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U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re

ERIC & BRENDA OLIPHANT,

Debtors.

) Chapter 11 proceedings
)
) Case No. 2:09-bk-00367-CGC
) Adversary No. 2:11-ap-00626-CGC
)
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)

ERIC & BRENDA OLIPHANT,

Plaintiffs,

v.

**ALASKA COMMISSION ON POST
SECONDARY EDUCATION, ET AL.,**

Defendant.

) **UNDER ADVISEMENT DECISION RE**
) **DISCHARGEABILITY OF STUDENT**
) **LOANS**
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I. Introduction

Brenda and Eric Oliphant love education. Both have spent their lives in education as students and as administrators. Along the way they accumulated nearly \$500,000 in student loan debt from College Assist and other lenders. While bearing this debt burden, the Oliphants took out a mortgage on a four bedroom home, remodeled it, and purchased four cars. In January 2009, the Oliphants' debt burden grew so great that they declared bankruptcy. The situation further deteriorated: Mrs. Oliphant gradually lost her vision—eventually going blind; she lost both of her jobs; and Mr. Oliphant quit one of his jobs to take care of her. Rather than scale back their expenses during these turbulent times, the Oliphants acquired new debt. Mr. Oliphant took out a post-petition loan from College Assist for his PhD—a loan he now seeks to discharge. The question presented is whether

1 the Oliphants' financial decisions prevent their student loans from being discharged.
2 They do.

3 **II. Factual Background**

4 In January 2009, the Oliphants filed for bankruptcy after accruing \$474,783.46 in
5 debt with College Assist and other student loan lenders. In March 2011, the Oliphants
6 commenced this adversary proceeding to discharge their student loan debt. The
7 Oliphants settled with every lender except College Assist. As of January 2012: (1) the
8 Oliphants owe College Assist \$113,886.11; (2) the College Assist loan accrues interest at
9 a fixed rate of 3.875% per year; (3) College Assist's proposed payment plan requires
10 payments of \$599.27 per month for the first 294 months and a final payment of \$600.63
11 in the 295th month; (4) the Oliphants' monthly income is \$9040.63; and (5) their monthly
12 expenses are \$8,090.86.

13 Mr. Oliphant is a 60-year-old school counselor for Agua Fria Union High School.
14 He held a second job as a 9-1-1 operator for the Phoenix Police Department but quit in
15 2010 to care for his wife. Mr. Oliphant earns \$7,487.63 per month in combined income
16 from his school counselor job, retirement pension, and military disability income. Prior
17 to becoming a school counselor, Mr. Oliphant took out a College Assist loan for his
18 masters degree in education counseling and guidance from the University of Alaska
19 Anchorage. After filing for bankruptcy in 2009, Mr. Oliphant took out an additional loan
20 from College Assist to pursue a PhD in Organization Psychology—a degree he believes
21 will increase his income when he graduates in 2014. Mr. Oliphant seeks to discharge
22 both of these loans.

23 Mrs. Oliphant is 54 years old and unemployed. She previously worked as an
24 Arizona State hospital worker and an Avondale Elementary School District counselor.
25 However, beginning in 2008, she began losing her vision. In September 2009 she
26 completely lost her vision after unsuccessful eye surgery. Finally, in June 2010 she was
27 declared legally blind. Mr. Oliphant currently serves as her full-time caretaker. Mrs.
28 Oliphant currently receives \$1,553 per month in disability income.

1 The Oliphants reside in a four bedroom, three bathroom house in suburban
2 Surprise, Arizona. They purchased the house in 2004 for \$550,000, paying \$67,000
3 down and financing the rest. In 2006 they refinanced the house for \$680,000. The
4 Oliphants received \$168,000 in cash from the refinance and spent approximately \$75,000
5 of that amount remodeling their house. The Oliphants added stones, pillars, and gates to
6 their yard. In addition, they replaced their doors, installed exterior screens, enclosed their
7 patio, remodeled their upstairs entertainment room, and furnished new cabinets in their
8 library. The remaining amounts were spent on other expenses, none on paying down any
9 of the student loans.

