

1 10/3/03

2

3

4

5

6

7

8

UNITED STATES BANKRUPTCY COURT

9

NORTHERN DISTRICT OF CALIFORNIA

10	In re]	Case No. 01-51848-ASW
]	
11	Peter A. Adler and]	Chapter 7
	Sherry F. Adler,]	
12]	
	Debtor(s).]	
13	_____]	
14	Peter A. Adler,]	Adversary No. 01-5174
]	
15	Plaintiff,]	
]	
16	vs.]	
]	
17	Educational Credit Management]	
	Corporation,]	
18]	
	Defendant.]	
19	_____]	

20

MEMORANDUM DECISION
DETERMINING DEBT TO BE DISCHARGEABLE

21

22

23

24

25

26

27

28

Before the Court is a complaint by Peter A. Adler ("Husband"), the debtor in this Chapter 7¹ case, against Educational Credit Management Corporation ("Creditor"). The complaint seeks a determination that a debt owed to Creditor for student loans taken

¹ Unless otherwise noted, all statutory references are to Title 11, United States Code, as it provides with respect to cases filed on April 13, 2001.

1 by Husband is dischargeable in bankruptcy under §523(a)(8), on the
2 basis that payment of such debt would pose undue hardship.

3 Husband is represented by Cathleen Cooper Moran, Esq. of the
4 Moran Law Group, Inc. Creditor is represented by Miriam Hiser,
5 Esq. of the Law Offices of Miriam Hiser. The matter has been tried
6 and submitted for decision after post-trial briefing.² This
7 Memorandum Decision constitutes the Court's findings of fact and
8 conclusions of law, pursuant to Rule 7052 of the Federal Rules of
9 Bankruptcy Procedure.

10
11 I.

12 FACTS

13 Husband and his wife Sherry Adler ("Wife") filed a joint
14 petition under Chapter 7 on April 13, 2001, and a discharge of all
15 dischargeable debts was granted to each of them on July 9, 2001.

16 The parties stipulate to the following facts. Husband's debt
17 to Creditor ("Subject Loan") arose in 1991,³ when Husband
18 consolidated several loans that he had previously taken to finance
19 his masters degree and Ph.D. (which he received from the California
20 School of Professional Psychology in 1984 and 1989, respectively).
21 As of October 28, 2002, the amount of the Subject Loan was

22
23 ² Creditor filed a brief on December 5, 2002 and Husband
24 filed a response on December 16, 2002, which was the extent of the
25 briefing that was contemplated by the Court. However, Creditor
26 filed a letter on January 2, 2003 "to correct a misstatement" in
27 Husband's brief, followed by letters on January 22, 2003 and August
28 7, 2003 noting decisions published after trial. All of Creditor's
letters are shown to have been served on Husband's counsel, who has
filed nothing in response. The Court will accept these letters as
supplemental post-trial briefs.

³ Husband testified that Wife is not a party to the Subject
Loan, and that it was taken before the spouses met.

1 \$86,587.46, bearing interest at the rate of 9%. The Subject Loan's
2 original repayment term in 1991 was 25 years but Husband has
3 received forbearances totalling three years, so the repayment term
4 will last until 2016; monthly payments of \$830.20 would be required
5 to pay the Subject Loan in full by that time.

6 The evidence shows that Husband is also liable for a loan from
7 the United States Department of Health and Human Services ("HHS"),
8 which is a "health education assistance loan" ("HEAL Loan") made
9 pursuant to 42 U.S.C. §292 et seq.. At time of trial, the balance
10 was approximately \$126,000 and HHS had recently agreed to accept
11 monthly payments of \$125 subject to review after one year. Annual
12 interest of 4.25% was accruing at the rate of \$489.18 per month and
13 HHS advised Husband to pay approximately \$800 per month "to start
14 reducing your debt". There was no evidence of the HEAL Loan's
15 commencement date or repayment term.⁴

16 The parties stipulated that Husband became a licensed
17 psychologist in 1991 and has worked in that capacity ever since:
18 from 1991 to 1995, he was director of the Psychology Department at
19 Royal Therapeutic Residential Center in Southern California; from
20

