UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

VIOLA J. WILLIAMSON AND **CASE NO. 07-50098-NPO**
CLAUDE L. WILLIAMSON,

CHAPTER 13

DEBTORS.

MEMORANDUM OPINION AND
ORDER DENYING CONFIRMATION OF DEBTORS' CHAPTER 13 PLAN

On July 19, 2007, there came before the Court for hearing (the "Hearing") the Chapter 13 plan (the "Plan") (Dk. No. 13) filed by Viola and Claude Williamson (the "Debtors"), the Objection to Confirmation (the "Objection") (Dk. No. 18) filed by American General Auto Finance ("American General"), and the Debtors' Response to Objection to Confirmation (the "Response") (Dk. No. 27) in the above-styled chapter 13 proceeding. During this proceeding, Edmund Phillips represented the Debtors, and John Simpson and Kent McPhail represented American General. The Court, having considered the pleadings, testimony and other evidence presented at the Hearing, and the post-trial legal memoranda submitted by counsel (Dk. Nos. 54 and 60), finds that the Plan should not be confirmed because it impermissibly attempts to bifurcate American General's claim into secured and unsecured portions in violation of the "hanging paragraph"[1] contained in 11 U.S.C. § 1325(a).[2]

[1] So called because it was not assigned a subparagraph designation.

[2] Hereinafter, all code sections refer to the Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

Specifically, the Court finds as follows:[3]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (B), (L), and (O). Notice of the Hearing on the Objection was proper under the circumstances.

Facts

The facts relevant to this proceeding are undisputed. The Debtors filed their voluntary petition (the "Petition") (Dk. No. 1) pursuant to chapter 13 of the Bankruptcy Code on January 26, 2007. Within the 910-day period preceding the date of filing the Petition, Debtor Viola Williamson (the "Debtor") purchased a 2002 Mercury Villager V-6 wagon (the "Vehicle") and entered into a purchase money security interest transaction with American General applicable to the acquisition of the Vehicle (Claim No. 2). The Debtor testified at the Hearing that she is employed as a school teacher and does not use the Vehicle to perform any work-related duties or transport students (Hr'g Tr. at 9, 16-17) (Dk. No. 58). The Debtor also testified that she uses the Vehicle to drive to and from work, the doctor, church, her lawyer's office, court, and the grocery store (Hr'g Tr. at 8, 12). In addition, she uses the Vehicle to transport her son (Hr'g Tr. at 14).

American General filed a proof of claim asserting the value of the Vehicle to be $13,109.81, the amount of the balance owed on the debt (Claim No. 2). The Plan proposes to pay American General a secured claim of $9,587.50, which the Debtors assert to be the value of the Vehicle (Dk.

[3] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Rule 9014 of the Federal Rules of Bankruptcy Procedure.

No. 18). American General objects to the Debtors' attempt to bifurcate its claim into secured and unsecured portions.

Issue

The sole issue before the Court is whether the Debtor's use of the Vehicle driving to and from work qualifies as "personal use" pursuant to the "hanging paragraph" contained in § 1325(a) such that American General's claim cannot be bifurcated into secured and unsecured portions under the terms of the Plan. The Debtors bear the burden of proving by the preponderance of the evidence that the Plan complies with §1325(a). *See* In re McPike, 2006 WL 3422684, *2 (Bankr. S.D. Tex. 2006) (citing In re Hill, 268 B.R. 548 (9th Cir. BAP 2001)).

Discussion

Prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") on October 17, 2005, § 506(a) allowed a debtor in a chapter 13 case to bifurcate any claim secured by the debtor's automobile by treating the claim as secured up to the value of the vehicle and treating the remainder of the claim as unsecured. *See* § 506(a); In re Solis, 356 B.R. 398, 405 (Bankr. S.D. Tex. 2006). Bankruptcy courts were obliged to confirm such a plan if it paid the lender the present value of the secured portion of the claim and paid the unsecured portion in the same manner as other unsecured creditors were paid. In re Solis, 356 B.R. at 405 (citing Till v. SCS Credit Corp., 541 U.S. 465 (2004)).

1. "Hanging Paragraph"

BAPCPA amended § 1325(a) of the Bankruptcy Code by adding what has come to be known as the "hanging paragraph" which states:

> For purposes of paragraph (5), section 506 shall not apply to a claim

> described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

See § 1325(a). With respect to motor vehicles, the "hanging paragraph" serves to prohibit the debtor's attempt to bifurcate a secured creditor's claim if (1) the creditor has a purchase money security interest securing the debt, (2) the debt was incurred within 910 days prior to filing the bankruptcy petition, and (3) the collateral is a motor vehicle, (4) acquired for the personal use of the debtor. In re Pinti, 363 B.R. 369, 375 (Bankr. S.D.N.Y. 2007). In the case at bar, the parties agree that the first three (3) elements of § 1325(a) are satisfied. The only issue here is whether the Vehicle was acquired for "personal use of the Debtor." *See* § 1325(a).

