

Non-filing spouse and non-filing, non-spouse income: How do you analyze its impact on the calculation of Current Monthly Income?

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I. Relevant Sections of the Bankruptcy Code

A. Section 101(10A) defines “current monthly income” as follows:

(10A) The term “current monthly income” –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) (i) includes 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); and

(ii) excludes—

(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism;

(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title; and

(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).

B. Points to note:

The definition includes “average monthly income from **all** sources” . . . “without regard to whether such income is taxable income.” Section 101(10A)(A).

The definition includes “**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**” with some specific exclusions. Section 101(10A)(B). The major exclusions are benefits under the Social Security Act and military disability pay.

If you break Section 101(10A)(B) down these are the elements:

- 1) paid by entity other than the debtor;
- 2) on regular basis;
- 3) for household expenses of debtor or debtor’s dependents.

C. “Joint case” is defined in Section 302 as follows:

- (a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual’s spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.
- (b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors’ estates shall be consolidated.

D. Why does current monthly income matter in Chapter 7? Section 707(b)(2)(A)

Subsection 707(b)(2)(A)(i) – uses the definition of “current monthly income” discussed above. Basically Section 707(b)(2)(A)(i) states that there is a presumption of abuse if the debtor’s “current monthly income” multiplied by 60, less certain reductions, exceeds a target figure.

There are four possibly relevant expenses or deductions set out in this Subsection.

First, Section 707(b)(2)(A)(ii)(I), sets out the following:

The debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.

This portion of the Subsection only permits the deduction of expenses for the debtor’s spouse in a joint case, unless the spouse is a dependent of the debtor.

Section 707(b)(2)(A)(ii)(I) continues:

Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor.

This sentence probably permits the deduction of health insurance, disability insurance and HSA expenses for the spouse of a debtor, even if the case is not a joint case.

Continuing, Section 707(b)(2)(A)(ii)(I) states as follows:

In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law.

This sentence does not include the concept that the debtor's spouse must be a joint debtor to include expenses for such a non-filing spouse.

The next Subsection 707(b)(2)(A)(ii)(II), provides as follows:

In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

This Subsection again specifically includes a statement that such expenses are deductible for "the spouse of the debtor in a joint case." But the Subsection does seem to indicate that expenses for a spouse who is a dependent, regardless of whether the spouse is a joint debtor, would also be deductible. Finally, the Subsection would permit the deduction of expenses for a disabled "household member" even if that person is not the spouse of the debtor or otherwise related to the debtor.

None of the deductions permitted by the other subsections of 707(b)(2)(A) implicate issues regarding non-filing spouses or other persons that contribute to the debtor's income.

E. Why does current monthly income matter in Chapter 13? Section 1325(b)

Because for all Chapter 13 Debtors, the projected disposable income begins with CMI and CMI will determine whether the Debtor is above or below median.

Section 1325 of the Bankruptcy Code governs confirmation of a debtor's Chapter 13 plan. Section 1325(b)(1) prohibits the Court from confirming a plan over the objection of a holder of an allowed unsecured claim or the trustee unless:

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such [unsecured] claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Section 1325(b)(4)(A) provides that the applicable commitment period is three years or:

not less than 5 years, if the **current monthly income** of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than — . . . (III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$575 per month for each individual in excess of 4.

Sec 101(10A) permits a debtor to take a “marital adjustment” if the debtor is married and the debtor’s spouse is not a joint debtor in the case.

II. Relevant Portions of the Official Forms

A. Schedule I

Official Form 1061

MM / DD / YYYY

Schedule I: Your Income

12/15

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Note this introductory statement says that you include information about the debtor’s spouse if the debtor is living with the spouse. And it says that if you are separated, and your spouse is not filing with the debtor, you do not include information about the spouse. There certainly could be issues about defining when a debtor and their spouse are “separated.”

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write \$0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

For Debtor 1

For Debtor 2 or
non-filing spouse

2. List monthly gross wages, salary, and commissions (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.

2.

\$ _____

\$ _____

Note that this section calls for information about a non-filing spouse unless the debtor and the non-filing spouse are separated.

11. State all other regular contributions to the expenses that you list in Schedule J.

Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives.

Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in Schedule J.

Specify: _____

11. + \$ _____

This portion calls for reporting of contributions from an unmarried partner, as well as others.

B. Schedule J

Part 1: Describe Your Household

1. Is this a joint case?

No. Go to line 2.

Yes. Does Debtor 2 live in a separate household?

No

Yes. Debtor 2 must file Official Form 106J-2, *Expenses for Separate Household of Debtor 2*.

Note that this requires the disclosure of separate expenses (on a second Schedule J) of expenses of a spouse living in a separate household, but only applies in a joint case. Meaning only in cases where the debtors are married.

C. Means Test Forms

1. Calculation of Current Monthly Income

a. Official Form 122A-1 – “Chapter 7 Statement of Your Current Monthly Income”

Part 1: Calculate Your Current Monthly Income

1. What is your marital and filing status? Check one only.

Not married. Fill out Column A, lines 2-11.

Married and your spouse is filing with you. Fill out both Columns A and B, lines 2-11.

Married and your spouse is NOT filing with you. You and your spouse are:

Living in the same household and are not legally separated. Fill out both Columns A and B, lines 2-11.

Living separately or are legally separated. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

This question delves into the varieties of marital relationships that are applicable under the Means Test. Note that the final question specifically points out that the debtor is stating under penalty of perjury that they are either: 1) separated from their spouse under state law, and: 2) living apart for their spouse for reasons that do not include evading the Means Test. This is derived from Section 707(b)(7)(B).

b. Official Form 122C-1

Part 1: Calculate Your Average Monthly Income

1. What is your marital and filing status? Check one only.

Not married. Fill out Column A, lines 2-11.

Married. Fill out both Columns A and B, lines 2-11.

Note the difference as the Chapter 13 form does not include as much detail. Chapter 13 does not contain an equivalent provision like Section 707(b)(7)(B).

c. Other sources of income

Subsection 707(b)(7)(B)(ii)(II) requires the debtor to disclose “the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor’s spouse attributed to the debtor’s current monthly income.”

2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____

Question 4 is where you include contributions from an “unmarried partner.” But it also includes contributions from people that are in non-marriage like relationships with the debtor – like household members, dependents, parents and roommates. Note the specific inclusion of the fact that this applies to “regular contributions.”

The Chapter 13 form is identical for these line items.

10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____
Total amounts from separate pages, if any.	+ \$ _____	+ \$ _____

This is the catch all provision to sweep up any other contributions.

The Chapter 13 form is identical for these line items.

2. Official Form 122-A-2 – “Chapter 7 Means Test Calculation”

2. Did you fill out Column B in Part 1 of Form 122A-1?

No. Fill in \$0 for the total on line 3.

Yes. Is your spouse filing with you?

No. Go to line 3.

Yes. Fill in \$0 for the total on line 3.

3. Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents. Follow these steps:

On line 11, Column B of Form 122A-1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

No. Fill in 0 for the total on line 3.

Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	Fill in the amount you are subtracting from your spouse's income
_____	\$ _____
_____	\$ _____
_____	+ \$ _____
Total	\$ _____

Copy total here → - \$ _____

4. Adjust your current monthly income. Subtract the total on line 3 from line 1.

\$ _____

This portion of the form provides for the deduction of non-filing spouse income that is not used for household expenses.

What sorts of things do we see here? Paycheck deductions, student loan payments, support paid by the non-filing spouse to another household, secured debt payments, and unsecured debt payments.

On the Means Test forms there are two “paths”.

- a) Married and living together, whether or not the spouse is a debtor – include income, then deduct portions of spouse’s income not used to pay for household expenses.
- b) Not married **or** married and legally separated – do not include income – only include amounts regularly paid for household expenses of debtor or debtor’s dependents.

Note that if you are not married it really does not matter if you are living together or not.

3. Chapter 13 and non-filing spouse and non-spouse’s income

- a. Section 101(10A)(B) includes in CMI “any amount paid by any entity other than the Debtors (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. This statutory language includes those paid by "others," on a "regular basis" for the "household expenses" of the debtor or the debtor's dependents."

b. In cases where non filing *non* spouse's reside together, courts have used the economic impact approach. This approach is a seven-part test to determine household size and whether debtor's live together, but maintain separate households more fully addressed in *Morrison* below.

c. Line 4 of 122C is where "101(1A) income should be listed for non-filing non-spouse cases.

4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.

\$ _____ \$ _____

d. The mechanics of 122C in Chapter 13 for non-filing spouses? Lines 13 and 19 on form 122C in Chapter 7 are applied differently in Chapter 13 cases. These line items impact whether a Debtor is above or below median income and, ultimately, what amount must be paid for the benefit of unsecured creditors.

e. Line 13: This measures the amount of marital deduction that can be taken. Here, one lists the non-filing spouse's income that was not regularly paid for household expenses, such as tax liability or support for an individual other than the non-filing spouse and debtor's dependents. Allowable deductions can be deducted from CMI.

Part 2: Determine How to Measure Your Deductions from Income

12. Copy your total average monthly income from line 11. _____ \$ _____

13. Calculate the marital adjustment. Check one:

- You are not married. Fill in 0 below.
- You are married and your spouse is filing with you. Fill in 0 below.
- You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

		\$	
		\$	
		+\$	
Total		\$	Copy here →

14. Your current monthly income. Subtract the total in line 13 from line 12. \$ _____

f.

Line 19: Line item 13 is carried over to line 19 to determine the applicable commitment period.

Part 3:

Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. Copy your total average monthly income from line 11.	\$	<input type="text"/>
19. Deduct the marital adjustment if it applies. If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13. 19a. If the marital adjustment does not apply, fill in 0 on line 19a.	— \$	<input type="text"/>
19b. Subtract line 19a from line 18.	\$	<input type="text"/>

g. Selected Case Law

A. Many situations where being a “dependent” matters? Who is a dependent?

In re Justice, 404 B.R. 506, 514-516 (Bankr. W.D. Ark. 2009). This case includes an extensive discussion of who is a “dependent” under Section 707(b)(2). The court ultimately concludes that the determination is a factual one to be determined on a case-by-case basis. Factors to consider include: whether the debtor has reason to support the person, whether the dependent has reason to rely on the debtor, the length of time the claimed dependent has been in the household, the reason the claimed dependent has been in the household, the claimed dependent’s age, the claimed dependent’s income, whether the claimed dependent is in school, whether the claimed dependent is claimed on as a dependent for tax purposes and whether the claimed dependent is claimed as a dependent for other reasons such as medical insurance.

Leslie Womack Real Estate, Inc. v. Dunbar (In re Dunbar), 99 B.R. 320, 324 (Bankr. M.D. La. 1989). “Dependent” means “a person who reasonably relies on the debtor for support and whom the debtor has reason to and does support financially.” Further, the term “dependent” should be broadly construed. This was a Section 727 objection to discharge based in part on debtor’s allegedly false statement regarding the number of his dependents.

But see U.S. Trustee v. Duncan (In re Duncan), 201 B.R. 889, 897 (Bankr. W.D. Pa. 1996). Debtor that did not claim any dependents in his schedules or in his tax returns could not claim his children and grandchildren, who lived with him, as dependents in a case under 707(b).

And Meler v. U.S. Trustee (In re Meler), 295 B.R. 625 (D. Az. 2003). Debtor not entitled to claim his live-in girlfriend and her four children as dependents. “[Debtor] has absolutely no legal obligation or even moral responsibility, to them.” *Meler* at 630-31.

B. “Current Monthly Income” and Non-Filing Spouse

Robbins v. Ervin (In re Ervin), 2016 WL 721043 at *8 (Bankr. W.D. Va. 2016) (Judge Black). Statement of Current Monthly Income form is required to be filed by Rule 1007(b)(4). That form requires debtors to report their income and all of their non-filing spouse’s income for the applicable period. Further, whether a portion of the non-filing spouse’s income is not used to pay the household expenses of the debtor or the debtor’s dependents, and thus not part of the debtor’s current monthly income, is subject to court review. *See Ervin* at *9 (refusing to reduce a debtor’s current monthly income by an amount that the non-filing spouse allegedly was required to pay her employer when there was no evidence that such payments had actually been made during the relevant time).

In re Baker, 580 B.R. 662 (Bankr. E.D. Va. 2017)

Debtor resided with non-filing spouse and dependent child. Non-filing spouse acquired the marital residence prior to marriage and pays two monthly mortgages on the property. On her 22C, the Debtor sought to deduct \$1,200.00 worth of mortgage payments of the residence on line 13 in addition to claiming it on secured debt payments. The Trustee objected to confirmation on grounds that the Plan failed to provide all of Debtor’s projected disposable income. The Court

addressed what portion of the non-filing spouse's income should be included in disposable income and the extent to which the Debtor was entitled to a marital adjustment.

Interpreting the plain language of 101(10A), the court concluded that the spouse's mortgage payment was neither a "household expense" nor "an expense of the debtor or the debtor's dependents. Adopting the "debtor centric" approach, concluding that when a Debtor does not have an ownership interest in the home and is not liable on the indebtedness, the payments may be excluded from the CMI. The Court reasoned that disallowing the marital adjustment solely on the basis that the Debtor and her dependent receive an indirect benefit from the spouse's mortgage payment would lead to an artificially inflated monthly disposable monthly income calculation and would deprive the spouse of the income needed to make the mortgage payments that only he owes.

In re Montalto, 537 B.R. 147, 155-57 (Bankr. E.D.N.Y. 2015). Court refused to allow debtor to deduct non-filing spouse's business expenses as debtor failed to substantiate them. Court also refused to allow deductions for non-filing spouse's credit card payments and 401(k) loan repayment on grounds that debtor did not show what portion of those debts had been incurred for non-household purposes.

In re Persaud, 486 B.R. 251, 263 (Bankr. E.D.N.Y. 2013). Non-filing spouse's payments towards college and high school tuition of the children of the debtor and the non-filing spouse should be treated as income of the debtor even though the expenses were paid from an account that belonged only to the non-filing spouse and the non-filing spouse was the only party contractually liable. Court held that such payments were for the benefit of the debtor's dependents and thus "current monthly income" of the debtor under Section 101(10A)(B). Court distinguished as case where the non-filing spouse was paying such expenses for a child of a prior marriage as the payments in that case were not for the debtor's dependents. *See In re Shahan*, 367 B.R. 732 (Bankr. D. Kan. 2007).

See also In re Hamilton-Conversano, 2017 WL 4417566 at *4 (Bankr. E.D.N.C. 2017). Improper to deduct payment of private secondary school tuition by non-spouse from debtor's current monthly income. Such payments are household expenses. Further, such payments are capped by the means test.

C. Non-Filing Spouse Refuses to Provide Information

In re Kuhns, 2011 WL 4713225 (Bankr. N.D. Ohio 2011). Debtor did not include income information from his non-filing spouse. Debtor and his spouse had been married for five years and they filed separate tax returns. Debtor stated he did not know, and had never knows, her income or what she paid for mortgage and utilities on the house where they lived. The house was in the wife's name. The debtor stated that his wife refused to provide information on her income and refused to contribute to satisfying the debtor's debts. According to the debtor, on the day of the hearing regarding the dismissal of his case, his wife told him she wanted a divorce and presented him with a proposed settlement agreement. The court held that non-filing spouse's income information was required by Section 521(a)(1)(B)(ii), Rule 1007(b)(1)(B) and the Official Forms. *See Kuhns* at *2. Since that information had not been provided, the court dismissed the case on the United States Trustee's Section 707(a) motion.

Questions: 1) Would this case be different if the debtor and his wife were living together and not married? 2) Could the debtor use Rule 2004 to seek information about his wife's income?

D. Non-Spouse Issues

In re Hector, 2017 WL 4286138 (Bankr. E.D.N.C. 2017). Debtor lived with her domestic partner but was not married. Partner owned the home where they lived and paid all expenses associated with the property, including mortgage, utilities, insurance and taxes. Debtor purchased all groceries and cleaning supplies for the household. Debtor and her partner did not commingle funds, share any expenses or own any joint assets. Debtor and her partner did not have any joint bank accounts and had no joint debt. Debtor paid her own car expenses, cell phone expense and all her own business expenses (debtor was a realtor). The court held that debtor was not entitled to claim her partner as a member of her household finding they did not exist as an economic unit. *See Hector* at *3. The court held that none of the payments by the partner for housing expenses should be included in the debtor's current monthly income under the theory that the partner paid for his own housing expenses and the debtor merely benefited from that. *See Hector* at *4. Finally, the court held that the debtor could not claim the mortgage or rent housing expense deduction on the means test because she did not actually pay any mortgage or rent expenses at all. *See Hector* at *4-5.

In re Babson, 2011 WL 5902664 at *4-5 (Bankr. E.D.N.C. 2011). Debtor's partner, who was jointly liable on the note with the debtor, paid an average of \$670 per month towards the mortgage payment. That contribution went towards the household expenses and was required to be included in the debtor's current monthly income.

In re Epperson, 409 B.R. 503 (Bankr. D. Az. 2009). Case involved a debtor and his roommate who were described as a "cohabitating couple." The court rejected the United States Trustee's attempt to force the debtor to claim and household size of one and ignore the roommate's income or to claim a household size of two and count all of the debtor's cohabiting roommate's income on the means test. *See Epperson* at 508. The court sited to the definition of "current monthly income" in Section 101(10A)(B) and required the debtor to include the roommate's \$900 contribution to household expenses. The court also permitted the debtor to claim a household size of two on the means test.

Note that *Epperson* adopts the "heads on beds" approach to household size. *See Epperson* at 507. This approach was rejected by the Fourth Circuit in favor of the "economic unit approach" in *Johnson v. Zimmer*, 686 F.3d 224, 236, 242 (4th Cir. 2012) (2-1 decision), *cert. denied*, 568 U.S. 1087 (2013). The distinction probably does not matter given that in *Epperson* the debtor and the roommate had a marriage-like relationship and it was uncontested that the roommate contributed \$900 a month to the household expenses. *See, e.g., In re Morrison*, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011) (holding that debtor and her cohabitating boyfriend were an economic unit and debtor was entitled to claim boyfriend as a member of her household under the means test).

E. Other family members as part of debtor's household

Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012)

The Debtor's ex-husband objected to confirmation of the Debtor's plan on the grounds that the proposed plan overstated the Debtor's household size, resulting in a skewed calculation of her monthly expenses. In his objection, he maintained that the plan improperly showed a "disposable monthly income" insufficient to make payments on an unsecured loan for which he was jointly liable.

The parties stipulated that the Debtor and Creditor share joint custody of two minor sons for which neither pays support. Instead, the share expenses for clothing, school supplies, and incidentals and divide medical expenses evenly. By agreement, the sons both reside with the Debtor for 204 days a year. The Debtor's current husband has joint custody of three children of a previous marriage and they reside with the Debtor and her current husband approximately 180 days per year. As such, the Debtor's Plan claimed a household of seven members. The Creditor contended this was improper as rather than using the "heads on the bed" approach, the Debtor should instead use a better method to approximate the economic impact, which would result in lower calculation of her monthly expenses.

Rejecting the "heads on bed" approach, the Court reasoned the Congress did not intend the term "household" to be so broadly defined. Instead, adopting the economic unit approach, the Court reasoned:

"We find no error in the bankruptcy court's method of applying the economic unit approach in a manner that accounted for part-time members of the Debtor's household. The cases apart from *Robinson* that have used the economic unit approach were asked to determine whether an individual who resided full-time with the debtor should be considered part of his or her "household." *E.g.*, *Morrison*, 443 B.R. at 388 (using the economic unit approach to determine that the boyfriend of a debtor who lived with that boyfriend full-time was a member of the debtor's "household" under [§ 1325\(b\)](#)); *Jewell*, [365 B.R. at 802](#) (using the economic unit approach to determine whether the debtors' adult daughter and her children, and the debtors' adult son, who resided full-time with the debtors were members of the debtors' "household")." *Johnson v. Zimmer*, 686 F.3d 224, 240 (4th Cir. 2012)

Mitrano v. Consiglio (In re Consiglio), 2018 WL 1162869 at *6 (Bankr. D. Conn. 2018). Debtor lived with her 75-year-old mother and 25-year-old daughter. Court held that the mother and daughter's incomes are only included in the debtor's current monthly income to the extent that it is used to support the debtor or the debtor's dependents. After hearing evidence, the court determined that the mother and daughter did not contribute enough to raise the debtor's income above median.

F. Burden of Proof

Robbins v. Ervin (In re Ervin), 2016 WL 721043 at *7 (Bankr. W.D. Va. 2016) (Judge Black) ("Thus, the U.S. Trustee bears the burden of proof in establishing a prima facie case in support of the application of the presumption of abuse under [§ 707\(b\)\(2\)](#). Because the presumption is

applied only after a debtor fails the means test, the initial burden of establishing a prima facie case that the Debtor's disposable monthly income exceeds the relevant statutory benchmarks is on the U.S. Trustee.”) (citations omitted).

McDow v. Meade (In re Meade), 420 B.R. 291, 303 (Bankr. W.D. Va. 2009) (Judge Stone). The burden of proof is on the debtor to rebut a presumption of abuse which has arisen under Section 707(b)(2).

However, as *Ervin*, at *9, notes: “the burden of proving an abusive filing under Chapter 7 is on the U.S. Trustee. However, as stated by this Court in *Meade*, this is ‘subject to one qualification,’ namely ‘that when a presumption of abuse would arise under [Section 707](b)(2) based on a debtor’s income and allowed expenses according to the prescribed [IRS] ‘national standards’ or ‘local standards’ guidelines ... but the debtor asserts that other ‘necessary expenses’ or permitted deductions for debt repayment ... negate the presumption of abuse, the burden of proof as to those deductions ought to be placed on the debtor.’ *In re Meade*, 420 B.R. 291, 303 (Bankr. W.D. Va. 2009).” (alterations in original).

Williams v. McDow (In re Williams), 2010 WL 3292812 at *6 (W.D. Va. 2010) (Judge Conrad). “[T]he court concludes that the burden of persuasion remains upon the UST to prove that the debtors' disposable monthly income exceeds the relevant statutory benchmarks. But, where the UST has produced sufficient evidence in support of its Form 22A line item calculations, and where the UST's proposed figures result in a prima facie conclusion that the debtors' disposable monthly income exceeds the statutory benchmarks, the burden of going forward shifts to the debtors to controvert the accuracy of the UST's calculations.”

Mitrano v. Consiglio (In re Consiglio), 2018 WL 1162869 at *2 (Bankr. D. Conn. 2018). Party filing a motion to dismiss has the burden to “demonstrate the extent to which income received by [debtor’s family members] should be considered part of the Debtor’s current monthly income.” Family members were debtor’s 75-year-old mother and 25-year-old daughter, both of whom lived with debtor.

Rice, Heitman & Davis, S.C. v. Sasse (In re Sasse), 438 B.R. 631, 643-44 (Bankr. W.D. Wisc. 2010) (“The burden is on the creditor [the moving party], however, to prove that the contributions [to the debtor’s current monthly income] are so substantial as to alter the equation [under the means test].”).

III. Hypotheticals to consider

A. Hypothetical No. 1: Does Long-term boyfriend count against debtor?

June comes into my office to discuss filing a bankruptcy. After having her sign the initial disclosure to meet with me, and going through the initial questions with June, it looks as if she qualifies to file a Chapter 7. June makes \$35,000 a year and owns no real estate. She does have a car payment, but she is current. Then, at the very end of the conversation, I ask June how many people live in her house. June says my boyfriend Paul lives there, but I don’t know anything about his income. I then ask her how long he has lived in the house with her. She said 10 long years! I

asked her how they split the household bills. June said Paul puts \$2000 into a joint account each month and she uses that to pay the bills. I ask her if she can get proof of his income. She said they have never shared finances and he would not disclose that information to her. She said he does not use the joint checking account except for depositing \$2000 into the joint account each month. I tell June that we must have her boyfriend's income for her to file. She bursts into tears and tells me that is not fair. She said this is her debt and he knows nothing about it.

Question: Should not being able to get her boyfriend's income prevent June from filing the Chapter 7?

Question: Should Paul's contribution to June be on CMI?

Question: Should Paul count as a household member on CMI?

Question: When preparing June's income and expenses sheet, how do you disclose Paul's contribution?

Question: Would answer change if they had shared a joint bank account for years?

B. Hypothetical No. 2: Married but Separate

Eleanor has been married for 17 years and has one child age 12. She is looking to file a bankruptcy individually. She advises you that she has no idea what her husband's income is and they do not share bank accounts. Furthermore, he lives in the finished basement of the home they jointly own which has its own entrance. She advises you that they have lived "separately" within the house for the last seven years due to marital difficulties, but he stays for the benefit of the child. She knows that he will not give her paychecks, as financial issues are a large part of the marital rift which occurred about 7 years ago when she tried to make him contribute more to childcare. The husband contributes \$750.00 per month to the mortgage and utilities by Venmoing her the funds, and advises her that should be enough if she is economical. She only makes about \$35,000 a year at a local non-profit and is still paying off her student loans from when she dropped out of her master's program years ago. She has accumulated medical debt and some credit cards over the years which she seeks to discharge so she can pay her car payment and the student loan. She believes the husband makes about \$50,000 or \$60,000 a year, but they file separate tax returns and she states she has not seen his return or income since the big blow up seven years ago which led to him living in the basement.

Question: What constitutes being separated? Can a married couple be separated in their own home?

Question: Can she file without disclosing his full income?

Question: Can she file without his income, but disclose the \$750.00 as a regular contribution?

Question: Can the bankruptcy court order a non-filing spouse to pay more of the household expenses?

Question: Must she see a divorce attorney before she can file a bankruptcy?

C. Hypothetical No. 3: Kick the Kids to the Curb?

Married couple seeks to file Chapter 13 to save their home from foreclosure. They are substantially behind and it will be a large payment to save the property. When you review their income, it appears the plan may be unfeasible. That is when they tell you about everyone else living in the home. Of course, none of these folk are currently contributing, but “they can if they have to” the parents say.

Living in the home:

19 year old daughter, her new baby and the boyfriend. She is not working and the boyfriend is only working part-time and not making any contribution, except to buy diapers and baby supplies.

26 year-old daughter who suffers from depression. She is not on disability, but has no income and has a difficult time keeping work due to her depression.

Wife’s sister and her two minor children. The sister is working full-time making about \$35,000 a year, but has not been paying rent as she is trying to get on her feet after leaving an abusive marriage. She does periodically buy food for the household and pays the internet bill so her children can attend school online.

Husband’s mother. Her only income is Social Security of \$1,800 per month. She has not historically contributed financially to the household, but does help out cooking and cleaning as she is able. She uses her Social Security to pay her for her medicine and her bills.

Question: What is the household size?

Question: If counting the individuals who are not filing bankruptcy in the household size, do you have to collect paystubs and count their total income?

Question: Since the grandmother’s income is Social Security can it be excluded?

Question: Do you advise the debtors everyone has to go get a job?

Question: Do fair household contributions always have to be monetary, or can childcare, cooking, cleaning, etc. be a fair contribution?

Question: Do parents have to kick out non-contributing adult children who take resources from creditors?

D. Hypothetical No. 4: Co-living and Co-budgeting

Janet, Donna and Ella jointly own a home in which all three women live with their individual children. For two of them, following divorce, they decided that living in a community of single women would prove a supportive environment. Then, they all realized with the collective buying power they could live in a much nicer home in a better school district and together purchased a large house together. The three women have a collective joint bank account for the

mortgage and utilities and a shared food budget. They divide up cooking, cleaning and food shopping and the arrangement has worked well. Unfortunately, Ella is being hit by a deficiency lawsuit for \$150,000 from a debt left over after a failed business venture. Because of the mortgage and her car payment, her “consumer debt” is larger than the deficiency from the lawsuit. Her income is just above the median income for a household of two (she has one child) and her attorney is struggling with how to address the unique living situation.

Question: Who is actually regularly contributing to Ella’s household?

Question: Does Ella get to claim the entire mortgage to determine disposable income?

Question: If she claims the entire mortgage, does she have to disclose the entire contribution to the combined joint account monthly, even if some of that is for the shared food bill and utilizes?

Question: If she counts the entire monthly deposits into the shared account as contributions, can she count everyone living in the home?

Question: Can counsel advise they stop handling the finances this way and everyone has to pay their own 1/3 share? If yes, how do you disclose that?