IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	'	
KENNETH EUGENE MCLEROY AND DIANA DUAN MCLEROY,	'	CASE NO. 99-50895-7
Debtors.	'	
KENNETH EUGENE MCLEROY,	'	
Plaintiff	'	
vs.	'	ADVERSARY NO. 99-5049
EDUCATIONAL CREDIT MANAGEMENT CORP.,	'	
Defendant.	'	

MEMORANDUM OPINION

This case is on remand from the District Court. The Debtor Kenneth McLeroy executed promissory notes for education loans taken out by him to help fund his two sons= college educations. Due largely to a myriad of health related problems, and the resulting costs, the McLeroys filed bankruptcy under Chapter 7 of the Bankruptcy Code. After filing, the McLeroys initiated this adversary proceeding against the Student Loan Marketing Association (the loans have since been purchased by Educational Credit Management Corporation, hereinafter, AECMC@), seeking a determination that the education loans are dischargeable under the Aundue hardship@ provision of 11 U.S.C. ' 523(a)(8).

This court has jurisdiction of this matter under 28 U.S.C. ' 1334(a) and 28 U.S.C. ' 157(a). This is a core proceeding pursuant to 28 U.S.C. ' 157(b)(1) and (b)(2)(I). This

memorandum opinion contains the court=s findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

On November 29, 1999, trial was held before the bankruptcy court. The evidence then established that the McLeroys= monthly income is between $2,215.07 and $2,399.65. Their expenses included a tithe to their church in the amount of $490.00 a month. With respect to the tithe, Mrs. McLeroy testified that she had tithed for forty years, and that a failure to tithe was the equivalent of Arobbing God.@ When counsel for ECMC attempted to cross-examine Mrs. McLeroy concerning the necessity of their tithe, the bankruptcy judge put a halt to the questions and prevented ECMC=s counsel from inquiring into the Debtors= tithing practices, citing for support the Religious Liberty and Charitable Donation Protection Act of 1998 (hereinafter the ARLCDPA@). In closing argument, the McLeroys argued that the RLCDPA protected their tithing from being used to defeat their request for discharge of the student loans pursuant to 11 U.S.C. ' 523(a)(8). ECMC argued the RLCDPA was only intended to address situations where a bankruptcy trustee was attempting to recover tithes or charitable donations as fraudulent transfers.

At the conclusion of the November 29 trial, the bankruptcy court, relying on the decision in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987), found that the McLeroys had met their burden of proving Aundue hardship@ and discharged the loans under 11 U.S.C. ' 523(a)(8). Regarding the McLeroys= tithing practices, the bankruptcy court noted that the RLCDPA compelled the court to allow the religious contributions to the extent that they had previously been made. ECMC appealed.

On appeal, the District Court framed the sole issue as follows: A[H]ave the provisions of 11

U.S.C. ' 523(a)(8) been amended by the Religious Liberty and Charitable Donation Act, thereby allowing the debtors= tithing practices or charitable donations to be considered as an appropriate expense in the analysis of what constitutes an undue hardship?@ The District Court held that the RLCDPA=s provisions do not apply to 11 U.S.C. ' 523(a)(8). It further held that the standards set forth in *In re Lynn*, 168 B.R. 693 (Bankr. D. Ariz. 1994), provide guidance when considering whether a tithe is a valid expense under the undue hardship analysis. Accordingly, the decision by the bankruptcy court was vacated and remanded for further proceedings.

On remand, this court held another evidentiary hearing to ascertain additional facts consistent with the District Court=s remand order and, specifically, to allow ECMC the opportunity to cross-examine the McLeroys concerning the circumstances of their tithing practices. Mrs. McLeroy reiterated that she and Mr. McLeroy have been married for twenty-four years; they are members of the Church of Christ in Denver City, Texas; she has been tithing for forty years; and, as long as she has been married to her husband, they have always tithed. Mrs. McLeroy stated that they presently tithe $127.50 per week.[1] Mrs. McLeroy further stated that the tithe is approximately 16% of their income and that the amount of the tithe does not change if their financial condition changes.

With respect to Mr. McLeroy=s health, Ms. McLeroy testified that her husband receives AKelation Therapy@ twice a week which costs approximately $1,000.00 per month. Regarding their household budget, Mrs. McLeroy testified that, since the previous hearing in

[1]The McLeroys= monthly tithe has increased as the District Court=s opinion, as well as this bankruptcy court=s prior ruling, finds that the McLeroys= tithe is $490.00 per month. Their present tithe of $127.50 per week equates to $510.00 per month.

bankruptcy court, they had a 1984 truck break down and were forced to borrow a friend=s truck for transportation. Finally, Mrs. McLeroy testified that even if the tithe was eliminated from their budget, they still could not survive financially.