2. "Personal Use"

The term "personal use" is not defined by the Bankruptcy Code. The meager legislative history that accompanied the passage of BAPCPA provides no explanation of the term "personal use" as it pertains to the "hanging paragraph."[4] Following the passage of BAPCPA, courts have been divided as to whether transportation to and from work constitutes "personal use" in the context of the "hanging paragraph." One line of cases holds that use of a vehicle for transportation to and

[4] The brief discussion of the "hanging paragraph" amendment to § 1325 in the Report of the House of Representatives provided in pertinent part as follows: "Protections for Secured Creditors. S. 256's protections for secured creditors include a prohibition against bifurcating a secured debt incurred within the 910-day period preceding the filing of a bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the debtor's personal use." H.R.Rep. No. 109-31(I), Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Cong. (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 103.

from work constitutes "personal use" of the vehicle so that the "hanging paragraph" prohibits bifurcation of the secured creditor's claim. *See* In re Joseph, 2007 WL 950267 (Bankr. W.D. La.) (slip copy) (using totality of the circumstances test); In re Solis, 356 B.R. at 398 (using totality of the circumstances test); In re White, 352 B.R. 633 (Bankr. E.D. La. 2006) (using IRS guidelines test); In re Phillips, 362 B.R. 284 (Bankr. E.D. Va. 2007) (using totality of the circumstances test); In re Lowder, 2006 WL 1794737 (Bankr. D.Kan.) (slip copy) (using statutory construction test). Another line of cases holds that the "hanging paragraph" does not prevent bifurcation in cases in which the use of a vehicle is for transportation to and from work because that use does not constitute "personal use." *See* In re Martinez, 363 B.R. 525 (Bankr. S.D. Tex. 2007); In re Medina, 362 B.R. 799 (Bankr. S.D. Tex. 2007); In re Hill, 352 B.R. 69 (Bankr. W.D. La. 2006); In re Johnson, 350 B.R. 712 (Bankr. W.D. La. 2006) (holding that using the vehicle to commute to and from work allows the debtor to make a significant contribution to the gross income of the family unit.) This Court finds more persuasive the reasoning of the cases which hold that transportation to and from work constitutes "personal use" of a vehicle.

a. Cases Within the Fifth Circuit.

Three recent opinions issued by bankruptcy courts within the Fifth Circuit have held that a debtor's use of a vehicle for traveling to and from work constitutes "personal use" of the vehicle. In the White case, the debtor stipulated that she had acquired her vehicle for both personal use and transportation to and from work. In re White, 352 B.R. at 641. The bankruptcy court noted that the debtor did not use the vehicle for business purposes while at work, received no reimbursements from her employer for its use, and deducted no expenses from her income for tax purposes. Id. Relying on IRS guidelines on personal versus business assets, the court held that "the vehicle was purchased

for personal use within the meaning of the Bankruptcy Code." Id.

In Solis, the bankruptcy court held that "the intention of the purchaser at the time that the vehicle was acquired" is the appropriate test for determining "personal use." In re Solis, 356 B.R. at 409.[5] The court found that the debtor's "vehicle was purchased in significant and material part for Debtor's personal use, *including* her transportation to and from work and including family and household use." Id. at 403 (emphasis added). Using a totality of the circumstances test, the bankruptcy court held that the use of the vehicle for transportation to and from work constitutes "personal use." Id. The court further stated:

> '[P]ersonal use' includes any use of the vehicle that benefits debtor(s) such as transportation that satisfies personal wants (such as recreation), transportation that satisfies personal needs (such as shopping or seeking medical attention or other errands), and transportation that satisfies family and other personal obligations, whether legal or moral obligations.

Id. at 410.

In the Joseph case, the debtor testified that she purchased the vehicle for transportation to and from her place of employment. In re Joseph, 2007 WL 950267 at *1. Joseph testified that she also used the vehicle for errands, but that the primary use of the vehicle was for transportation to and from work. Id. Using a totality of the circumstances test, the bankruptcy court held:

> Transportation to and from work is a personal use in the sense that it satisfies the debtor's personal needs and obligations - namely, the need for reliable means for the debtor to commute to his or her place

[5] The Solis court also noted that "[a]lthough the jurisprudence sometimes discusses how the vehicle 'is used' rather than discussing the 'purpose for which it was acquired', the loose language in many cases can be attributed to lax evidentiary presentations, to the fact that in most cases there is probably no difference between intended use and subsequent actual use, and to the fact that the courts are judging credibility of testimony about 'intended use' by observing 'actual use.'" Id.