21 ⁴ The parties did not formally stipulate that the HEAL Loan
22 is non-dischargeable in bankruptcy and there was no evidence on the
23 issue, but Husband's attorney consistently took that position in
24 argument without dispute from Creditor's counsel. HEAL Loans are
25 dischargeable in bankruptcy only if all three conditions of
26 §292f(g) are met: "such discharge is granted -- (1) after the
27 expiration of the seven-year period beginning on the first date
28 when repayment of such loan is required, exclusive of any period
after such date in which the obligation to pay installments on the
loan is suspended; (2) upon a finding by the Bankruptcy Court that
the nondischarge of such debt would be unconscionable; and (3) upon
the condition that the Secretary shall not have waived the
Secretary's rights to apply subsection (f) of this section
[permitting offset of certain federal benefits against unpaid HEAL
Loan balances] to the borrower and the discharged debt."

1 1995 to 1997, he had a private practice in Southern California;
2 from 1997 to 2000, he was a staff psychologist at Bristol Park
3 Medical Group in Southern California; and since October 2000, he
4 has been a staff psychologist at Children's Health Council in Palo
5 Alto. It is further stipulated that Husband's gross annual salary
6 has increased from \$33,000 in 1996 to \$72,800 at time of trial.

7 Husband testified that "his personal expectations" when
8 deciding to become a psychologist were that he would earn "well
9 over \$100,000 a year", but that did not prove to be the case.
10 After receiving his doctorate in 1989, he was required to undertake
11 additional training for a year and a half in order to secure a
12 license, during which time he was paid \$16 an hour. Once he
13 received his license, he earned "somewhere in the range of" \$23 to
14 \$24 an hour. While working full time at his first job, he opened
15 two part-time private practices for additional income so that he
16 could repay his student loans. In 1995, he commenced a full-time
17 private practice with two offices but it was not financially
18 successful due to restrictions imposed by the insurance industry:
19 most patient referrals were made to doctors who were members of
20 established industry "panels", which were closed to new members;
21 insurers offered only limited payments for services; and payments
22 were withheld for up to six months. During that period, Husband
23 sought forbearance on his student loans based on financial
24 hardship, which was granted. Husband and Wife eventually moved
25 into a small room with Wife's mother because they could not afford
26 to pay rent -- the room had only a twin bed, which the spouses took
27 turns using, and Husband stated "I kept those [student loan]
28 payments going even though I was sleeping on the floor and did not

1 have my own home any more." Husband testified that he inquired
2 about the National Health Service Corps, a student loan forgiveness
3 program under which doctors are assigned to work in locations where
4 their services are required. However, he found that most positions
5 were assigned to physicians and nurse practitioners, with "very
6 few" available for psychologists. He could not serve in other
7 states because he was licensed only to practice in California, and
8 the one position in California was filled. He explored the
9 possibility of establishing a location himself, but "the process
10 appeared to be far too difficult". In 2000, while working as a
11 staff psychologist for a medical group, Husband took on a second
12 job as a salesman but was unable to make any sales. The couple
13 moved from Southern California to the San Jose area in October 2000
14 and, at time of the trial, Husband was employed by the Children's
15 Health Council. He testified that salaries there "compete" with
16 those at "similar places", but he had been told there would be no
17 increase during that fiscal year. He stated that, as a senior
18 staff psychologist, he was "at the top" of the salary range and
19 could not advance unless a management position were to become
20 available to him; as to that possibility, he said "I do not know if
21 there were to be a management position open up, whether I would be
22 up for that type of position or not". Husband testified that
23 opening a private practice could generate more income, but he
24 lacked funds with which to pay for malpractice insurance and was
25 not familiar with all financial aspects of starting a new business.
26 Husband said that his salary had doubled when the couple moved
27 north, but the higher cost of living in the San Jose area "negated
28 any improvement in the cash flow".

