the City Attorney's office in Iowa City in March 1995. During this period, she reached an agreement with H.U.D. to prevent foreclosure of her house. Debtor's ex-husband, who was also living with her and her children to minimize expenses, took over the utilities accounts for her house at this time. She continued her employment with the City Attorney's office until she was terminated November 6, 1995.

Since her termination from the City Attorney's office, Debtor has received severance pay and unemployment benefits. She works part-time for a bookstore making $5.00 per hour. Debtor has attempted to maintain her law practice by setting up an office in her home. Debtor is currently pursuing the possible option of creating income through a legal practice on the Internet.

Currently, Debtor is taking medication, which she receives free of charge at the Abbe Center. She does not own a working automobile. She has continued to seek legal employment in the area, but has not obtained a professional position. Debtor lives with her two dependent daughters and her ex-husband. Debtor's home, valued for tax purposes at $92,000.00, has a $65,000.00 mortgage which is $8,000.00 in arrears, as well as a second mortgage of $11,000.00.

Debtor's student loans have an outstanding balance of $48,896.59 as of February, 1996. Debtor has made no payments on her student loan since November 15, 1991. While she was not making payments, Debtor contacted the student loan company to receive forbearances and deferments. Debtor's income as reported on her federal income tax returns since her last payment on her student loans, is as follows:

1995 Income:	$32,181.00
1994 Income:	$10,864.00
1993 Income:	$ 8,490.00
1992 Income:	$12,326.00
1991 Income:	$ 7,597.00

Debtor claims that her student loans should be discharged because they impose an undue hardship on her and her dependents. She states that her daughters, as gifted and talented students, are suffering undue hardship because they have been denied opportunities which Debtor is unable to afford.

ISAC denies that Debtor or her dependents will suffer undue hardship if she is denied a discharge of her student loans. ISAC points to Debtor's expenditures for flying lessons for herself and horseback riding lessons and camp for one of her daughters, as unnecessary. ISAC alleges Debtor had the means to pay in 1995 as evidenced by her federal income tax returns. ISAC claims Debtor has not minimized expenses or made a good faith effort to repay her student loans.

CONCLUSIONS OF LAW

Student loans may be discharged under 523(a)(8) in two ways. Section 523(a)(8)(A) provides that if bankruptcy is filed more than seven years after the date payments become due and no suspensions, extensions or deferrals were given to the debtor the loan may be discharged. In re Eckles, 52 B.R. 433, 434 (E.D. Wis. 1985); In re Zulaica, Adv. No. 95-2176KD, slip op. at 4 (Bankr. N.D. Iowa June 24, 1996). Debtor testified that she had received deferments and forbearances. Both parties concede a discharge under this section is inapplicable. The dispute in this matter concerns the second method for discharge -- undue hardship under 523(a)(8)(B).

UNDUE HARDSHIP TO DEBTOR AND DEBTOR'S DEPENDENTS

Student loan obligations may be dischargeable if "excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C.

523(a)(8)(B). The debtor has the burden of proving undue hardship on the debtor or the debtor's dependents. In re Faish, 72 F.3d 298, 300 (3d Cir. 1995). The Bankruptcy Code does not define undue

hardship. Courts have used a variety of methods for determining what constitutes "undue hardship" under 523(a)(8)(B). See 3 Norton Bankruptcy Law & Practice 47:48 at 47-107 to 47-110 (identifying four approaches). "The equitable approach is to view each case in the totality of circumstances involved." In re Clay, 12 B.R. 251, 255 (Bankr. N.D. Iowa 1981).

This Court applies the Brunner test. In re Hawkins, 187 B.R. 294, 298 (Bankr. N.D. Iowa 1995); Zulaica, slip op. at 6. The Brunner test requires that three elements be proven before a debtor's student loan can be discharged. Brunner v. New York State Higher Educ. Servs., 831 F.2d 395, 396 (2d Cir. 1987). Debtor must establish:

(1) that she 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 she has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396; Hawkins, 187 B.R. at 298; Zulaica, slip op. at 6.

The Brunner test for undue hardship has been applied in three circuits. In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993)(expressly adopting Brunner test); In re Cheesman, 25 F.3d 356, 359-60 (6th Cir. 1994), cert. denied, 115 S. Ct. 731 (1995) (reviewing facts under Brunner); and In re Faish, 72 F.3d 298, 300 (3rd Cir. 1995) (expressly adopting Brunner test). The debtor must prove all three elements, or a discharge will not be granted. Faish, 72 F.3d at 306.