Mrs. McLeroy testified that she and her husband have the same jobs but that they made Aless in 1999", and she was unsure how much they had made in 2000. Mr. McLeroy still works full time and, despite his ill health, is not considered disabled. With respect to the McLeroys= tithing practices, Mrs. McLeroy testified that tithing is a private matter between the individual and God, and that the Church of Christ does not require a tithe as a condition of membership. She testified that tithing is not required by the church and the church elders do not pressure members to tithe. Additionally, Mrs. McLeroy testified that the benefits she and Mr. McLeroy receive from the church are not tied to the amount of the tithe or even to whether they tithe at all.

The statutory authority for discharging a student loan is found in 11 U.S.C. ' 523(a)(8), which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtB
>
> > (8) 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 for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

The Second Circuit Court of Appeals, after considering the legislative intent of 11 U.S.C. ' 523(a)(8), set forth a three part analysis for courts to utilize when determining whether to discharge student loans. *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395, 396 (2nd

Cir. 1987). The debtor must establish: A(1) that the debtor 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 the debtor has made good faith efforts to repay the loans.@ *Id.* at 396. This standard has been adopted by a majority of the courts interpreting ' 523(a)(8). *See Brunner* at 396; *In re Faish*, 72 F.3d 298, 300 (3rd Cir. 1995); *In re Kasey*, 187 F.3d 630 (4th Cir. 1999); *Matter of Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *In re Dolph*, 215 B.R. 832, 834 (6th Cir. BAP 1998); *In re Pena*, 155 F.3d 1108, 1111 (9th Cir. 1998); and *In re McLeroy*, 250 B.R. 872, 876 (N.D. Tex. 2000).

While the *Brunner* court has provided the framework upon which ' 523(a)(8) cases may be analyzed, the court in *In re Lynn*, 168 B.R. 693 (Bankr. D. Ariz. 1994), and its progeny, including *In re Ritchie*, 254 B.R. 913 (Bankr. D. Idaho 2000)(cited by the defendants), specifically considered the effect that tithing and charitable donations have on the Aundue burden@ analysis. In this respect, the *Lynn* court appears to be the standard bearer and the District Court=s remand order requires this court to undertake the analysis found in *Lynn*. In *Lynn*, the debtor was attempting to discharge student loans pursuant to the Aundue burden@ test of ' 523(a)(8). *Id.* at 693. Included in the debtor=s budget were tithing expenses which was recounted by the court:

> The Debtor also discussed her strong religious beliefs and her commitment to turning over ten percent (10%) of her gross wages to her church. Her position was that the money was not hers to spend and that her income must be decreased accordingly. The Debtor testified that at times, she went without food because of her commitment to tithe. She stated that she felt an obligation to tithe if she earned any income. She also conceded that the guidelines of her church did permit her to stop under certain circumstances, such as being impoverished. Nevertheless, she had made a personal

> decision that, irrespective of her financial circumstances, she would tithe as soon as she earned any income.

Id. at 696. The court then applied the three part test in *Brunner* and concluded that while the debtor met prongs one and three of the test, she failed prong two because her state of affairs was not likely to persist for a significant portion of the repayment period of the student loans because she was seeking a college degree with the intention of becoming a teacher that would in turn increase her salary. *Id.* at 697.

The *Lynn* court further opined on the subject of tithing and the effect it has on the nondischargeability analysis. *Id.* at 697. Citing *In re Lee*, 162 B.R. 31 (Bankr. N.D. Ga. 1993), which held Athat the monthly expenses for tithing were unreasonable, because the debtors had not tithed consistently, and the debtors= church did not require tithing as a condition for full membership privileges,@ the *Lynn* court concluded that ASection 523(a)(8) is a neutral law, which is not designed to promote or restrict religious beliefs.@ *Id.* at 700.

Additionally, the court cited to several cases holding that, under ' 1325 of the Bankruptcy Code, tithing is not to be considered in determining what is reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. *Id.* at 699; *See In re Miles,* 96 B.R. 348 (Bankr. N.D. Fla. 1989)(while donations may be a source of inner strength, not necessary for maintenance or support); *In re Sturgeon,* 51 B.R. 82 (Bankr. S.D. Ind. 1985)(stated no church law required donation; under circumstances of case, more noble gesture is for the debtor to offer money to the unsecured creditors); *In re Ivy,* 1988 WL 409629 (D. Or. 1988) *affirmed* 920 F.2d 936 (9th Cir. 1990) *cert. denied, Ivy v. Myers,* 501 U.S. 1217, 111 S.Ct. 2825, 115 L.Ed.2d 995 (1991)(debtors could tithe, but debtors were required to pay same amount to unsecured creditors

as debtors who did not tithe); and *In re Packham*, 126 B.R. 603 (Bankr. D. Utah 1991)(as debtors would lose no benefits as a result of their failure to tithe, tithing was not necessary for maintenance or support).