1 Husband testified that his monthly take-home pay at time of
2 trial was \$4,022, and that average monthly expenses totalled
3 \$3,844.74, as follows:

4	Rent	\$1,800.00
5	Utilities	\$ 80.00
6	Automobile insurance	\$ 96.00
7	Automobile payment	\$ 240.21
8	Telephone	\$ 62.00
9	Gasoline	\$ 72.00
10	Trainfare	\$ 75.00
11	Pet expense	\$ 7.00
12	Automobile repair	\$ 21.00
13	Dry cleaning	\$ 8.90
14	Medical and dental	\$ 150.00
15	Food	\$ 931.00
16	Household items	\$ 176.73
17	HEAL Loan payment	\$ 125.00

18 With respect to the automobile expenses, Husband testified that
19 the couple own a 2001 Geo Prizm and a 1990 Mitsubishi Mirage. He
20 said that the latter is "at its last leg" but not worth repairing,
21 and cannot be driven more than two miles without engine
22 malfunction. Husband drives the Geo one hundred miles to and from
23 work twice a week, and drives the Mitsubishi to the train station
24 the rest of the week.

25 Insofar as the medical expenses are concerned, Husband
26 testified that the couple are members of an insurance plan under
27 which they would pay only \$10 for each doctor's visit, but Wife
28 used an "out of network provider" who charged \$150 per visit and

1 that was not covered by insurance. Wife testified that she
2 suffered an automobile accident in 1996, had a hysterectomy in
3 2001, and would soon require more surgery. Surgery is covered by
4 the insurance plan, but Wife was dissatisfied with the non-surgical
5 treatment she received from the various doctors who were available
6 under the plan and considered their approach harmful, so she was
7 consulting instead "a licensed regular doctor" with a certification
8 in "holistic medicine". Husband testified that the doctor
9 recommended more frequent visits but Wife can only afford half
10 sessions once a month, and the thyroid medication he prescribes for
11 her is not covered by insurance. Wife testified that she also
12 required "a lot" of dental work, and that only "extremely limited"
13 insurance coverage is provided for that.

14 As for the food expense, Husband testified that it includes
15 items needed by Wife, such as vitamins and food supplements at \$30
16 to \$40 per month, and yeast-free and wheat-free bread at \$5 per
17 loaf. Wife testified that her doctor had prescribed vitamins and
18 "things like that".

19 Concerning the expense for household items, Husband testified
20 that it includes toilet paper, paper towels, garbage bags, paper
21 plates, plastic folks, soap, cleaning fluids and the like. He said
22 that Wife has been too weak to wash dishes, and Husband is too
23 tired to do so after a twelve-hour workday, so it is necessary to
24 buy disposable paper and plastic supplies.

25 Husband testified that "basically five years ago I was living
26 paycheck to paycheck, I am still living paycheck to paycheck". He
27 said that the couple had been sleeping on \$25 inflatable camping
28 mattresses until they purchased "the cheapest twin mattresses",

1 which hurt their backs. Husband said that the only clothes the
2 couple bought in the past two years was underwear and a pair of
3 shoes, Wife had two pairs of pants, and Husband was still using the
4 same four pairs of "dress pants" and "dress shirts" that he
5 purchased in 1999. Husband testified that he owns "some furniture"
6 but neither spouse has a cell phone or pager. Husband said that he
7 had \$147 in savings, between \$7,000 and \$8,000 in a 401K retirement
8 plan from a previous employer, \$1,500 in contributions by his
9 current employer to a retirement fund, and Wife had approximately
10 \$2,000 in an Individual Retirement Account. Husband testified that
11 the couple accumulated some \$38,000 in credit card debt while
12 student loan payments were being made, which has now been
13 discharged in bankruptcy. He said that they no longer have any
14 credit cards to serve as a "buffer" when unusual expenses arise,
15 such as needing new tires for the automobiles (which he expects to
16 occur) -- "we have absolutely no back up or savings if these types
17 of expenses hit" and "we are already on a shoe string, if any thing
18 remotely extraordinary turns up we will not be able to handle it,
19 let alone the student loan payment".

