

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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IN RE:

GARY JAMES BROWN and wife,  
CAROLYN JANICE BROWN,

BK #89-30096-WHB  
Chapter 7

Debtors.

DENISE BROWN,

Plaintiff,

v.

Adversary Proceeding  
No. 90-0075

GARY JAMES BROWN,

Defendant.

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**MEMORANDUM OPINION AND ORDER  
ON COMPLAINT TO DETERMINE DISCHARGEABILITY  
OF DEBT**

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This adversary proceeding arose from a complaint filed by Denise Brown, former wife of the debtor/defendant, Gary James Brown, alleging that a debt owed to American General Finance Company and secured by a 1985 Cadillac SeVille, should be excepted from discharge pursuant to 11 U.S.C. §523(a)(5), under the terms of a Marital Dissolution and Child Custody and Support Agreement filed as a part of a pre-bankruptcy divorce action in the Chancery Court of Shelby County, Tennessee. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), and this memorandum opinion contains conclusions of law and findings of fact pursuant to Bankruptcy Rule 7052.

**ISSUE**

The issue is whether a provision in the Marital Dissolution and Child Custody and Support Agreement executed by the former spouses on May 2, 1988, and incorporated into the divorce decree by the

Chancery Court of Shelby County, Tennessee is alimony or support in nature so as to be excepted from discharge under §523(a)(5) of the Bankruptcy Code. The particular provision of the parties' agreement is as follows:

16. Transfer of Automobiles.

Upon the execution of this Agreement the husband will assume and pay the current and outstanding monthly payments upon the 1986 Cadillac SeVille automobile owned by the parties. The husband will continue to make all payments upon the loan for which said vehicle is the security until that indebtedness is paid in full by its terms. Said monthly payments to be made by the husband shall be additional rehabilitative alimony and taxable to the wife as income and deductible to the husband as alimony hereunder. The husband will hold harmless and indemnify the wife as to any such payments owed to Manufacturers Hanover for the payments under said loan agreement. Upon the conclusion of all payments under the loan agreement, the title to said vehicle will be immediately transferred to the wife in fee simple absolute. It is the intention of the parties to make said vehicle the sole property of the wife pending completion of the payments under this paragraph.

Wife will receive the 1985 928 Porsche automobile and will assume and pay all future outstanding indebtedness upon said automobile in the approximate amount of \$25,000.00. Husband warrants that the payments on said automobile are current as of the date of this Agreement. Husband will take the necessary steps to transfer title of said automobile to wife and wife agrees that she will either sell said automobile or will refinance same within thirty days. Wife will hold harmless and indemnify husband from any and all payments which he may be required to make upon said vehicle.

At the hearing of this adversary proceeding, both parties testified. Denise Brown identified the settlement agreement (Exhibit 1) and testified that Mr. Brown's attorney had drafted the agreement. Mr. Brown testified, however, that both his attorney and his former wife's attorney prepared the dissolution agreement. Mrs. Brown testified that she was not working at the time of the execution of the dissolution agreement, but that after she began working she used the Cadillac vehicle to get back and forth to work and to take her child to necessary places. She testified that she drove the Cadillac for approximately six months at which time she bought a used BMW convertible and then sub-leased the Cadillac to a mechanic for \$300.00 a month. Mrs. Brown never made any payments on the Cadillac, and she utilized the \$300.00 from the lease of

the Cadillac to apply on her BMW note. The Cadillac was leased for approximately one year at which point she received the car back (approximately four months before the hearing of this cause), and she is not currently driving the vehicle. She is now driving a 1990 Toyota Celica which she purchased. Mrs. Brown admitted that she did not now need the Cadillac for transportation. Mrs. Brown testified that the \$377.00 monthly Toyota payments were being paid for her by her father.

Mrs. Brown testified that 1987 was the last joint tax return filed by the parties and that she has not yet filed her individual tax returns since that time; therefore, she has filed no tax returns to this point that reflect the Cadillac payments as being income to her.

On cross-examination, Mrs. Brown testified that from the lump sum amounts received by her under the dissolution agreement, she paid off a debt on her fur coat and paid \$5,000.00 down on the BMW automobile. She further testified that she has sold the house which she received in the dissolution agreement and received approximately \$22,000.00 from that sale.

Mrs. Brown testified about her current income from two jobs and her expenses.

The debtor, Gary Brown, testified that at the time of the dissolution agreement he was employed as an investment banker earning substantial income, which has declined from in excess of one half million dollars in 1986 to seventy thousand dollars in 1988 and approximately eighty thousand dollars in 1989. Mr. Brown testified that he did not need the Cadillac and could not afford to pay for it, and that he was approximately twelve months behind in the \$442.00 monthly payments on the Cadillac, which had approximately twenty more payments due. Mr. Brown testified that he alone was on the note for the Cadillac and that Denise Brown had no personal liability on that note.

