

# **WEDDED BLISS**

## **CURRENT MONTHLY INCOME AND THE NON-FILING SPOUSE**

or

**There's No Such Thing as "Community Debt" in Texas\***

**UNIVERSITY OF TEXAS SCHOOL OF LAW**

**4<sup>TH</sup> ANNUAL CONSUMER BANKRUPTCY PRACTICE CONFERENCE**

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**MICHAEL BAUMER**

7600 BURNET ROAD, SUITE 530  
AUSTIN, TEXAS 78757  
512-476-8707  
FAX 512-476-8604  
[baumer@swbell.net](mailto:baumer@swbell.net)

baumerlaw.com

**Form B22A, Line 17 and B22C, Line 19** are the means test provisions for dealing with the income

of a non-filing spouse. All of this is wrong because the form doesn't match the Code, but until the powers that be fix the problem, this is how we get to deal with it. The analysis I provide here for Line 17 is based upon MANY filings with a non-filing spouse and the local US Trustee's office statements about how we are supposed to make the marital adjustment.

## **Income**

To account for the non-filing spouse's income, fill in the appropriate information for the spouse on Line 3 (**gross** wages for an employed person), Line 4 (**gross** revenue and expenses for a self employed person), Line 5 (**gross** revenue and expenses for rental income), etc.

## **Expenses**

The instructions for Line 17 say: "If you checked the box at Line 2.c, enter on line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero." [Line 2.c is "Married, not filing jointly, without the declaration of separate households set out in Line 2.b above."]

1. Start with the obvious. Take the spouse's pay checks and itemize amounts which are deducted from the spouse's gross income, such as:

### Taxes

- Withholding
- Social Security
- Medicare

### Insurance

- Medical
- Dental
- Vision
- Life
- Disability
- Prepaid legal

### Retirement

- Mandatory (for public employees)
- 401(k) and similar plans
- 401(k) loans

### Miscellaneous

Child support  
Parking  
Gym  
Union dues  
Uniforms  
Charity

**Be careful** with cafeteria plan deductions (health savings accounts and dependent care savings accounts) as these amounts will typically be contributed toward the household expenses of the debtor or a dependent. This is an easy double or triple dip. Line 19B gives you the National Standard for out of pocket health care costs. (\$54 per person under age 65.) Line 31 gives you out of pocket health care in excess of the National Standard. (Be prepared to document.) If the debtor has a health savings account (Line 34.c.), you would normally deduct the payroll deduction for that amount from Line 31.

2. Next, go the spouse's credit report. (The UST will ask you to prove the amount of any debt payments which you are excluding from the spouse's income and this will have all of it in one place.)

Deduct any payments for secured installment debt (ie, car, boat, motorcycles, jet skis) which are **not** going to be listed on Line 42, payments on secured debt.

Deduct any payments for other installment debt (ie, student loans, installment agreements with the IRS).

Deduct at least the minimum monthly payments on revolving debt. If the spouse makes more than the minimum payments and you can document this from the monthly statements, use the higher amount.

**Be careful** with the spouse's credit card debt as some of the expenses charged on the cards may be "amounts regularly contributed to the household expenses of the debtor or the debtor's dependents." There may also be payments on secured debt that fit in this category, i.e., the car (and car loan) in the non-filing spouse's name only, but that is driven by the filing spouse. That sounds like it should be included in income as amounts regularly contributed to the household expenses of the debtor, but the filing spouse should **either** get the vehicle ownership expense deduction for the car payment on Line 42 and the vehicle operating expense deduction on Line 22 or should get to take that amount back out on Line 17. (You don't include the income if you don't include the expense. See.e.g., Line 4 where the debtor includes gross revenue from a business but then reduces that amount by the amount of the operating expense.)

3. Ask questions. I get a lot of cases where there are past due amounts owed to the IRS but no formal repayment plan and the spouse is sending in \$200 per month. I get a lot of cases where child support is being paid without a court order. I see quite a few cases where there is a probation fee for DWI or bad checks.

The UST will argue with you on some of these and may even file a motion to dismiss [usually under 707(b)(3), not 707(b)(2)], but in Austin they usually withdraw the motions prior to hearing.

Remember, the issue is “any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent).” Sec. 101(10B). Our local UST’s office frequently opines that certain expenses of the non-filing spouse are “not allowed” based upon what expenses are allowed *for a debtor*. Its not the same. Congress says so.

## **The Law**

Analysis and understanding of current monthly income (and by extension, disposable income in a Chapter 13) and a non-filing spouse **must** include an analysis of both the Bankruptcy Code and Texas marital property law.