20 Wife testified that she does not work and is unable to do so.
21 She said that she has a bachelor's degree in art history and a
22 masters degree in social work. After graduating from college, she
23 worked as an interior designer for "a year or so", as a graphic
24 designer for "probably less than two years", and as a clinical
25 social worker "for a while". She had two separate contract
26 positions in 1999 for "about three to four months apiece", which
27 were "almost like full time positions". Her earnings ranged from
28 \$35 an hour for "pure technical writing" to \$15 an hour for a two

1 day contract position in 2000, which was her last employment. Wife
2 stated that she was unable to find a permanent position despite
3 "extremely intensive efforts" in 1999 and 2000, such as attending
4 conventions and "tech fairs", contacting "a lot" of agencies, and
5 sending out "a lot" of resumes. She said that her master's degree
6 in social work did not qualify her for employment in that field
7 because, although she had once held a temporary license, she lacked
8 the necessary permanent license. She had taken the license
9 examination and passed the written part but failed the oral part --
10 she did not make a second attempt because the test was "expensive",
11 she had been unable to find employment even when she had a
12 temporary license, and the license had to be obtained within a
13 limited period of time after graduating. Wife testified that,
14 commencing in early 2001, she "got really really sick" and had a
15 hysterectomy in March; thereafter, she has "hardly left the bed"
16 and has been unable to look for work. She also testified that,
17 since the automobile accident in 1996, she has had difficulty
18 sitting or standing for prolonged periods and suffers from reduced
19 strength and mobility. She has not received any physical therapy
20 since moving north in October 2000 because her experience has been
21 that the "cold pack" treatment offered under the insurance plan
22 does not help and could make her condition worse. Wife described
23 her symptoms as including hair loss, "extreme" fatigue, joint pain,
24 "what is called technically brain fog, which is when your brain is
25 not working right", and weight loss of eight or nine pounds. She
26 stated that, although she is "basically unable to work", she is not
27 eligible for disability benefits because Husband's income is too
28 high and she never made sufficient contributions to qualify.

1 Husband testified that his student loan debts have had a
2 "profoundly devastating impact on the marriage", and said that he
3 did not know whether his wife "will ever recover from it". Wife
4 testified that the debts have "completely impoverished us", the
5 couple could never afford to buy a house or have children or enjoy
6 "simple things like vacations", and "we will never have a normal
7 life" after having "sacrificed everything we have got".

8 Husband testified that a total of \$44,000 has been paid on all
9 of his student loans since 1988, but he did not know how much of
10 that had been paid on the Subject Loan.

11 The parties stipulate that Husband is eligible for
12 participation in the William D. Ford Program ("Ford Program"). The
13 Ford Program offers various repayment plans, including an "income
14 contingent repayment plan" that determines the monthly payment
15 amount based on income. The parties agree that the monthly payment
16 based on Husband's 2000 adjusted gross income of \$64,728 would be
17 \$885.30, whether Husband used the Ford Program only for the Subject
18 Loan, or only for the HEAL Loan, or chose to consolidate both. The
19 maximum repayment term under the Ford Program is twenty-five years
20 and any balance remaining unpaid at the end of that term is
21 forgiven. It is undisputed that debt forgiveness constitutes
22 taxable income pursuant to 26 U.S.C. §61(a)(12), unless the
23 taxpayer is insolvent pursuant to 28 U.S.C. §108(a)(1)(B).

24 There is no evidence of Husband's age, though his attorney
25 stated in argument without contradiction that he was 49 years old
26 at time of trial. The only evidence of Wife's age is her testimony
27 that "now we are like old, we are like fifty years old".

28 Husband introduced into evidence the Internal Revenue Service

1 ("IRS") Collection Standards, which set forth amounts that IRS
2 considers necessary for support before a delinquent taxpayer's
3 excess income is subject to collection. For a couple with
4 Husband's gross income, those standards provide the following
5 monthly amounts, totalling \$3,282:

6	Food, housekeeping supplies, 7 clothing, personal care, 8 miscellaneous expenses:	\$1,235.
8	Housing, utilities:	\$1,649.
9	Transportation:	\$ 398.
10	Health care, insurance, 11 recreation, professional 12 education, etc.:	case by case basis

13 II.

14 APPLICABLE LAW

15 Bankruptcy Code §523(a)(8) provides that student loans such as
16 that at issue here are excepted from a Chapter 7 bankruptcy
17 discharge unless the debtor shows that "excepting such debt from
18 discharge under this paragraph will impose an undue hardship on the
19 debtor and the debtor's dependents". Husband claims that he and
20 Wife would suffer undue hardship if the debt to Creditor had to be
21 repaid.

