

FILED

at 4 O'clock & 00 min. PM

Date 7/19/93

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Waycross Division**

In the matter of:

JOHN WESLEY BULLARD

Debtor

)
)
)
)
)

Chapter 7 Case

Number 92-50687

**MEMORANDUM AND ORDER ON DEBTOR'S
MOTION TO GRANT SPECIAL POWER OF ATTORNEY**

The Debtor, John Wesley Bullard, filed a Motion to Grant Special Power of Attorney on April 27, 1993, and twice amended this motion on June 15, 1993, and July 9, 1993. The United States Trustee filed an objection to Debtor's Motion on July 13, 1993. The matter came on for hearing on August 9, 1993, and was continued until September 16, 1993, wherein I took the matter under advisement.

FINDINGS OF FACT

Debtor has apparently been convicted of murder and will be unable to attend any of the proceedings in his Chapter 7 case. As a result, Debtor moves this Court to allow him to grant special power of attorney to his mother, Gladys Bullard.

The grant would give Debtor's mother the power to file any pleadings with this Court, to submit to examination under oath at the meeting of creditors pursuant to Section 341(a) of the Bankruptcy Code, and to perform any other functions on behalf of the Debtor necessary in this Chapter 7 case.

The United States Trustee contends that such a power of attorney, particularly as it relates to the Section 341(a) meeting of creditors, violates 11 U.S.C. Section 343, and as a result, Debtor must appear in person to testify and to submit to an examination of creditors under to Section 341(a).

CONCLUSIONS OF LAW

11 U.S.C. Section 343, entitled "Examination of the Debtor" provides:

The debtor *shall* appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, [or] any trustee or examiner in the case, or the United States Trustee may examine the debtor . . . (emphasis added).

Based on this provision's use of the word "shall", the United States Trustee contends

that the Debtor is compelled to attend the Section 341(a) meeting. The Trustee, however, acknowledges that several cases have held otherwise.

The decision of whether to allow a Debtor to appoint someone else as his attorney in fact to appear at a section 341(a) meeting is within the sound discretion of the Bankruptcy Court. See In re Chandler, 66 B.R. 334 (N.D.Ga. 1986). Several courts have held that the debtor's presence at the section 341(a) meeting of creditors is mandatory, and no exceptions can be made to this rule. See In re Import Toy Sales, Inc., 41 B.R. 784, 785 (Bankr. S.D.Fla. 1984); In re Martin, 12 B.R. 319, 320 (Bankr. S.D.Ala. 1981). Another line of cases, however, has held that the Bankruptcy Court possesses the discretion to waive the mandatory language of Section 343 when two elements are present: (1) The debtor is truly indisposed; and (2) it is unlikely that the debtor could give the creditors any information not available to them through a representative or co-debtor. See In re Stewart, 14 B.R. 959, 961 (Bankr. N.D.Ohio 1981); In re O'Donnell, 43 B.R. 679, 680 (Bankr. E.D.Pa. 1984).

Applying this two-prong test to the case at bar, I conclude that Debtor's Motion must be denied. While it is clear that Debtor's incarceration for murder has caused him be "truly indisposed", it has not been shown that it is unlikely that Debtor could provide creditors with information not available to them through

his mother as his representative. There is no evidence to suggest that Debtor suffers from any sort of mental infirmity or is otherwise unable to undergo a meaningful examination by his creditors. Moreover, allegations have been made that Debtor transferred property to his mother, the person to whom Debtor seeks to grant the power of attorney, approximately six months prior to Debtor filing his bankruptcy case. Thus, this appears to be just the sort of case where the creditors should be afforded the opportunity to examine the Debtor personally about transactions which he may have made prior to his filing his bankruptcy petition. I therefore conclude that the Debtor must personally appear at his Section 341(a) meeting of creditors.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the United States Trustee's objection to Debtor's Motion is SUSTAINED. Debtor's Motion is DENIED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 18th day of November, 1993.