### **General Bankruptcy Code Provisions:**

The relevant Bankruptcy Code sections which apply in both Chapter 7 **and** 13:

101(10A)

101(10B)

101(13)

541(a)(2)

### **Definitions:**

101(13) defines “**debtor**” as “a person or municipality concerning which a case under this title has been commenced.” A non-filing person (including the spouse of a filing person) is **not** a debtor.

101(10A) defines “currently monthly income” as “the average monthly income from all sources that the **debtor** receives (**or in a joint case the debtor and the debtor’s spouse receive**)... [for the six month period prior to filing].”

101(10B) further defines “current monthly income” as including “any amount paid by any entity **other than the debtor (or in a joint case the debtor and the debtor’s spouse)**, on a regular basis for the household expenses of the **debtor** or the debtor’s dependents (**and in a joint case the debtor’s spouse** if not otherwise a dependent).

Both 101(10A) and 101(10B) speak specifically in terms of income received by the “**debtor**” [singular]. Under the express terms of 101(13), “**debtor**” does **not** include a **non-filing** spouse. (No case has been commenced with respect to the non-filing spouse.) Under the express terms of 101(10A) and 101(10B), “current monthly income” does **not** include the income of a non-filing spouse **unless** that income is an amount paid “...on a **regular** basis for the **household expenses** of

the **debtor** or the debtor’s dependents.”

### **Property of the Estate:**

541(a)(2) provides that property of the estate includes “all interests of the debtor and the debtor’s spouse in community property as of the commencement of the case that is –

- (A) under the sole, equal, or joint management and control of the **debtor**; or
- (B) liable for an allowable claim against the **debtor**, or for both an allowable claim against the debtor **and** an allowable claim against the **debtor’s spouse**, to the extent that such interest is so liable.” [Emphasis added.]

The issue of what interest in community property of the debtor is liable for a claim against the debtor’s spouse is an issue of **state** law. There are no Bankruptcy Code provisions which purport to address this issue.

### **Texas Marital Property Law:**

The relevant Texas Family Code sections are:

3.002

3.102

3.104

3.201

2.501

3.202

All of the foregoing sections are contained in Texas Family Code, Title 1. The Marriage Relationship, Subtitle B. Property Right and Liabilities, Chapter 3 Marital Property Rights and Liabilities. As we go down the list of cited sections, the subchapters become more specific. For instance, 3.002 is contained in Subchapter A. General Rules for Separate and Community Property. 3.102 and 3.104 are contained in Subchapter B. Management, Control and Disposition of Marital Property. 3.201 and 3.202 are contained in Subchapter C. Marital Property Liabilities.

The general rule that property acquired during marriage is presumed to be community is contained in Tex. Fam. Code Sec. 3.002 which provides that “Community property consists of the property, other than separate property, acquired by either spouse during marriage.”

Just because property is community does **not** mean that it is liable for every debt of either spouse. Community property which is subject to the **sole management** of the non-debtor spouse is **not liable** for the **non-tortious debts** of the debtor spouse. Tex. Fam. Code Sec. 3.102 provides:

“(a) During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

(1) personal earnings...

(b) If community property subject to the sole management, control, and disposition of one

spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.” (If the non-debtor spouse deposits sole management community property, i.e., wages, in a joint management checking account, the sole management community property becomes joint management. Simple answer: keep separate bank accounts.)

Tex. Fam. Code Sec. 3.104(a) provides:

“During the marriage, **property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse’s name**, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in that spouse’s possession and is not subject to such evidence of ownership.” [Emphasis added.]

Tex. Fam. Code Sec. 3.201 provides:

“(a) A person is personally liable for the acts of the person’s spouse **only if**:

(1) the spouse acts as an agent for the person; or

(2) the spouse incurs a debt for necessities as provided by Subchapter F, Chapter 2.

(b) Except as provided by this subchapter, community property is not subject to a liability that arises from the act of a spouse.

(c) A spouse does not act as an agent for the other spouse solely because of the marriage relationship.”

Tex. Fam. Code Sec. 2.501 [Subchapter F, Chapter 2, referenced in 3.201(a)(2) above] provides:

“(a) Each spouse has the duty to support the other spouse.

(b) A spouse who fails to discharge the duty of support is liable to any person who provides necessities to the spouse to whom support is owed.”

Tex. Fam. Code Sec. 3.202 provides:

“(a) A spouse’s separate property is not subject to liabilities of the other spouse unless both spouse’s are liable by other rules of law.