22 The Code does not define "undue hardship", but the Ninth
23 Circuit has adopted the three-part test of In re Brunner, 46 B.R.
24 752 (S.D.N.Y.1985), aff'd, 831 F.2d 395 (2nd Cir.1987) ("Brunner")
25 to determine whether "undue hardship" exists, see In re Pena, 155
26 F.3d 1108 (9th Cir.1998) ("Pena"). That test requires a debtor to
27 prove each of the following:

28 First, the debtor must establish "that she cannot
maintain, based on current income and expenses, a

1 'minimal' standard of living for herself and her
2 dependents if forced to repay the loans."
[Citation omitted]

3 Second, the debtor must show "that additional
4 circumstances exist indicating that this state of
5 affairs is likely to persist for a significant
6 portion of the repayment period of the student
7 loans." [Citation omitted]

8 The third prong requires "that the debtor has
9 made good faith efforts to repay the loans...."
[Citation omitted]

10 Pena, at 1112.

11 When a debtor proves all three parts of the test and thus shows
12 that undue hardship would result from having to pay the entire
13 loan, it may nevertheless be the case that paying only part of the
14 loan would not impose undue hardship. In that event, the loan can
15 be partially discharged, see In re Saxman, 325 F.3d 1168, 1173-74
16 (9th Cir. 2003):

17 ... once the debtor has satisfied the Brunner
18 factors and the court has concluded that the debt
19 is too great for the debtor to shoulder,
20 §523(a)(8) is silent with respect to whether the
21 bankruptcy court may partially discharge the
22 loan. Although §523(a)(8) is the sole mechanism
23 by which debtors may seek discharge of student
24 debt, it is not the only provision bearing on the
25 dischargeability of student loans. [¶]
26 Following [In re Myrvang, 232 F.3d 1116 (9th Cir.
2000)], it is now generally recognized that an
27 all-or-nothing approach to the dischargeability
28 of student debt contravenes Congress' intent in
granting bankruptcy courts equitable authority to
enforce the provisions of the Bankruptcy Code.
[footnote omitted] Under 11 U.S.C. §105(a),
bankruptcy courts may "issue any order, process
or judgment that is necessary or appropriate to
carry out the provisions" of the Bankruptcy Code.
In [In re Hornsby, 144 F.3d 433 (6th Cir. 1998)
("Hornsby")], the Sixth Circuit held that §105(a)
authorizes bankruptcy courts to enter partial
discharges in student loan cases.

29 The Ninth Circuit endorsed Hornsby's application of §105(a) to
30 permit partial discharge, but disagreed with that case's failure to

1 require a finding of undue hardship with respect to the discharged
2 portion of a loan.

3 We therefore conclude that before the bankruptcy
4 court can partially discharge student debt
5 pursuant to §105(a), it must first find that the
6 portion being discharged satisfies the
7 requirements under §523(a)(8).

8 Saxman, at 1175.

9 III.

10 ANALYSIS

11 A. Minimal Standard of Living

12 The first prong of the Brunner test requires Husband to show
13 that, based on current income and expenses, he and Wife cannot
14 maintain a minimal standard of living if the debt to Creditor had
15 to be repaid.

16 To meet this requirement, the debtor
17 must demonstrate more than simply tight
18 finances. In defining undue hardship,
19 courts require more than temporary
20 financial adversity, but typically stop
21 short of utter hopelessness. The proper
22 inquiry is whether it would be "unconscionable"
23 to require the debtor to take steps to earn
24 more income or reduce her expenses. In re
25 Nascimento, 241 B.R. 440, 445 (9th Cir. BAP
26 1999) (citations omitted).

27 In re Birrane, 287 B.R. 490, 495 (9th Cir. BAP 2002) ("Birrane").

28 The term "minimal standard of living" is not defined by the Code or
caselaw and there was no evidence at trial concerning a local norm.
As noted above, Husband did introduce into evidence the IRS
Collection Standards, but Creditor argues that those are irrelevant
and caselaw does not apply them. As a matter of law, it is true
that the IRS Collection Standards have not been held to constitute

1 a "minimal standard of living" for purposes of §523(a)(8). Insofar
2 as factual issues are concerned, the Court finds the IRS Collection
3 Standards to be of limited usefulness because they do not explain
4 the assumptions upon which they are based, do not adjust all
5 amounts for local variances, and do not address such essential
6 items as health care, insurance, and retirement at all.

