

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

TELEPHONE
(605) 224-0560

January 26, 1996

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Subject: *In re John A. Wingert,*
Chapter 11; Bankr. No. 95-40479

Dear Counsel and Interested Parties:

The matter before the Court is the MOTION FOR FURTHER ADMINISTRATION UPON THE DEATH OF DEBTOR IN POSSESSION filed by Thomas J. Wingert, a Special Administrator appointed by the state court following the death of John A. Wingert, Debtor. This is a core proceeding under

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28 U.S.C. § 157(b)(2). This letter memorandum of decision and accompanying Order shall constitute the Court's preliminary findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that this motion shall be continued pending an evidentiary hearing on a motion to dismiss, convert, or for appointment of a Chapter 11 trustee.

Summary of Facts.

John A. Wingert filed a Chapter 13 petition on August 28, 1995. At the time of filing, Debtor owned and operated a construction company known as Wingert Construction. Pursuant to schedules and statements filed September 21, 1995, Debtor had assets of \$58,394.00 and liabilities of \$478,165.38. On Debtor's motion, the case was converted to a Chapter 11 proceeding by Order entered November 8, 1995. By Order entered December 13, 1995, Cecelia A. Grunewaldt was appointed Debtor's bankruptcy counsel. By report filed December 15, 1995, the United States Trustee advised the Court that it was unable to appoint a committee of unsecured creditors.

Debtor died unexpectedly on January 3, 1996. He did not leave a will. By Order entered January 5, 1996, the state court appointed Debtor's brother, Thomas J. Wingert, a Special Administrator

with the powers of a general personal representative until such time as the special administrator's duties have been completed, provided the special administrator[']s prescribed duties are to proceed with the decedent's Chapter 11 bankruptcy case and assume all

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the powers of a debtor in possession under pending case No. 95-40479 under the United States Bankruptcy Code, 11 U.S.C. §101, et seq., and the letters shall be issued to the special administrator to serve without bond.

In re Estate of John Allen Wingert, No. 96-5, slip op.(2nd Cir. S.D. Jan. 5, 1996)(order appointing special administrator). The state court also issued a Letters of Special Administrator on January 5, 1996.¹

On January 10, 1996, Thomas Wingert filed a MOTION FOR FURTHER ADMINISTRATION UPON THE DEATH OF DEBTOR IN POSSESSION. Therein, he summarized the facts to date and attached the state court's Order and Letters. In the Motion, Thomas Wingert stated that all pre-petition bankruptcy estate property was secured to individual creditors or the Internal Revenue Service except for certain exempt property valued at less than \$1,000.00. He also stated that post-petition estate property, which was not subject to the IRS lien, included some tools and accounts receivables totaling \$17,000.00. Thomas Wingert asked that the Chapter 11 continue so that current projects can pay salaries and payroll taxes and so that accounts receivable can be collected for application against claims. He argued that the Bankruptcy Court offered the most appropriate jurisdiction for an orderly liquidation of the estate and would prevent a seizure of all unsecured assets by the IRS. Thomas

¹ Thomas Wingert did not receive relief from the automatic stay from this Court before proceeding in state court. Further, it is not clear what parties in interest, other than Thomas Wingert and Debtor's spouse, were given notice of and participated in the state court proceeding.

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Wingert stated he intended to accomplish the liquidation through a motion for sale before this Court, rather than through a confirmed plan.

The IRS filed an Objection to the Motion on January 16, 1996. It argued that Thomas Wingert should not be appointed as trustee or debtor in possession because he was a creditor and also a party to an executory contract or lease with Debtor. The IRS argued in the alternative that a disinterested Chapter 11 trustee should be appointed or the case should be converted to a Chapter 7 or dismissed.

The United States Trustee filed a Response on January 16, 1996. The United States Trustee stated that decisions addressing whether a case should continue after the death of the debtor generally favor dismissal. The United States Trustee cited one case in which the court ruled that a special administrator could not be appointed a debtor in possession. Finally, the United States Trustee stated that

if continued administration is allowed, the administration [should] be for the limited purpose of collecting accounts receivable and paying post-petition administrative claims; that the Special Administrator be required to obtain court approval of a full accounting of all funds received and disbursed through notice and hearing; and that this be accomplished within 90 days after which time this case be dismissed.