(b) Unless both spouse’s are personally liable as provided by this subchapter, the **community property subject to a spouse’s sole management, control, and disposition is not subject to:**

(1) any liabilities that the other spouse incurred before marriage; or

(2) **any nontortious liabilities that the other spouse incurs during marriage.**

(c) The community property subject to a spouse’s sole or joint management, control and disposition is subject to the liabilities incurred by the spouse before or during marriage.

(d) All community property is subject to tortious liability of either spouse incurred during marriage.” [Emphasis added.]

Pay attention to cased law cited for the proposition that a spouse is liable for the debts of the other spouse. Most of this case law is ancient. One of the cases I am cited to regularly is Walling v. Hannig, 11 S.W. 547 (Tex.1889.) That’s right folks: 1889. This is a case where the husband and wife went

to a store and wife purchased “many articles of house furnishing goods.” Wife made payments for a time, but then defaulted. Store owner sues husband who denies liability because he did not authorize the purchases. The Court ruled in favor of store owner stating: “Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. She is considered as his agent, and the law implies a promise on his part to pay the value.” A few things have changed since 1889. Like Texas Family Code Sec. 3.201(c). (And in case the UST hasn’t figured this one out, we let women vote and own property now, too. We even have laws like the federal Equal Credit Opportunity Act. Times, they are a changin.’)

\* There really is no such thing in Texas as “community debt.” Texas Family Code Sec. 7.001 provides that in a divorce decree, the court “shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.” The rest of Chapter 7 of the Family Code. **The phrase “community debt” does not appear anywhere in the Texas Family Code.** (Try a Westlaw search of the Family Code for the phrase “community debt” and you get no results match your request.) This is an unfortunate term that gained common usage **before** there was a Family Code and has survived as a shorthand abbreviation when it is really just a lazy way of saying “debt incurred during marriage.”

## Chapter 7:

The relevant Bankruptcy Code sections in a Chapter 7 case are:

707(b)(2)(A)(i)

707(b)(2)(A)(ii)(I)

707(b)(2)(A)(ii)(II)

707(b)(2)(C)

707(b)(3)(B)

707(b)(2)(A)(i) provides that in determining whether the granting of relief would be an abuse, the court shall presume abuse if the “**debtor’s** current monthly income” (singular possessive) reduced by the amounts in the following subparagraphs exceeds certain specified amounts.

707(b)(2)(A)(ii)(I) specifies what certain of the debtor’s expenses shall be for the purposes of the means test “for the debtor, the dependents of the debtor, **and the spouse of the debtor in a joint case.**” 707(b)(2)(A)(ii)(II) provides for additional allowable expenses paid by the debtor for care and support of an elderly, chronically ill, or disabled member of the debtor’s immediate family, including “**the spouse of the debtor in a joint case** who is not a dependent.”

707(b)(2)(C) provides that “As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the **debtor’s** (singular possessive) current monthly income.” (There is no requirement that the income of the non-filing spouse be disclosed.)

707(b)(3)(B) provides that in considering whether the granting relief under paragraph 1 in case where the presumption does not arise, the court “shall” consider whether the debtor filed the petition in bad faith or the totality of the circumstances ... of the **debtor’s** (singular possessive) financial situation

demonstrates abuse.”

I routinely receive requests for information and even the occasional motion to dismiss from the UST that refers to “debtors’ household current monthly income.” Could someone please show me the Bankruptcy Code section that refers to “debtors” (plural possessive) “household” current monthly income. (There isn’t one.)

### Chapter 13:

The relevant Bankruptcy Code sections in a Chapter 13 case are:

1306(a)(2)

1322(d)

1325(b)(1)(B)

1325(b)(2)

1325(b)(3)

1325(b)(4)

1306(a)(2) provides that property of the estate in a Chapter 13 case includes (in addition to the property listed in 541), “earnings from services performed by the *debtor* after the commencement of the case.” [Emphasis added.] In other words, the debtor’s post-petition wages are property of the estate in a Chapter 13. If there is a non-filing spouse, that spouse is **not** a debtor and his/her earnings are **not** property of the estate. (Although 541 brings in all interests of both the debtor spouse and the non-debtor spouse in any community property liable for an allowable claim against the debtor and an allowable claim against the debtor’s spouse *as of the commencement of the case*, 1306 is limited to the earnings of the **debtor** and contains no similar provision for the post-petition sole management community earnings of the non-filing spouse.)