> of employment. . . . Any other reading would essentially eradicate the distinction between personal and business use.

Id. at *3.

The bankruptcy court in Joseph also set forth factors relevant to determining whether a vehicle is used for a business purpose. According to that court, those factors include: the nature of the debtor's work, how the vehicle is used to perform the debtor's job duties, whether the debtor's employer requires her to use the vehicle to perform job-related duties, whether the employer reimburses the debtor for mileage, and whether the debtor claims any vehicle-related expenses as business expenses on her tax returns. Id. Additionally, the bankruptcy court stated that it would consider whether the debtor indicated in the retail installment contract whether she was purchasing the vehicle for personal and business use. Id. Based on the facts that the debtor used the vehicle to get to and from work, but did not use the vehicle to perform the duties of her employment, the bankruptcy court held that the debtor's use was "personal use." Id.

b. Cases Outside the Fifth Circuit.

There are bankruptcy courts outside the Fifth Circuit who agree that use of a vehicle for transportation to and from work constitutes "personal use." The debtor in Phillips asserted under oath that she purchased her minivan for family errands and to commute to and from work. In re Phillips, 362 B.R. 292-293. The court held that "the requirement of 'personal use' found in the 'hanging paragraph' of Section 1325 means use of a vehicle for a non-business or non-profit making purpose." Id. at 303-304. The bankruptcy court relied on a case from the Fourth Circuit Court of Appeals which held that (1) "personal use" in the context of § 722 of the Bankruptcy Code was "use of a non-business nature without profit motive," and (2) "the rules of statutory construction require

the presumption that identical terms have the same meaning throughout the same act." In re Runski, 102 F.3d 744, 747 (4th Cir. 1996) (citing United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 460 (1993)). In applying this definition of "personal use" to the debtor, the bankruptcy court held that "the use of the Automobile by Phillips for commuting to and from work is not a business use. There is no evidence that Phillips' employer requires her to have a motor vehicle for her employment." In re Phillips, 362 B.R. at 305.

In the Lowder case, the debtor stipulated that she used her vehicle to do personal shopping, run personal errands and travel to and from work. In re Lowder, 2006 WL 1794737 at *1. Like the Phillips court, the Lowder court relied on the reasoning in Runski. Id. at *3 - *4. The bankruptcy court held that "when a vehicle is not used within the scope of employment and the vehicle is acquired for the joint purpose of traveling to and from work and for conducting a debtor's private affairs, it is properly classified as 'personal use' for purposes of the Bankruptcy Code." Id. at *4. The court noted that to hold otherwise could lead to harsh results for debtors in other contexts. "For example, many individual debtors who use their automobiles primarily to drive to and from work could, under this [] theory, be prohibited from redeeming those vehicles under § 722." Id.

c. The Case at Bar.

In the present case, the Debtor testified that she uses the Vehicle to drive to and from work, the doctor, church, her lawyer's office, court, and the grocery store (Hr'g Tr. at 8, 12). In addition, she uses the Vehicle to transport her son (Hr'g Tr. at 14). The Debtor denied using the Vehicle to perform any of her work-related duties as a school teacher (Hr'g Tr. at 16-17). Additionally, the Debtor failed to offer any testimony that she is required by her employer to have a vehicle, that her employer reimburses her for mileage, that she claims any vehicle-related expenses as business expenses on her tax returns, or that she uses the Vehicle for any profit-making purpose. The Debtor's

own testimony makes clear that she uses the Vehicle to satisfy "personal wants," "personal needs," and "family and other personal obligations, whether legal or moral obligations." *See* Solis, 356 B.R. at 410.

Conclusion

In the instant case, the parties agree that all of the uses of the Vehicle qualify as "personal use," with the exception of driving to and from work, which the Debtors assert is not "personal use." The Court expresses no opinion herein regarding the proper test for determining business use. Additionally, the Court expresses no opinion regarding the application of § 1325(a) when a debtor uses a vehicle for both personal and business uses. The Court concludes only that the use of a vehicle to travel to and from work is properly classified as "personal use" for the purposes of the "hanging paragraph" contained in § 1325(a).

Based on the foregoing, the Court finds that the Debtors failed to establish by a preponderance of the evidence that the Plan complies with § 1325(a). Accordingly, the confirmation of the Plan is denied.

A separate final judgment consistent with this Memorandum Opinion and Order will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS THEREFORE ORDERED that the Objection to Confirmation is hereby sustained, and confirmation of the Plan is denied.

SO ORDERED,

Neil P. Olack
United States Bankruptcy Judge
Dated: October 3, 2007