The first prong of the Brunner test requires proof that the debtor is currently unable to repay the loan and maintain a minimal standard of living. Roberson, 999 F.2d at 1135. More than a showing of tight finances is required. Faish, 72 F.3d at 306. Student loans should not be discharged unless the debtor is able to demonstrate that she is unable to earn "sufficient income" to support the debtor and the debtor's dependents while repaying the student loan obligation. Roberson, 999 F.2d at 1135. Although the poverty guidelines would constitute an objective standard to measure whether the debtor has a "minimal standard of living," the Brunner test does not require a showing that the debtor's income is below the poverty line before a discharge can be granted. In re Ammirati, 187 B.R. 902, 907 (D.S.C. 1995), aff'd, 85 F.3d 615 (4th Cir. 1996).

The second prong of the Brunner test requires a debtor to show that debtor's critical financial condition is likely to continue for an extended period of time. Roberson, 999 F.2d at 1135. Dischargeability should be based on a "certainty of hopelessness" of repayment, rather than a present inability to repay student loans. Id. at 1136. Requiring evidence of the debtor's future inability to pay "more reliably guarantees that the hardship presented is undue." Brunner, 831 F.2d at 396.

The hardship must be "long-term" and more than the usual hardship of repaying a debt. In re Boston, 119 B.R. 162, 165 (Bankr. W.D. Ark. 1990). The Brunner test requires evidence that the debtor's current inability will extend throughout the loan repayment period. Brunner, 831 F.2d at 396. The Brunner test requires the debtor to demonstrate unique or extraordinary circumstances to satisfy the Brunner test. Ammirati, 187 B.R. at 907. Examples of unique and extraordinary circumstances include "illness, a lack of usable job skills, and the existence of a large number of dependents." Id. If the debtor lacks usable job skills and exists at a subsistence level, a discharge may be granted under the Brunner test. In re Kraft, 161 B.R. 82, 86 (Bankr. W.D.N.Y. 1993). Illness is not cause for a discharge when the debtor is sufficiently healthy to perform the debtor's job. Wardlow, 167 B.R. at 152.

The third prong of the test examines the debtor's good faith efforts to repay the loan. Roberson, 999 F.2d at 1136. By receiving a governmental guaranteed student loan, the student "assumes an obligation to make a good faith effort to repay those loans." Id. This good faith effort is measured by the student's efforts to "obtain employment, maximize income and minimize expenses." Id. Good faith is also measured by inquiring whether the debtor is culpable for causing the debtor's poor financial condition. Id. Some evidence beyond financial incapacity to pay must be shown. In re Maulin, 190 B.R. 153, 157 (Bankr. W.D N.Y. 1995). While a history of payment is not required to establish good faith, a history of effort to achieve repayment is required. Id. at 156.

This inquiry requires the debtor to demonstrate that the debtor is "actively minimizing the debtor's expenses" and "making a strenuous effort to maximize personal income" in the debtor's vocation. In re Healey, 161 B.R. 389, 394 (E.D. Mich. 1993). A debtor is not minimizing expenses under Brunner for the debtor or the debtor's dependents when incurring bills for cable television, recreation and miscellaneous expenses over $180.00 per month. In re Wardlow, 167 B.R. 148, 152 (Bankr. W.D. Mo. 1993).

Undue hardship requires the debtor to show that the debtor is suffering from "truly severe, even uniquely difficult circumstances," not merely severe financial difficulty. In re Craig, 64 B.R. 854, 857 (Bankr. W.D. Pa. 1986). "Garden variety hardship or unpleasantness is insufficient excuse for discharge of student loans based on undue hardship." Healey, 161 B.R. at 393. A strong legislative policy exists against allowing the discharge of student loans in bankruptcy. Id.

The debtor must prove the elements of the Brunner test by a preponderance of the evidence. See Faish, 72 F.3d at 300. When considering if an undue hardship on the debtor's dependents exists, additional expenses caused by dependents are considered. See In re Smith, 45 B.R. 711, 714 (Bankr. W.D. N.Y. 1985); In re Johnson, 121 B.R. 91, 93 (Bankr. N.D. Okla. 1990). The debtor must prove that expenses incurred for the dependents are other than usual expenses. Wardlow, 167 B.R. at 152.

Debtor alleges that she has satisfied the first element of the Brunner test. She states that she cannot maintain a minimal standard of living and repay her student loans. Her federal income tax returns for 1991-1994 provide some support for this conclusion. Debtor does not currently own an operating automobile. She does not have health insurance. Nevertheless, the amount she lived on in 1995, over $32,000.00, is not so low that she could not maintain a minimal standard of living for the family while

still making student loan payments.