1322(d)(1) provides that “if the current monthly income of the debtor **and the debtor’s spouse** combined” is more than the median family income for a family of the same size, the plan term may not exceed five years. 1322(d)(2) provides that “if the current monthly income of the debtor **and the debtor’s spouse** combined” is less than the median family income for a family of the same size, the plan term may not exceed three years, unless the court, for cause, approves a longer period not to exceed five years.

1325(b)(1)(B) provides that the court may not approve a plan unless it provides that “all of the **debtor’s** projected disposable income to be received” during the applicable commitment period will be paid to unsecured creditors. Note that the statute refers to the “**debtor’s**” (singular possessive) disposable income, **not** the debtor **and the debtor’s spouse**.

1325(b)(2) provides that for the purposes of that section, the term “disposable income” means “current monthly income received by the **debtor**” (singular) less certain exceptions.

1325(b)(3) provides that amounts reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor shall be determined pursuant to 707(b)(2) “if the **debtor** (singular) has

current monthly income” greater than the median family income for a family of the same size.

1325(b)(4) provides for determination of the applicable commitment period, which is not less than five years “if the current monthly income of the debtor *and the debtor’s spouse* combined” is more than the median family income of the same size. Although there is certainly an argument that all of the spouse’s income should be included for purposes of determining the applicable commitment period, the case law **so far** is saying that interpretation does not make sense given the definitions in 101(10A) and (B) and so income of the non-filing spouse is considered only to the extent it is regularly contributed to household expenses of the debtor or a dependent.

## **Case Law Post-BAPCPA:**

### **Chapter 13 Cases**

#### **Texas Cases**

In In re Charles, 375 B. R. 338 (Bankr.E.D.Tex.2007), the debtor’s non-filing spouse had a car note which the non-filing spouse would continue to pay directly which note would pay off during the term of the Chapter 13 plan. The plan did not propose to increase the plan payment when the car loan paid off. The Trustee objected to confirmation on the ground that the plan did not satisfy 1325(b)(1)(B) in that the plan did not apply all of the debtor’s projected disposable income to the plan during the applicable commitment period (in that case, 36 months.)

Judge Parker acknowledged pre-BAPCPA jurisprudence which had generally required that a non-filing spouse’s income be considered in determining the amount of income available to fund a plan, but also noted “courts disagreed to varying degrees as to whether this requirement mandated the actual dedication of all excess family income, including that of the non-debtor spouse, to the proposed plan, and whether a non-debtor spouse could be precluded from utilizing non-estate earnings to address any debts which he may have incurred.”

Judge Parker acknowledged that “The rationale behind including non-debtor spouse income in debtor’s individual plan under the disposable income test is simple: a portion of the non-debtor spouse’s income is likely to be applied to the basic needs of the debtor and to potentially increase the share of the debtor’s own income that is not reasonably necessary for support. In other words, it is fair that the non-debtor spouse’s income should be considered in calculating the appropriate chapter 13 plan payment.” Citing In re Carpenter, 318 B.R. 645 at 647 (Bankr.E.D.Va.2003).

Judge Parker concluded, however, that “While the Trustee’s position might be viable under the former [pre-BAPCPA] standard, its foundation has been completely eradicated by the BAPCPA amendments in this area.” (Oh, by the way, plan confirmed over objection.)

In re Louviere, 2008 WL 925824 (Bankr.E.D.Tex.2008) is kind of a goofy case where the debtor retired the month before she filed so her income on the means test was approximately double her income on Schedule I. (I’m thinking wait a few months and avoid at least one issue, but there may

have been some creditor poking her with a sharp stick that prompted an earlier filing.) The Chapter 13 trustee, apparently having not read Hardacre or the “projected” appended to disposable income, objected because her plan did not pay her disposable income under the job she didn’t have anymore to unsecured creditors. That one didn’t work.

The Chapter 13 trustee also objected to confirmation because “the Debtor failed to demonstrate that a sufficient contribution [from the non-filing spouse] is being made to the household expenses of the family unit.” The court described the testimony on the non-filing spouse as “somewhat disjointed” (a polite way of saying “not credible”?) On the amended I and J, the debtor took out her non-filing spouse’s gross income altogether and included a line for “husband’s contribution to household.” Correct interpretation of 101(10B), but doesn’t disclose what the form asks for. The court found that despite “the Debtor’s difficulty in quantifying her husband’s income and expenditures” the evidence “clearly” indicated that the non-filing spouse contributed “a minimum” of 69.5% of the household expenses. The Court concluded “Under whatever standard one might wish to apply, that does not constitute an inequitable apportionment of the household expenses nor can it be said that the Debtor in this case is improperly diverting potential plan payments in order to subsidize the lifestyle of her non-filing spouse.”