10 At the time of filing for bankruptcy, the Oliphants owned four vehicles: a 2007
11 Volkswagen Beetle, 2007 Chrysler 300, 2005 Hummer H2, and 1997 Jeep Wrangler;
12 taking out loans for each one. They subsequently sold the Beetle and kept the remaining
13 vehicles, paying off the loans on the Jeep Wrangler and Hummer H2 from funds held in
14 trust by the Chapter 13 Trustee and returned to them upon conversion to Chapter 11. The
15 Oliphants currently pay \$535 per month on the Chrysler 300 loan. According to the
16 Oliphants' monthly budget ("Exhibit 3"), they spend \$600 per month on gasoline.
17 During trial Mr. Oliphant stated that Mrs. Oliphant is unable drive because she is blind.

18 **III. Issues**

- 19 1. Is the student loan debt an undue hardship and thus dischargeable?
20 2. If there is undue hardship, should the debt be fully or partially discharged?

21 **IV. Analysis**

22 **A. Introduction**

23 Under 11 U.S.C. § 523(a)(8),¹ a student loan debt is nondischargeable in
24 bankruptcy "unless excepting such debt from discharge . . . would impose an undue

25 ¹ 11 U.S.C. § 523(a)(8):

26 A discharge under section 727, 1141, 1228(a) 1228(b), or 1328(b) of this title does not discharge an
27 individual debtor from any debt unless excepting such debt from discharge under this paragraph
28 would impose an undue hardship on the debtor and the debtor's dependents, for an educational
benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under
any program funded in whole or in part by a governmental unit or nonprofit institution; or an
obligation to repay funds received as an educational benefit, scholarship or stipend; or any other
educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal
Revenue Code of 1986, incurred by a debtor who is an individual.

1 hardship on the debtor and the debtor’s dependents.” *In re Craig*, 579 F.3d 1040, 1044
2 (9th Cir. 2009). The term “undue hardship” is not defined by the Bankruptcy Code, but
3 “garden variety” hardship is insufficient. *In re Nys*, 446 F.3d 938, 944 (9th Cir. 2006)
4 (quoting *In re Pena*, 155 F.3d 1109, 1111 (9th Cir. 1998)). The Ninth Circuit has
5 adopted the three prong test, established in *Brunner v. New York State Higher Educ.*
6 *Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987), to determine if excepting a student loan
7 from a debtor’s discharge would impose an undue hardship. *In re Saxman*, 325 F.3d
8 1168, 1173 (9th Cir. 2003). Under the *Brunner* test, a debtor has the burden of proving
9 by a preponderance of the evidence: (1) that he cannot maintain, based on current income
10 and expenses, a “minimal” standard of living for himself and his dependents if forced to
11 repay the loans; (2) that additional circumstances exist indicating that this state of affairs
12 is likely to persist for a significant portion of the repayment period of the student loans;
13 and (3) that he has made good faith efforts to repay the loans. *Craig*, 579 F.3d at 1044.
14 Failure to satisfy any of the three requirements results in a finding of nondischargeability.
15 *In re Rifino*, 245 F.3d 1083, 1088 (9th Cir. 2001). The Court will analyze each prong of
16 the *Brunner* test.

17 **B. Brunner Test**

18 **1. Minimal Standard of Living**

19 To satisfy the first prong of *Brunner*, a debtor must show that they cannot
20 maintain, based on current income and expenses, a “minimal” standard of living if forced
21 to repay the loans. *Craig*, 579 F.3d at 1044. Debtors do not have to live at or below the
22 official poverty guidelines. *In re Greenwood*, 349 B.R. 795 (Bankr. D. Ariz. 2006)
23 (citing *In re Howe*, 319 B.R. 886, 889 (BAP 9th Cir. 2005)). However, a debtor must
24 show that their expenses are reasonable. *In re Bossardet*, 336 B.R. 451, 455 (Bankr. D.
25 Ariz. 2005). Courts look to the guidelines promulgated by the local panel Chapter 13
26 Trustee (“Guidelines”)² when analyzing the reasonableness of a debtor’s expenses. *In re*
27 *Steward-Johnson*, 319 B.R. 192, 197 (Bankr. D. Ariz. 2005).