Mr. Brown has remarried and lives in a home titled in the name of his present wife and co-debtor, Carolyn Janice Brown.

The plaintiff contends that the car was utilized for some period of time by her for transportation purposes and then was leased for income which provided necessary support. Further, the plaintiff argues that the transfer of the Cadillac to Denise Brown could not be a division of property since there was no equity in

the vehicle until it was paid off. Under In re Calhoun, 715 F. 2d 1103 (6th Cir. 1983), the plaintiff argues that the debtor's obligation to pay for the Cadillac and to hold the wife harmless from any obligation thereon is support in nature, and the plaintiff points to the dissolution agreement's provisions that the monthly payments would be considered additional rehabilitative alimony, taxable to the wife as income and deductible to the husband as alimony as evidence of the parties' intent to create a support/alimony obligation.

On the other hand, the defendant/debtor argues that the monthly payment on the Cadillac was not and is not now necessary support. The debtor points to his obligation under the dissolution agreement to pay all medical expenses, educational expenses, insurance for children and child support. Further, the debtor points to the fact that the plaintiff received two automobiles in the dissolution agreement so that only one could be considered necessary support. The debtor argues that Denise Brown received approximately \$52,000.00 in cash and all equity in the house, and the debtor argues that the utilization of approximately \$4,000.00 to pay off a fur coat and \$5,000.00 to make a down payment on a BMW vehicle is evidence of the lack of Denise Brown's need for support from the Cadillac.

#### **CONCLUSIONS OF LAW**

This Court is bound by the four part test established in In re Calhoun, on which test the plaintiff Denise Brown bears the burden of proof for each element. In re Calhoun, 715 F. 2d at 1111. First, the bankruptcy court must determine "whether the state court or the parties to the divorce intended to create an obligation to provide support." Id. at 1109. It certainly appears from a reading of the marital dissolution agreement that the initial intent of the parties was to create an alimony obligation. The language of paragraph 16 of the dissolution agreement specifically calls the Cadillac payments "rehabilitative alimony" which is made taxable to the wife as income and deductible to the husband as alimony. The Court has some question of whether the parties actually intended a support obligation or whether the label "alimony" was a part of a tax structure in the settlement.

Assuming that intent to create an alimony obligation does exist, this Court must move to the second tier of the Calhoun test which is a factual inquiry into whether the alleged support "has the effect of providing the support necessary to insure that the daily needs of the former spouse and any children of the marriage are satisfied." In re Calhoun, 715 F. 2d at 1109. As the Calhoun Court acknowledged, this level of inquiry may have the effect of modifying state court decrees, but in this instance, this Court would be modifying the parties' consensual agreement rather than a state court's independent judicial determination. The Calhoun Court observed that concern for comity is less when the state court has merely incorporated the parties' agreement into the divorce decree, as is the case here. Id.

The record and testimony reveals that Denise Brown received a considerable property division, separate rehabilitative alimony and child support. (See Exhibit 1) Further, the periodic alimony and child support has been amended in July 1990 by the parties' agreement. (Exhibit 4) The Court is not persuaded that the Cadillac payments or the money received by Denise Brown from the Cadillac were ever necessary support. Denise Brown received sufficient property, other alimony and child support to adequately maintain the daily needs of herself and the children of this marriage. At least for a period of time after the divorce, Denise Brown was living well and perhaps engaged in excessive spending. For example, a fur coat and BMW convertible are not necessary items for family maintenance. That is not to criticize Mrs. Brown; rather, this spending indicates an absence of necessity for any support which the Cadillac would offer. In reality, Denise Brown did not need, nor did she continue to drive, the Cadillac. The \$300.00 she received from leasing the Cadillac was not utilized for essential support; rather, it was applied to payments on a luxury automobile, the BMW convertible which she purchased after the divorce.

Having found that the Cadillac did not have the effect of providing necessary support, the Court concludes that the plaintiff failed to satisfy the second element of the Calhoun test. Therefore, the debt arising out of the Cadillac payments is dischargeable as to the former spouse, Denise Brown. In re Calhoun, 715 F. 2d at 1109.

The Court also notes that Denise Brown was not obligated on the Cadillac secured debt and has no risk of liability to the lien holder.

**IT IS THEREFORE ORDERED** that the obligation of Gary James Brown to Denise Brown arising out of the Cadillac payments is dischargeable under 11 U.S.C. §523(a)(5) and In re Calhoun, 715 F. 2d 1103 (6th Cir. 1983). See, generally, Brown, "The Impact of Bankruptcy on Alimony, Maintenance and Support Obligations. The Approach In The Sixth Circuit," 56 TENN. LAW REVIEW 507 (Spring 1989).

**SO ORDERED** this 23<sup>rd</sup> day of August, 1990.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

cc:

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