In In re Barfknecht, 378 B.R. 154 (Bankr.W.D.Tex.2007), Judge Clark held that the debtors exclusion of Social Security benefits in determining projected disposable income was proper under the definition of current monthly income contained in 101(10A). He also concluded that failing to include those amounts did not constitute lack of good faith under 1325(a)(3) because the debtors were simply taking an exclusion that Congress authorized them to take. This is **not** a non-filing spouse case, but Judge Clark correctly follows the definition in the statute to get to the answer. As a debtor’s attorney, cite this case for “the correct approach is read the statute.”

In In re Aprea, 368 B.R. 558 (Bankr.E.D.Tex.2007), the court held that a debtor’s voluntary payment of his non-working fiancé’s car ownership and operating expenses were to be excluded in calculating the debtor’s disposable income for purposes of 1325(b)(2)(A). [This is an expense case, not an income case, and so not directly on point, but it’s from Texas and its in the neighborhood, so be aware.]

I would also refer you to a pre-BAPCPA case out of the Northern District. Although it is a pre-BAPCPA case, I recommend it to you because I would suggest that Judge Lynn reached the correct result under the old law, thus establishing a continuity of result under both versions of the Code. See, In re Nahat, 278 B.R. 108 (Bankr.N.D.Tex.2002).

### **Elsewhere**

The most cited case on this issue is In re Quarterman, 342 B.R.647 (Bankr.M.D.Fla.2006). This case states several noteworthy conclusions. First, the opinion clearly states: “The burden is on the objecting party, here the Trustee, to provide satisfactory evidence in order for the Court to make a decision.” In that case the court concluded that due to the “absence of evidence” on what amount of the non-filing spouse’s income was contributed to household expenses of the debtor or a dependent

of the debtor , the court “cannot presume” that the non-filing spouse’s income was contributed to such expenses. The same analysis applies to the UST in a Chapter 7 case.

The Quarterman court analyzed the statutory language in 101(10A) and (B) and concluded: “...current monthly income does not include all the income of the non-debtor spouse, but rather only amounts expended on a regular basis for household expenses. If income is not (1) expended regularly (2) on household expenses, then it is not included in the debtor’s current monthly income.” Simple enough, right? But wait, the above quote ends with a footnote which states: “Problems may arise with respect to determining the non-debtor spouse’s contribution to household expenses. If the family maintains joint accounts, it may be difficult to determine what part of the income of the non-debtor spouse is used for household expenses and what part is used for that spouse’s personal expenses or investments.” [Citation omitted.]

I would agree that if the family maintains joint accounts, there may generally be a fundamental problem with making that distinction, but not in all cases. I had a recent case in which the UST filed a motion to dismiss under 707(b)(2) and (3) in which the non-filing husband was the sole breadwinner for the family and the filing wife’s debts resulted primarily from a failed business. (They were recently married and she was pregnant with their child which was born while the motion to dismiss was pending. Not directly relevant, but what judge would not want to know those facts?) The couple maintained a joint checking account and she could write checks for whatever she wanted. Their total monthly household expenses were \$5000. His monthly take home pay was \$6500. The UST’s position was that if the \$1500 net was funded into a Chapter 13, it would pay \$90,000 to her creditors. Sounds good, but the issue is, were those “excess” funds were “regularly contributed to household expenses of the debtor or a dependent of the debtor.” The answer is absolutely, unequivocally, no. They went into savings. Remember, the undisputed facts were that total household expenses were \$5000. If there was money beyond that, it went to something else, not household expenses, and is not included in current monthly income pursuant to 101(10A) and (B).

Perhaps the larger issue, regardless of whether the family maintains joint accounts, is what constitutes “household expenses of the debtor or a dependent of the debtor.” This gets complicated where the non-filing spouse (or non-married significant other) and the debtor share expenses. If they each pay half of the rent, is the half contributed by the non-filing spouse contributed to the household expenses of the debtor? What if the debtor has two kids not from the non-filing spouse and they have to rent/own a bigger house so they have enough space for the debtor’s kids? How do you allocate percentages where the expense is higher because of the debtor’s situation and the non-filer would have a much lower expense but for the debtor?

In re Hall, 2007 WL 445517 (Bankr.C.D.Ill.2007) cites Quarterman for both its analysis of the current monthly income issue under 101(10A) and (B) and for the proposition that the burden is on the objecting party to prove how much of a non-filing spouse’s income should be imputed to the debtor in determining the disposable income calculation.