7 At time of trial, Husband's net monthly income was \$4,022 and
8 monthly expenses totalled \$3,844.74. There appears to be a surplus
9 of \$178.26, but that is illusory because the budget is not
10 realistic. For example, there is no provision for clothing,
11 although Husband's testimony showed that both spouses require new
12 clothing. Further, the 1990 automobile is barely functioning and
13 beyond repair, so a reasonable budget would include the cost of
14 replacing it (which would probably increase the insurance expense).
15 Significantly, the budget does not provide for contributions to a
16 pension plan, although the couple is middle-aged and has only some
17 \$11,000 set aside for retirement.

18 Creditor argues that the medical and grocery expenses are too
19 high because Wife consults a doctor whose services are not covered
20 by insurance and the couple buys expensive bread. However, Wife
21 testified that she selected her doctor because she was not
22 satisfied with the treatment she received from the doctors offered
23 by the insurance plan, and the bread appears to be used for health
24 reasons rather than as a luxury. Even assuming for the sake of
25 argument that those expenses should be reduced, the budget would
26 still be unrealistic with respect to clothing, transportation, and
27 retirement. If the \$150 medical expense were replaced by one \$10
28 visit to a doctor provided by the insurance plan, that would save

1 \$140 per month; if the grocery expense were reduced by one \$5 loaf
2 of bread a week (for which a \$1.50 loaf of bread was substituted),
3 that would save approximately \$14 per month -- those savings of
4 \$146 would reduce total monthly expenses to \$3,670, for a surplus
5 of \$324 per month (approximately \$70 per week). That surplus would
6 have to cover clothing for two adults (one of them a professional
7 man), replacement of the 1990 automobile, and retirement savings
8 for a couple with approximately fifteen more years to work and only
9 \$11,000 set aside now.

10 Furthermore, reduction of those expenses would not permit
11 payment of the Subject Loan. In order for the Subject Loan to be
12 paid in full by the end of its seventeen year term, \$830.20 per
13 month is needed -- if the Subject Loan were included in the Ford
14 Program, either alone or consolidated with the HEAL Loan, monthly
15 payments of \$885.30 would be required based on Husband's current
16 income. Even if expenses were reduced as Creditor urges, the
17 resulting monthly surplus would be only \$324 (or \$422 if the \$125
18 HEAL Loan payment were eliminated by consolidation under the Ford
19 Program), which is approximately half of what would be needed to
20 pay the Subject Loans.

21 Based on current income and expenses, Husband and Wife could
22 not maintain a minimal standard of living if the Subject Loan were
23 repaid, either in full or in part.

24

25 B. Additional Circumstances

26 The second prong of the Brunner test requires Husband to show
27 that additional circumstances exist such that the current state of
28 affairs will persist over the life of the loan repayment period.

1 The "additional circumstances" prong of
2 the Brunner test "is intended to effect
3 'the clear congressional intent exhibited
4 in §523(a)(8) to make the discharge of student
5 loans more difficult than that of other non-
6 excepted debt.'" Rifino, 245 F.3d at 1088-89
7 (citations omitted). There must be evidence
8 that the debtor's "road to recovery is ob-
9 structed by the type of barrier that would
10 lead [the court] to believe he will lack the
11 ability to repay for several years." [cita-
12 tion omitted]. Examples of such barriers may
13 include psychiatric problems, lack of usable
14 job skills and severely limited education.
15 [Citation omitted].