28 _____
² The Guidelines can be found at: <http://www.maney13trustee.com/TrusteeExpenseGuidelines2008.9-25-08.pdf>.

1 The Oliphants fail the first prong of Brunner on at least three fronts: their monthly
2 income exceeds their monthly expenses, their mortgage payments are unreasonable, and
3 their vehicle payments are unreasonable.

4 Mr. Oliphant receives \$7,487.63 per month combined from his school counselor
5 job, retirement pension, and military disability income. Mrs. Oliphant receives \$1,553
6 per month in disability income. Together, the Oliphants' monthly income is \$9,040.63.
7 The Oliphants' monthly expenses are \$8,090.86. Thus, the Oliphants have a monthly
8 surplus of \$949.77.

9 The Oliphants' monthly mortgage payments are unreasonable. The Oliphants pay
10 \$3,839.60 per month for a 4 bedroom, 3 bathroom home that includes an entertainment
11 center and a library. The Guidelines' recommended mortgage payment is 35% of the
12 debtors' income. The Oliphant's monthly income is \$9,040.63; 35% of this income is
13 \$3,164.22. Thus, there is a \$675.38 difference between what the Guidelines recommend
14 as reasonable and what the Oliphants actually pay. There is insufficient evidence that the
15 home is necessary to accommodate Mrs. Oliphant's disability. In fact, during trial, Mr.
16 Oliphant stated that after Mrs. Oliphant went blind, they discussed moving to a less
17 expensive home before ultimately deciding to remain in their current home. They may
18 choose to stay in the house but that choice has consequence, one of which is an adverse
19 judgment in this non-dischargeability case. In sum, paying \$675.38 more per month than
20 what the Guidelines recommend for a house is unreasonable.

21 The Oliphants' monthly vehicle payments are also unreasonable. The Oliphants
22 pay \$535 per month in loan payments on their third vehicle, the Chrysler 300, and spend
23 \$200 per month insuring three vehicles even though Mr. Oliphant is the only driver in
24 their household. The Oliphants spend \$600 per month on gasoline while the Guidelines
25 recommend \$300. There is no evidence that Mr. Oliphant drives more often than the
26 average driver to justify paying \$600 per month for gasoline. Simply put, having three
27 cars for one driver is unreasonable.

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1 Other items including utilities, food, and entertainment are reasonable under the
2 Guidelines; albeit on the high end for each. Nonetheless, between mortgage and vehicle
3 payments there is at least a \$975.38 difference between what the Guidelines recommend
4 as reasonable and what the Oliphants actually pay. When taken together with the fact
5 that the Oliphants yield a monthly surplus of \$949.77, the Court concludes that the
6 Oliphants fail the first prong of *Brunner*.

7 **2. Likely to Persist**

8 To satisfy the second prong of *Brunner*, a debtor must show that additional
9 circumstances exist indicating that the current state of affairs is likely to persist for a
10 significant portion of the repayment period of the student loans. *Craig*, 579 F.3d at 1044.
11 A debtor does not have a separate burden to prove “additional circumstances” beyond the
12 inability to pay presently or in the future. *Nys*, 446 F.3d at 945. Factors that courts may
13 consider in determining whether the debtors’ inability to pay presently or in the future is
14 likely to persist include, but are not limited to, the following:

- 15 • Serious mental or physical disability of debtor or debtor’s dependents which
16 prevents employment or advancement;
- 17 • Debtor’s obligation to care for dependents;
- 18 • Limited number of years that remain in debtor’s work like to allow payment of
19 loan;
- 20 • Age or other factors that prevent retraining or relocation;

20 *Id.* at 947.³

21 The Oliphants’ financial state of affairs is likely to persist for a significant portion
22 of the repayment period. Mrs. Oliphant’s blindness is a significant handicap that will
23 hinder, perhaps even prevent, her from gaining future employment. Mrs. Oliphant’s
24 blindness also hinders Mr. Oliphant from gaining additional employment because he
25 must serve as her full-time caretaker. In fact, Mr. Oliphant quit his previous 9-1-1
26 operator job to care for her.