In re Shahan, 367 B.R. 732 (Bankr.D.Kan.2007) involves analysis of the proper way to account for expenses of the non-filing spouse. If you just read the headnotes, it sounds like the opinion supports the Chapter 13 trustee’s objection, but the real result is that if you move the expenses to the correct

line of the form they are still deductible. This case doesn't break any new ground, but it does give you a judge's eye view on the issue of how you fill out the forms.

In re Grubbs, 2007 WL 4418146 (Bankr.E.D.Va.2007) addresses inclusion of the non-filing spouse's income for purposes of determining the applicable commitment period in a Chapter 13. The court concludes that the use of "current monthly income of the debtor and the debtor's spouse" in 1325(b)(4)(A)(ii) includes the income of the non-filing spouse **only to the extent** that is contributed to household expenses of the debtor or a dependent under 101(10A) and (B). See, also, In re Borders, 2008 WL 1925190 (Bankr. S.D.Ala.2008) which reaches the same result citing Grubbs extensively.

Finally, in In re Barnes, 378 B.R. 774 (Bankr.D.S.C.2007), the court starts off with a correct analysis of the law post-BAPCPA (citing in part Quarterman), but then goes off on a side road that leads to the insane asylum. The court concludes that the non-filing spouse's current annual bonus is not included in current monthly income because "there is no evidence the Debtor received the bonus." The court then goes on to conclude that "the burden shifts to Debtor to demonstrate, by a preponderance of the evidence, that [his future] bonus is not paid on a regular basis for her household expenses." The Court also states: "... if paid in the future, the bonus should be captured in Debtor's plan payment absent evidence that the bonus is *necessary for the husband's non-household expenses*." [Emphasis added.] This statement is particularly jarring given the Court's correct analysis of 101(10A) and (B). The objecting party has to prove that the non-filing spouse's income is regularly contributed to the household expenses of the debtor. Why does the burden now shift to the debtor to show that a non-filing spouse will (or won't) get a bonus and what it might be spent on in the future.

## Chapter 7 Cases

### Texas Cases

There aren't any.

### Elsewhere

You have to start here with Baldino and Travis because they were two of the earlier cases and everybody since then cites them. They are actually both good opinions except for some wayward statements in Travis which will be discussed below.

In In re Baldino, 369 B.R. 858 (Bankr.M.D.Pa.2007) the debtor earned approximately \$1200 per month. Her non-filing spouse earned \$6722 per month. The debtor provided a list of the monthly expenses paid by the non-filing spouse (mortgage payment, ad valorem taxes, insurance, groceries, utilities, car insurance, medical insurance, and home maintenance) totaling \$1978 per month. On Form B22A (the opinion says B22C, but that is the form in a Chapter 13 case) the debtor listed a marital adjustment of \$4794 which represents the balance of the non-filing spouse's income. There was no explanation what the non-filing spouse did with the rest of his income.

The UST argued for dismissal on two grounds: first, that the non-filing spouse's income should be considered as a relevant factor when determining the filing spouse's ability to repay her debts, and second, that the non-filing spouse's income should be included under the totality of the circumstances test of 707(b)(3)(B).

The Baldino court rejected both of these arguments. The court focused on the "plain meaning" of the language of 101(10A) and 101(10B) which speak in terms of the **debtor's** (singular possessive) income. The non-filing spouse's income is included **only** to the extent that it is regularly contributed to household expenses of the debtor. The court rejected the UST's second argument as well, concluding that the general language of 707(b)(3)(B) cannot override the express language used elsewhere in the statute.

The court also considered it of "some import" that all of the debts listed in the debtors schedules were in the debtor's name only, "meaning therefore, that the creditors extended the Debtor the credit based on her creditworthiness alone, and thus assumed the risk in doing so, i.e., losing her higher paying job and becoming unable to repay her debts."

Finally, the court notes that it also of "some import" that the debtor's creditors would not be able to reach the income of the non-filing spouse under Pennsylvania state law. (Check the language of the statute. It is very similar to Texas law.)

In re Travis, 353 B.R.520 (Bankr.E.D.Mich.2006), reaches the correct result, but contains some language which will no doubt be of comfort to the UST. (The fact that the language is dicta and is patently wrong will not stop the UST from citing that language, so be prepared.) In Travis, the debtor earned \$3500 per month and his non-filing spouse earned \$3291 per month. The UST contended that the debtor filled out the B22A incorrectly and that if the form was filled out properly a presumption of abuse resulted. After much wrangling over the proper amount of expenses which might be deducted the court came up with a negative disposable income number, so no presumption of abuse resulted.