16 Birrane, at 497.

17 Husband testified that he currently earns more than he ever did
18 before, his salary is comparable to those at similar institutions,
19 he is at the top of his salary range, he has no prospects for
20 advancement unless he were offered a management position (which is
21 beyond his control), and he cannot afford to establish a private
22 practice. He has been a practicing psychologist since 1991 and is
23 now middle-aged -- there is no evidence that he has either
24 education or experience that qualify him for work in some more
25 lucrative field.⁵

26 Creditor argues that Wife should become employed so as to
27 increase the couple's income. It is undisputed that all family or
28 household income must be included when assessing undue hardship
29 under §523(a)(8), see Pena; see also In re White, 243 B.R. 498,
30 509, n.9 (Bankr.N.D.Ala. 1999), cited by Creditor and collecting
31 cases. Creditor also urges that Wife's claimed inability to work
32 should be disregarded because it was not corroborated by evidence
33 such as expert medical testimony, citing Pena. In Pena, the wife

34 ⁵ The only evidence that Husband has ever done any other
35 kind of work is his testimony that he took a second job as a
36 salesman for a time, but made no sales.

1 offered corroborating evidence of chronic mental illness by showing
2 that she had qualified to receive past and future benefits based on
3 such a disability, but the case does not stand for the proposition
4 that uncorroborated claims have no merit.⁶ Without expert medical
5 evidence, this Court is not competent to determine whether Wife
6 suffers from a medical disability -- but this Court is capable of
7 evaluating Wife's credibility as a witness, and has concluded that
8 Wife sincerely believes that she is too ill to work. Given her own
9 perception that she is not able to work, it follows that she cannot
10 work; even if her disability were a psychosomatic one, it would be
11 no less real in its effects. Furthermore, it appeared from Wife's
12 demeanor at trial that she is a tense, emotional, and nervous
13 person who is easily distracted and quickly fatigued. Such
14 qualities are not conducive to retaining a job even if she were
15 able to find one, and her failure to obtain a permanent position
16 despite two years' "extremely intensive" efforts shows that she has
17 not been readily employable (for whatever reason). Creditor
18 contends that Wife has not availed herself of treatment for her
19 current condition, because she has not sought physical therapy
20 since 2000 and is relying on holistic medicine instead of
21 consulting the doctors provided by the insurance plan. However,
22 Wife credibly testified that she has not benefitted from
23 traditional treatment in the past and believes it would harm her --
24 whether her opinion is or is not medically justified, it appears to

25
26 ⁶ In this case, there is no basis upon which to draw
27 negative inferences from the lack of corroboration. Husband's
28 attorney stated in argument that Husband would have retained an
expert medical witness if he had been able to afford it. Wife
testified that she was ineligible for disability benefits due to
Husband's income and her own earnings history, so the absence of
benefits does not reflect a lack of disability.

1 be a sincerely held and firm one, and she cannot reasonably be
2 expected to submit to treatments in which she has no confidence
3 (and in fact considers harmful).

4 Assuming for the sake of argument that Wife were able to obtain
5 employment, the evidence does not suggest that she could earn much.
6 Her work experience as a technical writer and graphic designer did
7 not result in her finding a job during her "extremely intensive"
8 search in 1999 and 2000, and her degree in social work is useless
9 without the license that she has been unable to acquire, cannot now
10 afford, and may now be unqualified for. She has earned from \$35 to
11 \$15 per hour at various times in the past but has not worked since
12 2000, which was prior to her surgery in 2001. At time of trial,
13 she said that she had "hardly left the bed" since the surgery, and
14 Husband testified that she was too weak to wash dishes;
15 furthermore, as noted above, her behavior tends to be erratic.
16 Under all of these circumstances, it is not probable that she would
17 earn anywhere near as much as she did in the past; if she were
18 employable at all, it is more likely than not that she would be
19 confined to low paying positions on a part-time basis. If she were
20 qualified for a job paying the current California minimum wage of
21 \$6.75 per hour⁷ and worked twenty hours a week, her gross earnings
22 would be only \$135 per week, or approximately \$540 per month. That
23 would have to be reduced by any payroll taxes withheld, and the
24 couple's expenses would have to be increased to provide for
25 employment-related clothing, transportation, and the like. As
26 explained following, any nominal additional income that Wife might
27 conceivably be able to produce in future would not permit payment

7 The current federal minimum wage is \$5.15 per hour.

1 of the Subject Loan, in full or in part.

2 As set forth above, income now exceeds expenses by only \$178.26
3 per month, and that is based on an unrealistic budget that does not
4 provide for currently needed items such as clothing, automobile
5 replacement, and retirement savings. Even that tiny (albeit
6 illusory) surplus will vanish when the HEAL Loan payments rise from
7 their current temporary level of \$125 to the \$800 or more that HHS
8 advises will be needed "to start reducing your debt". At that
9 point, expenses would increase by at least \$675, absorb the
10 illusory surplus of \$178.26, and exceed income by approximately
11 \$495. If the expenses were adjusted to provide for the necessities
12 of clothing, transportation, and retirement savings (as the Court
13 considers they should be), the deficit would increase. If the
14 expenses were reduced by \$146 to eliminate uninsured medical
15 treatment and expensive bread (which reduction the Court does not
16 consider warranted), a significant deficit would continue to exist.
17 Under these circumstances, minor contributions that Wife might
18 someday be able to make are not likely to create a surplus from
19 which any amount could be paid on the Subject Loan, let alone the
20 \$830.20 per month required to pay it in full by the end of its
21 seventeen year contractual term, or the \$885.30 per month (based on
22 current income) that would be required for twenty-five years under
23 the Ford Program.

24 Whether the repayment period for the Subject Loan is seventeen
25 years or twenty-five years, additional circumstances exist that
26 cause the current state of affairs to persist throughout the
27 repayment period.

28

1 and described their budget as "a shoe string". They are saving
2 nothing, have bought virtually no clothing in two years, were
3 sleeping on air mattresses until changing to inexpensive mattresses
4 that are uncomfortable, have no amenities such as cable television
5 and cell phones, and are using an automobile that cannot be driven
6 more than two miles at a time.

7 With respect to the Ford Program, it is undisputed that Husband
8 could use it for the Subject Loan, or the HEAL Loan, or both; under
9 the income contingent repayment plan, monthly payments would be
10 based on income regardless of the total amount of the loan or
11 loans.⁸ But it is also undisputed that, under the current state of
12 the law, any balances left unpaid at the end of the maximum twenty-
13 five year term would be forgiven and treated as taxable income.
14 Husband calculates that, if 25% of the Subject Loan could be repaid
15 under the Ford Program, some \$64,940 would remain to be forgiven
16 and taxed as income -- if the tax rate were 28%, the tax would
17 amount to \$18,183. If the HEAL Loan were also included in the Ford
18 Program and also remained unpaid at the end of the term, that
19 balance would likewise be treated as taxable income. Creditor
20 argues that the law may well change in the next twenty-five years,
21 so that the Ford Program can be used without fear of tax
22 consequences. But it would be complete speculation to consider
23 what the law might possibly be far in the future, whereas Husband's
24 decision about whether to enter the Ford Program must be made in
25 the present. Birrane notes (at 500, n.7) that, even though it is

26
27 ⁸ As discussed above, Husband's budget cannot support the
28 \$885.30 monthly payments that the Ford Program would require for
any loan or loans based on current income, so the issue of whether
the Ford Program should or should not be used is to some extent
academic.

1 "not unlikely" that adverse tax consequences may result from using
2 the Ford Program, its availability is nevertheless "a factor to be
3 considered" in determining whether a good faith effort was made to
4 repay. This Court has given due consideration to that factor, but
5 cannot find a lack of good faith in a decision to forgo the Ford
6 Program under the circumstances of this case. In the first place,
7 Husband's budget cannot meet the payments required. Even if it
8 could, the current state of the law is such that he will face a tax
9 bill that he calculates at \$18,000 or more when he is 74 years old
10 and likely to be retired with even less income than he has now.

11
12 CONCLUSION

13 For the reasons set forth above, Husband has established that
14 repaying the Subject Loan in full would entail undue hardship. The
15 Court has considered whether Husband could pay any part of the
16 Subject Loan without undue hardship, as provided by Saxman, and has
17 concluded that he cannot, for the reasons stated herein. The
18 Subject Loan is therefore dischargeable under §523(a)(8).

19 Counsel for Husband shall submit a form of judgment so
20 providing, after review by counsel for Creditor as to form.

21 Dated:

22
23
24
25 ARTHUR S. WEISSBRODT
26 UNITED STATES BANKRUPTCY JUDGE
27
28