A hearing on shortened notice was held January 17, 1996. Appearances included Attorney Grunewaldt for Thomas Wingert, Special Administrator; Assistant U.S. Attorney Craig P. Gaumer for

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the IRS; Assistant U.S. Trustee Bruce J. Gering; Attorney Todd V. Meierhenry for Taylor Equipment, Inc.; Attorney David V. Vrooman for Stan Houston Equipment; and Terry VanderPol for Lawrence VanderPol. Taylor Equipment, Stan Houston Equipment, and Lawrence VanderPol appeared as creditors in support of the Motion.

Thomas Wingert filed an affidavit in which he waived any claim against the bankruptcy estate. Attorney Grunewaldt restated Thomas Wingert's arguments as set forth in his Motion and argued that a liquidation of the estate in Chapter 11 was in the best interest of the estate because it would allow administrative claimants to be paid. Attorney Grunewaldt also stated that Thomas Wingert would serve the bankruptcy estate without compensation.

Assistant U.S. Trustee Gering stated that he preferred that a trustee other than Thomas Wingert be appointed so that appropriate bonding and reporting safeguards would be in place. He stated he did not oppose the case remaining in Chapter 11.

The IRS argued that a bankruptcy estate trustee should be appointed. It stated that even if Thomas Wingert had waived his claim against the estate, he was still an insider and, therefore, not an appropriate candidate to be the trustee.

The Court noted, as some of the counsel had acknowledged, that no motions for appointment of trustee or to dismiss or convert were pending. The Court took the matter under advisement so it could review applicable case law.

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Discussion.

A review of applicable statutes, rules, and the case law cited by counsel allows the Court to make several preliminary findings.

General. Federal Rule of Bankruptcy Procedure 1016 provides that a Chapter 11 case may be dismissed or may proceed if the debtor dies post-petition. Under the Rule, the standard for continuing the case is "if further administration is possible and in the best interest of the parties." The Rule also states that the case may proceed and be concluded "in the same manner, so far as possible, as though the death . . . had not occurred."

As discussed by the court in *Querner v. Querner (In re Querner)*, 7 F.3d 1199 (5th Cir. 1993), a bankruptcy court cannot delve into probate matters. Consequently, any proposed Chapter 11 plan or other action in this case must stay clearly within this Court's jurisdiction.

Chapter 11 Option. Since this is a Chapter 11 case, any party in interest may propose a plan. 11 U.S.C. § 1121(c). Debtor's exclusivity period will expire March 7, 1996. That date, however, may be shortened to allow another party in interest to file a plan sooner. 11 U.S.C. § 1121(d). The Court sees no impediment to Thomas Wingert, as a party in interest, or a creditor quickly filing a liquidation plan. Moreover, if the case remains in a Chapter 11, a plan must be confirmed if any debts are to be discharged. 11 U.S.C. § 1129(d).

Appointment of a Chapter 11 Trustee. The court in *In re*

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Erickson, 183 B.R. 189, 194 (Bankr. D. Minn. 1995), emphasized the importance of having a fiduciary in place if a case continues in bankruptcy after a debtor's death. This Court concurs. Therefore, if the case continues in Chapter 11, a trustee appointed by this Court should be in place. The state court procedure appointing Thomas Wingert a Special Administrator does not comport with nor replace the procedures and requirements for appointment of a Chapter 11 trustee set forth in 11 U.S.C. § 1104(a). Compare *Wieczorek v. Woldt (In re Kjellsen)*, 53 F.3rd 944, 946 (8th Cir. 1995) (generally state law determines who has authority to file a bankruptcy petition on behalf of another); *In re Gridley*, 131 B.R. 447 (Bankr. D.S.D. 1991) (son acting under power of attorney could commence Chapter 7 case for mother; case would continue after the debtor's death as it was in the best interest of the estate).

Chapter 7 Option. After reviewing the case law cited by counsel, the Court finds no legal impediment to converting this case to a Chapter 7 proceeding. The reasoning in *In re Jarrett*, 19 B.R. 413 (Bankr. M.D.N.C. 1982), is not persuasive under the facts presented here. In *Jarrett*, the court refused to convert a Chapter 13 to a Chapter 7 after the Chapter 13 debtor's death because the probate estate could not be a Chapter 7 debtor. If that logic is followed here, then it could be argued that this case should not continue as a Chapter 11 either, as Chapter 11 eligibility is controlled by Chapter 7 eligibility. 11 U.S.C. § 109(g). Instead, Rule 1016 provides appropriate guidance. Under the Rule, the case

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may proceed so far as is possible "in the same manner, so far as possible, as though the death . . . had not occurred." If Debtor were still alive, the case could be converted to a Chapter 7.² Therefore, under Rule 1016 this Chapter 11 case may proceed as if the death did not occur. *In re Walters*, 113 B.R. 602, 604-06 (Bankr. D.S.D. 1990). Further, if it is in the best interest of the parties, the case may be converted to a Chapter 7 upon a showing of cause under 11 U.S.C. § 1112(b).