In its analysis of the marital adjustment the court starts by stating: "As a preliminary matter, the Court notes that the calculation of current monthly income when there is a non-filing spouse is complicated. The requirements which the Code imposes on a non-filing spouse in reference to the non-filing spouse's income are not clearly defined and are subject to interpretation." The first sentence is correct, the analysis is complicated. (Fifteen Bankruptcy Code sections and six Family Code sections are relevant.) The second sentence-is nonsense. Although the analysis may be complicated, the requirements of the Code with respect to a non-filing spouse's income are very clearly defined. In addition, the notion that the Code imposes some requirement on the non-filing spouse is clearly incorrect. The Code imposes a duty on the **debtor** to account for the non-filing spouse's income, but it imposes no obligation on the debtor's non-filing spouse who is not a party to the bankruptcy case.

The Travis court does correctly note that some expenses of the non-filing spouse may contribute to the debtor's household expenses. For instance, if the non-filing spouse chooses to spend his/her income on a luxury home in which the debtor resides, some portion of that expense **might be** imputed

to the debtor as an amount contributed for the household expenses of the debtor.

The UST also moved to dismiss the case under 707(b)(3) under the totality of the circumstances test. The Travis court did agree with the UST that the non-filing spouse's income should be considered under 707(b)(3)(B) [based upon pre-BAPCPA law], which led to two questions: "first, how much consideration does the Court give to the non-filing spouse's income and, second, even if all of the non-filing spouse's income is available to the Debtor, is there an ability to commit any of that income to repayment of unsecured creditors?" The court answers the first question that "the non-filing spouse's income should be considered only if his/her income is substantial enough to significantly raise the debtor's standard of living and generate total household income in excess of the reasonable costs of food, clothing, shelter and other necessities." The court answers the second question with a factual analysis that concludes that in this case, the debtor and the non-filing spouse spend all of their combined income in supporting their extended family and that there is no money left at the end of the day. The court fails to address the legal issue of whether the debtor spouse has any ability to compel the non-filing spouse their income to pay the debtor spouse's debts. This author would suggest that is the more relevant analysis. This author also agrees with the Baldino court that the plain language of the sections defining a debtor's current monthly income precludes use of 707(b)(3)(B) to "override" those express provisions.

A great case for debtors is In re Newman, 2008 WL 2228746 (Bankr.D.Neb.2008). This is a "totality of the circumstances" case under 707(b)(3). The debtor's current monthly income was \$5448. Her non-filing spouse's monthly gross was \$7080. There was no presumption of abuse because their mortgage payments totaled \$4493 per month. The court started by stating its practice of reviewing cases for abuse under a number of factors, including whether the case was precipitated by an unforeseen catastrophic event such as illness or job loss. In this case the debtor lost her longstanding, stable job when the company she worked for was sold. Apparently after being unemployed for some amount of time, she was only able to find new employment making a third less than her former employment. The court concluded "This is not an easy decision because the mortgage payment is so high. However, the bottom line is that this bankruptcy was precipitated by a job loss. Further, the non-filing spouse is not receiving a discharge but is covering most of the expense for the house payment. Debtor's own income (approximately \$65,000.00) is not excessively high and she does not otherwise have excessive expenses." Motion to dismiss denied.

This is what our local UST calls a "lifestyle" case. I have a pending motion to dismiss in a case where the debtor is a homebuilder and when things were "blowin' and goin'" four years ago (it seems so long now), he bought a house with a \$3500 payment which the UST deems excessive. Of course, back in the day, he was making a lot more money than he is now and it wasn't "excessive." (How convenient to have 20/20 hindsight.) It's one thing to act in bad faith, it's an entirely different thing to think that things will always be wonderful. (And do we really want the DOJ being the lifestyle police?)

In re Lightsey, 374 B.R. 377 (Bankr.S.D.Ga.2007) is a sad case where the debtor incurred a car loan during a prior marriage, was only able to make the payments with the help of her spouse, the marriage blew up, the car was repossessed, she remarried, and now the car creditor is garnishing her wages for

the deficiency. The debtor's attorney apparently filled out the means test form incorrectly because at hearing on the UST's motion to dismiss, the debtor stipulated that if her non-filing spouse's contribution to household expenses was included in her "current monthly income," the presumption of abuse arises. Since the presumption arises, the only issue remaining was whether there were "special circumstances" sufficient to rebut the presumption. The debtor's explanation for special circumstances was based upon the fact that the debt in question was incurred prior to her current marriage and that her new husband would be forced to help her pay for a car which she no longer owned. The court stated that the result was "unpleasant" and that circumstances which led to her filing were "unfortunate and arguably unfair," but concluded that although her position was "compelling," it did not fit within the "special circumstances" exception.