Ultimately, the *Lynn* court, with respect to the tithing issue, held that the debtor had failed to meet her burden of proof on the issue. *See Lynn*, 168 B.R. at 700. The court reasoned that the debtor receives services or benefits from her church, irrespective of whether she tithes, and the church permits her to cease tithing under certain circumstances, such as impoverishment. *Id.* at 700. As the debtor failed to meet her burden of proof on the tithing issue and failed prong two of the *Brunner* test, the debtor=s student loans were determined to be nondischargeable pursuant to 11 U.S.C. ' 523(a)(8). *Id.* at 700.

As with the debtor in *Lynn*, the McLeroys tithe is not an appropriate expense to be considered in their budget when reviewing their case under the Aundue burden@ analysis. Their church does not require tithing; the benefits they receive from their church are not tied to tithing; the elders of their church do not pressure members to tithe; the church provides no minimum percent for a member to tithe should they in fact choose to tithe. While it is true that the McLeroys have tithed consistently for many years and are deeply committed to doing so, the facts of the case do not support the allowance of tithing as an appropriate expense under these circumstances. *In re Lynn*, 168 B.R. 693.

Upon determining that the McLeroys cannot include their tithe as an appropriate monthly expense, the court turns to the three-part analysis under *Brunner*. With respect to the first prong of the analysis B whether the McLeroys are unable to maintain a minimal standard of living if forced to repay the loan B the court finds the McLeroys have failed to meet the required burden of proof.

A minimal standard of living requires more than a showing of tight finances. *In re Ritchie,* 254 B.R. 913, 917-918 (Bankr. D. Id. 2000). Debtors are expected to live within the strictures of a frugal budget in the foreseeable future. *Id.* at 918; *citing Healey v. Massachusetts Higher Education* (*In re Healey*), 161 B.R. 389, 393 (E.D.Mich.1993). In deciding whether the debtors can maintain a minimal standard of living if required to repay the student loans, the court looks to their monthly income and expenses. *Id.* at 918.

The McLeroys combined monthly net income is between $2,215.07 and $2,399.65. This amount is supported by the McLeroys= response to ECMC=s First Set of Interrogatories as well as their IRS Income Tax Returns for tax years 1996, 1997, and 1998. Mrs. McLeroy testified that she and Mr. McLeroy are both still employed at the same jobs. Mr. McLeroy is not disabled. According to their tax returns, they have earned more each year than in subsequent years while working in their same respective positions.

The McLeroys= Schedule J, which reflects current expenses, reveals that the McLeroys have monthly expenses totaling $2,442.33, which includes both the tithe of $490.00 and the student loan payment of $349.00. As the tithe is not a necessary expense item under the facts of this case, the McLeroys= income clearly exceeds their allowable expenses. The McLeroys contend that even if the court were to disallow their tithing practices, they would still be unable to make it financially. They argue that the AKelation Therapy@ Mr. McLeroy receives costs $1,000.00 per month. Mr. McLeroy has medical insurance which the court assumes will cover his medical expenses. No evidence was offered by the McLeroys to indicate otherwise.

The McLeroys have failed to carry the burden. Their monthly net income exceeds their expenses by approximately $300.00, including the student loan payment and excluding the tithe.

Since the debtor is required, under *Brunner*, to satisfy all three elements of the Aundue burden@ test, the student loans are determined to be nondischargeable under ' 523(a)(8), as the first prong is not met.

As the McLeroys have failed to satisfy the first prong of the *Brunner* analysis, it is not necessary to address the second and third prongs (persistence of their recent financial condition and good faith efforts to repay the loans) of the *Brunner* test. However, upon review of this court=s ruling at the prior trial, this court sees no need to disturb the court=s findings regarding the second and third prongs of the *Brunner* analysis.

In filing this bankruptcy, the McLeroys have succeeded in discharging approximately $127,000.00 of unsecured debt. The McLeroys now seek to discharge student loans pursuant to 11 U.S.C. '523(a)(8). Notwithstanding Mr. McLeroy=s persistent health condition, the McLeroys appear to have an ability to maintain, based on their current income and expenditures, a minimal standard of living for themselves and their dependents. Allowing the McLeroys to include a charitable donation of $510.00 per month[2] as a valid expense in their budget, while certainly generous and meritorious, is unfair to their creditors and is not supported by the case law. After subtracting the monthly tithe from the McLeroys= expenses, the McLeroys are able to make the monthly student loan payments. Both Mr. McLeroy and Mrs. McLeroy have been, and continue to be, gainfully employed in solid positions which they have held for some time. No evidence was adduced at trial that would indicate that this situation will change any time in the near future. Accordingly, the McLeroys have failed to meet their burden of proof under the Aundue burden@ analysis and, thus, the student loans are determined to be nondischargeable

[2]See note [1] *supra.*

under 11 U.S.C. ' 523(a)(8).

Signed March 30, 2001.

_____

Robert L. Jones
UNITED STATES BANKRUPTCY JUDGE