Such an application of Rule 1016 is not contrary to statute. The Court is not holding that a probate estate may commence a case; it may not because an estate is not a "person" as defined by the Code and related legislative history. See *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1566 (11th Cir. 1988). Further, allowing a conversion of a case after the death of a debtor may avoid unfortunate results. See *In re Erickson*, 183 B.R. 189, 194 n.15 (Bankr. D. Minn. 1995). In *Erickson*, the court noted that the Chapter 12 debtor, who had died after confirmation of a plan, had been an exemplary reorganization debtor and that his family had carried forward in the same way after his death. Nonetheless, the court recommended dismissal and concluded that the special administrator of deceased debtor's estate could not become the

² John A. Wingert filed a Chapter 13 petition on May 20, 1988, Bankr. No. 88-40252, and received a Chapter 13 discharge on May 13, 1994. His debts may be discharged under Chapter 7 because the instant case was filed more than six years before the petition date of August 28, 1995. See 11 U.S.C. § 727(a)(9).

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debtor-in-possession nor could the case be converted to a Chapter 7. *Id.* at 193-94.

The cases citing *Jarrett* do not have facts similar to those presented here and none provide additional analysis regarding their reliance on *Jarrett*. Further, the limited case law on this issue is not settled. See *Goerg*, 844 F.2d at 1562 (bankruptcy by probate estate lawfully commenced in a foreign jurisdiction may be governed by United States' Bankruptcy Code's provisions governing ancillary cases); *Erickson*, 183 B.R. at 194 n.14 (special administrator of deceased Chapter 12 debtor may not become the debtor-in-possession nor may case be converted to a Chapter 7); *Walters*, 113 B.R. at 604-06 (Chapter 11 may be reopened after the debtor's death for a limited purpose; an insolvent decedent's estate may not file bankruptcy); *Burner v. Security State Bank (In re Burner)*, 109 B.R. 216, 221 n.3 (Bankr. W.D. Tex. 1989) (case may not be converted to another chapter after the debtor's death); *In re Estate of Claude W. Patterson*, 64 B.R. 807 (Bankr. W.D. Texas 1986) (estate may not file a Chapter 11 petition); *In re Estate of Charles Whiteside*, 64 B.R. 99 (Bankr. E.D. Cal. 1986) (probate estate may not file a Chapter 11 petition).

Conclusion. While continuation under Chapter 11 or Chapter 7 appears to be the most prudent course to insure that administrative claimants are paid, the Court will leave it to the parties to determine what they think is best and will await their motions to dismiss, convert, or for the appointment of a Chapter 11 trustee.

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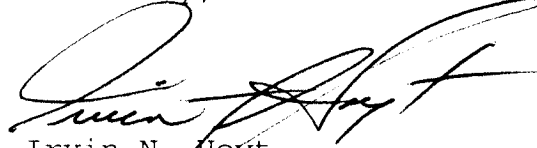
Without an evidentiary hearing, it would be inappropriate for this Court to decide which road to follow at this time. Fortunately, to date the Court has not been presented with some of the problems addressed in *In re Chester*, 61 B.R. 261 (Bankr. D.S.D. 1986).

I urge everyone to proceed with haste in filing their motions. Hearings on shortened, yet reasonable, notice will be considered. Finally, I trust that Attorney Grunewaldt and the United States Trustee will insure that insurance and other safeguards on estate property remain until a Chapter 11 or 7 trustee is in place or the case is dismissed.

An order will be entered holding this Motion in abeyance. A continued hearing will be set on it when an evidentiary hearing on a dispositive motion is filed and set for hearing.

The original of this letter decision will be docketed. Counsel and parties in interest will be served copies by facsimile transfer, as time is of the essence.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: Bankruptcy Clerk (for docketing)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 26 1996

Clerk
U.S. Bankruptcy Court, District of S.D.