In re Sale, 2007 WL 3028390 (Bankr.M.D.N.C.2007) is a stupid case where the debtor tried the clear "double dip" and got busted. In that case, the debtor took a marital adjustment (Line 17) for the payments on three vehicles titled in her spouse's name for which she was not liable AND included the vehicle ownership (Line 23) and operating expense (Line 22A) deductions for the same vehicles. Guess what? It didn't work. UST's motion to dismiss granted.

Setting aside the double dip, Sale does address a significant issue. Let's say we have a non-filing spouse who has a car note solely in his/her name, but the vehicle is driven by the filing spouse. How do we account for that payment? The vehicle ownership expense on B22A is for "vehicles for which you claim an ownership/lease expense." The courts have generally held that if the debtor is not liable for the loan payment, they don't get this expense. The amount of income imputed to the debtor (or for which the non-filing spouse is entitled to a marital deduction) is limited to the amount of the actual car payment, not the IRS standard allowance.

In re Lipford, 2008 WL 1782640 (Bankr.M.D.N.C.2008) is another stupid case where the original means test was filed showing disposable income of \$428 per month for a family with \$21,250 in unsecured debt. (Can you say 100% plan?) AFTER the UST filed a motion to dismiss, the debtor amended their B22A and Schedule J to increase their expenses resulting in disposable income of negative \$10. (Miracle of miracles.) Accepting that there was no presumption of abuse (which seems generous, under the circumstances, but of no real significance considering the ruling ), the court considered the UST's motion to dismiss only under the totality of the circumstances under 707(b)(3). With respect to the amended schedules, the court states "Any amendment that a debtor makes to Schedule I or J subsequent to a motion to dismiss under Section 707(b) is viewed with inherent suspicion" and "self serving amendments... which are made in direct response to an unfavorable action, are not viewed favorably." After noting that the husband only started his 401(k) contribution in the month prior to filing and that the wife's 401(k) loans would pay off in about 36 months, and after disallowing some of the expenses (primarily the new and improved expenses) the court concluded that the debtors had \$529 per month of disposable income which would fund a 100% plan. The lesson here (if nothing else) is do the forms right the first time.

In re Springirth, 2008 WL 748138 (Bankr.S.D.Ind.2008) is one of those "bad facts make bad law" cases. The debtor earned \$1443 per month. His non-filing spouse earned \$10,331. Ultimately, the court concluded "...the Court finds that the Debtor has the ability to pay under the totality of the

circumstances” test,’ based entirely on the fact that “Susan’s income easily covers and exceeds the costs of household necessities.” This court conveniently never mentions 101(10A) and (B). The court would no doubt say that they have no application here because the case was dismissed under 707(b)(3), not 707(b)(2). Nice try, but the statutory definition of current monthly income should not be so cavalierly ignored. As noted in the discussion of Travis, there is dicta in that opinion that will give comfort to the UST. It also gave comfort to the Springirth court which quoted Travis for the proposition that a non-filing spouse’s income should only be counted if that income “is substantial enough to significantly raise the debtor’s standard of living and generate total household income in excess of reasonable costs of food, clothing, shelter and other necessities.” Would someone please cite me to the Code section which even mentions “total household income?” (Oh, by the way, the Travis court denied the UST’s motion to dismiss, in case anybody cares.)

One can certainly argue that this is exactly the kind of result BAPCPA was intended to avoid. In case we forget, one of the principal arguments for the new Code was that the old “substantial abuse” standard was too subjective and we needed a more objective standard (ie, the means test) to take discretion away from soft hearted (or soft headed) bankruptcy judges in favor of a more uniform standard written, bought and paid for by the credit card industry. If the credit card industry was gracious (or asleep at the wheel) enough to exclude income of a non-filing spouse, what business do the courts have giving them something they didn’t even ask for?

### **Behave Yourself**

The debtor cannot “assume” responsibility for all of the household expenses leaving all of the non-filing spouse’s income available for frivolousness. See, Louviere, *infra*, and In re Bush, 120 B.R. 403 (Bankr.E.D.Tex.1990). (A pre-BAPCPA case, but lack of good faith is still lack of good faith.)