27 ³ *Nys*, 446 F.3d at 947 cites additional factors inapplicable in the instant case including: debtor’s lack of, or severely
28 limited education; poor quality of education; lack of usable or marketable job skills; underemployment; fact that debtor
has maximized income potential in chosen field and has no other more lucrative job skills; lack of assets, whether or
not exempt, which could be used to pay loan; potentially increasing expenses that outweigh any potential appreciation
in value of debtor’s assets and/or likely increases in debtor’s income; and lack of better financial options elsewhere.

1 The Oliphants' financial state of affairs is likely to persist for a significant portion
2 of the repayment period because at 60 years old Mr. Oliphant has a limited number of
3 years left in his work life to pay back his loans. College Assist's current repayment plan
4 calls for him to make payments until he is 85 years old. It is unlikely he will be working
5 and making payments beyond 80 years old. Mr. Oliphant's age also makes it unlikely he
6 will be able to train for another career or relocate for a new job. Mrs. Oliphant's
7 blindness will also make it difficult for her to learn new job skills or relocate. Thus, the
8 Court concludes that the Oliphants meet the second prong of *Brunner*.

9 **3. Good Faith**

10 To satisfy the third prong of *Brunner*, a debtor must show they have made good
11 faith efforts to repay the loans. *Craig*, 579 F.3d at 1044. Good faith is measured by a
12 debtor's efforts to obtain employment, maximize income, and minimize expenses. *In re*
13 *Birrane*, 287 B.R. 490, 499 (BAP 9th Cir. 2002). If a debtor has the capacity to pay a
14 student loan debt, he or she should do so. *In re Ristow* 2011 WL 2604841 *5 (Bankr. D.
15 Ariz. June 30, 2011).

16 The Oliphants have made good faith efforts to obtain and maximize their incomes
17 in order to repay the College Assist loan with each holding two jobs each as recently as
18 January 2009. Mrs. Oliphant lost her jobs in large part to her blindness and Mr. Oliphant
19 had to quit his 9-1-1 operator job to take care of her. Throughout all of this, Mr. Oliphant
20 continues to work as a public school counselor and accept his retirement pension and
21 disability income from the Air Force.

22 However, the Oliphants have not made good faith efforts to minimize their
23 expenses and repay their loans. The Oliphants were able to pay back their student loan
24 debt but chose to spend their money on other items. First, rather than repaying their
25 previous loan debt to College Assist, the Oliphants took out a loan for a 2007
26 Volkswagen Beetle, their fourth car, despite only having two drivers, at the time, in their
27 household. Second, rather than repaying their previous loan debt to College Assist, the
28 Oliphants spent \$75,000 of the \$168,000 they received after their home refinance

1 remodeling their backyard, upstairs entertainment room, and library. Finally, after filing
2 for bankruptcy, Mr. Oliphant took out another loan from College Assist. Rather than
3 repay the loan, he commenced this adversary proceeding to discharge it. In sum, the
4 Oliphants have not made a good faith effort to minimize their expenses and repay their
5 loan debts to College Assist. The Court concludes that the Oliphants fail the third prong
6 of *Brunner*.

7 **C. Partial Discharge**

8 Bankruptcy Courts in the Ninth Circuit may exercise their equitable authority
9 under 11 U.S.C. § 105(a) to partially discharge student loans. *Saxman*, 325 F.3d at 1173.
10 Before a court can partially discharge debt, it must first find that the portion being
11 discharged satisfies the *Brunner* test. *Id.* at 1174. The Oliphants are ineligible for a
12 partial discharge because they do not meet the *Brunner* test. The problem with
13 permitting partial discharge without first satisfying *Brunner* is that the equity-based
14 principal of partial discharge would have the very real potential to eviscerate the statute-
15 based undue hardship provision. *Id.*

16 **V. Conclusion**

17 The Court finds that the Oliphants' student loan debt is nondischargeable because
18 they did not maintain a minimal standard of living and make good faith efforts to repay
19 the loan. Partial discharge is unavailable. Counsel for College Assist is to upload a form
20 of judgment.

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24 Dated: March 26, 2012

25 
26 CHARLES G. CASE II
27 UNITED STATES BANKRUPTCY JUDGE
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1 **COPY** of the foregoing mailed by the BNC and/or
2 sent by auto-generated mail to:

3 All interested parties
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