The Court must also consider the contributions made by Debtor's ex-husband to maintain a minimal standard of living. See Zulaica, slip op. at 7 (considering the amount received in child support when analyzing the first prong of the Brunner test). Mr. Gunderson testified at trial that instead of paying child support, he assisted Debtor and her dependents by paying utilities, such as the electric, gas, water and telephone bill, and by contributing toward groceries. Mr. Gunderson's estimates of the amount he pays on these bills monthly is over $700.00. This amount was not included in Debtor's 1995 federal income tax return. Debtor has not demonstrated by a preponderance of the evidence that she cannot maintain a minimal standard of living and repay her student loans.

Debtor states that she has satisfied the second prong of the Brunner test. Debtor states that because ten years have passed since her graduation from law school, the Court need not look to the future because the repayment period is completed. However, during the past ten years, Debtor has received deferments or forbearances for five years. A deferment or forbearance extends the repayment period. See Hawkins, 187 B.R. at 299 (stating that if the debtor has obtained a deferment of the repayment period, the remaining period to consider under the second prong of Brunner is longer). Accordingly, the repayment period for Debtor's student loans has not been completed. The Court must determine if additional circumstances exist to indicate whether Debtor's inability to pay will continue for a significant portion of the remaining repayment period.

Additional circumstances to consider under the second prong of the Brunner test are whether Debtor lacks usable job skills, if a large number of dependents exist, or if she suffers from an illness. Debtor does not lack usable job skills. She has a legal degree and is able to perform a variety of skills, as evidenced by her tax work, work for a city attorney, D.B.E. certification, and ability to present her case before the court in this matter. Debtor has two dependents and receives assistance from their father. No large number of dependents exists.

Debtor points to her clinical depression as an additional circumstance which will continue throughout the repayment period and hinder her ability to find employment. Health is a factor to consider under the second prong, but if Debtor is sufficiently healthy to perform her job, it is not grounds for a discharge. See Wardlow, 167 B.R. at 152. While Debtor may not be able to maintain employment in the more stressful types of legal practice, her depression is manageable, except when she experiences extreme stress, and she may well be able to be employed in low stress legal work or related activities. Debtor has shown merely that her clinical depression is one circumstance that may hinder her ability to repay her student loan throughout the repayment period. This Court concludes that the record, when viewed as a whole, fails to establish that the present state of affairs will exist for a significant portion of the remaining repayment period.

Debtor claims that she has proven the third prong of the Brunner test. She states that her good faith effort is evidenced by her payments before 1991 and her contact with the student loan agency requesting forbearances and deferments. Debtor further states that she has proven a good faith effort in the evidence presented showing numerous efforts to obtain employment, renting out her home and requesting that her ex-husband live with her.

Debtor has shown that she made an effort to obtain forbearances and deferments. She has also shown that she has made some efforts to reduce her expenses. However, testimony revealed expenditures made by Debtor which included flying lessons for herself and $60 per month on horseback lessons for her daughter. Testimony at trial also revealed that $300.00 had been spent in 1995 on horseback riding camp for Debtor's daughter. While good faith does not require a long history of repayment, good faith does require that Debtor show a history of effort to make repayment. See Maulin, 190 B.R. at 156. Debtor has not made a payment since November 11, 1991. With an income in 1995 over $32,000.00, plus assistance received from Mr. Gunderson in paying bills, Debtor has not shown a good faith effort to make repayment.

Debtor states that paying her student loans imposes an undue burden on her dependents. She claims that her daughters require additional expenditures, beyond that of most children, because they are gifted and talented. While Debtor has shown that her daughters are talented, she has not proven that this has created an extra expense. Debtor pointed to some programs which her daughters are unable to fully pursue, such as college courses, but she has not established that these programs are necessary to support her daughters or constitute a minimal standard of living.

Debtor has shown that her financial condition has created some hardship. However, she has a good education and is currently pursuing many employment opportunities. The Court concludes that Debtor has not met her burden of showing that she can not maintain a minimal standard of living for herself or her dependents if she is required to repay her student loan, that this is likely to continue, or that she has made a good faith effort to repay her student loan. Her student loan obligation to ISAC must be excepted from discharge.

WHEREFORE, Debtor's student loan obligation owed to Illinois Student Assistance Commission (ISAC) is excepted from discharge pursuant to 523(a)(8).

FURTHER, excepting this obligation from discharge will not impose an undue hardship on Debtor and her dependents.

FURTHER, collection costs and fees and postpetition interest associated with Debtor's student loan obligation are also nondischargeable.

FURTHER, judgment shall enter accordingly.

SO ORDERED this 10th day of October, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge