

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 06-1005-GLP  
Chapter 13

ANTHONY J. DAVIS,

Debtor.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This case is before the Court upon the Internal Revenue Service's Motion to Set Aside Order of Dismissal Dated February 27, 2007, as to Ericka Davis, and Continuing Administration as to Anthony J. Davis. After a hearing held on April 4, 2007, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On April 10, 2006, Anthony J. Davis and Ericka Davis (the Davis') filed for relief under Chapter 13 of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").

2. On April 12, 2006, the Internal Revenue Service (the "IRS") filed an unsecured priority claim in the amount of \$1,800.00.

3. The amount of the IRS's claim was estimated due to Ericka Davis' failure to file federal unemployment tax returns and federal employment tax returns in relation to the child care business that she opened in late 2002, and continues to operate. Specifically, Ericka Davis did not file unemployment tax returns in 2003, 2004, and 2005, as well as quarterly employment tax returns from September 30, 2002, through March 31, 2006.

4. On April 13, 2006, the Davis' filed a proposed Chapter 13 Plan and the IRS subsequently objected to confirmation of the plan on the grounds that Ericka Davis had failed to file the tax returns referenced above.

5. On June 6, 2006, the Court held a confirmation hearing on the Davis' proposed Chapter 13 Plan. The Court continued the hearing until June 22, 2006, due to tax issues that needed to be resolved. At the continued confirmation hearing, the Davis' amended their plan in open court and the Chapter 13 Trustee

subsequently recommended confirmation of their plan. However, the IRS still maintained its objection upon the basis that the plan did not conform with 11 U.S.C. § 1308(a), due to Ericka Davis' failure to file her employment and unemployment tax returns. The Court held that the plan did comply with § 1308(a), and ordered confirmation of the plan.

6. On August 31, 2006, the Court entered an order confirming the Davis' Chapter 13 Plan.

7. On September 11, 2006, the IRS timely filed a Notice of Appeal of the Order Confirming Debtors' Chapter 13 Plan.

8. On November 21, 2006, the Davis' filed a Motion to Modify Confirmed Chapter 13 Plan, to which the Chapter 13 Trustee and IRS subsequently filed objections to. On December 12, 2006, the Davis' filed a Second Modified Chapter 13 Plan and the Chapter 13 Trustee consequently withdrew her objection.

9. At a hearing held on January 17, 2007, the Court granted the Davis' Motion to Modify Confirmed Chapter 13 Plan. In the corresponding order entered on February 21, 2007, the Court included language which specifically stated that the order did not affect the pending appeal of the IRS.

10. On February 22, 2007, a Notice of Voluntary Dismissal was filed as to Ericka Davis. On February 27, 2007, the Court entered an Order Dismissing the Case as to Ericka Davis, but Continuing Administration of the Case as to Anthony J. Davis.

11. On February 27, 2007, the District Court held a hearing on the IRS's appeal and noted that the dismissal as to Ericka Davis could potentially make the issue on appeal moot.

12. On February 28, 2007, the IRS filed a Motion for Reconsideration of the Court's Order Dismissing Case as to Ericka Davis. The IRS alleged in its motion that the attempt to dismiss Ericka Davis was not made in good faith, and that the issue on appeal is of "great importance."

**CONCLUSIONS OF LAW**

The sole issue before the Court for its determination is whether the Order Dismissing Case as to Ericka Davis, but Continuing Administration as to Anthony J. Davis, was properly entered.

11 U.S.C. § 1307 sets forth a debtor's right to voluntarily dismiss a Chapter 13 case. Section 1307 provides, in pertinent part:

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1307(b)

As Anthony J. Davis and Ericka Davis' Chapter 13 case was never converted, Ericka Davis has an absolute right to voluntarily dismiss the case as to herself, in accordance with 11 U.S.C. § 1307(b).<sup>1</sup> Additionally, the IRS's contention that the issue on appeal is of "great importance" has no substantive bearing as to Ericka Davis' inherent right to dismiss her case under the law, and the Court will not engage in such judicial activism.

### **CONCLUSION**

Based upon the above, the IRS's Motion to Set Aside the Court's Order Dated February 27, 2007, Dismissing the Case as to Ericka Davis, but Continuing Administration as to Anthony J. Davis, is denied. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

**ORDERED** on May 16, 2007, in Jacksonville, Florida.

/s/ George L. Proctor  
George L. Proctor  
United States Bankruptcy Judge

**Copies to:**  
Debtor  
Robert H. Zipperer  
Miriam C. Dillard  
Chapter 13 Trustee  
United States Trustee

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<sup>1</sup> The Court is cognizant of the recent Supreme Court decision which held that a debtor does not have an absolute right to convert a case from Chapter 7 to Chapter 13. Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105 (2007). However, the Marrama decision is not applicable, as the sole issue in the instant case is Mrs. Davis' absolute right to dismiss the Chapter 13 case as to herself, under 11 U.S.C. § 1307(b).