ESTATE OF FREDERICK DEMIENTIEFF	: Order Docketing Appeal and Affirming Decision : : Docket No. IBIA 97-5 : : October 9, 1996

On October 4, 1996, the Board of Indian Appeals (Board) received a notice of appeal from the Tanana Chiefs Conference, Inc. (TCC), through counsel, Mark Andrews, Esq., Fairbanks, Alaska. TCC seeks review of an order denying rehearing issued by Administrative Law Judge William E. Hamlett in the Estate of Frederick Demientieff, IP SA 184N 95. As its statement of errors of fact and law, TCC states at page 1 of its notice of appeal:

> 1. [TCC] sought to intervene to support the petition for rehearing of Arnold Demientieff. The judge erred by denying the motion to intervene.
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> 2. In the Order Determining Heirs, April 22, 1996, the judge erred by applying Estate of Jacob William Nicholai, [29 IBIA 157 (1996)] to the State of Alaska.
>
> 3. The judge erred by ruling that a faxed rehearing petition by Arnold Demientieff, received by the judge before expiration of the filing deadline was nevertheless filed untimely because it was not the original. [TCC] was not the petitioner, but the judge's error is so plain, and the consequences so drastic for Native Alaskans, the TCC asks the Board to review this issue on its own motion.

TCC then argues that it is a party in interest in this estate. Stating that its Division of Real Estate Services provides services to Alaska Natives by preparing probate records and submitting them to the Department of the Interior for probate, TCC argues at page 2 of its notice of appeal:

> TCC disagrees with the result in Nicholai. It is the position of TCC that 25 U.S.C. sec. 372a does not apply to Alaska, or, if it does, the statute allows recognition of traditional adoptions. Nicholai affects all Natives living in the State of Alaska. Traditional adoptions remain common, especially in rural areas, and it is vital that the Board hear new argument concerning the applicability of 25 U.S.C. sec. 372a.

Appellant failed to attach copies of Judge Hammett's orders in this estate to its notice of appeal. The Board requested and received copies from Judge Hammett.

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On April 22, 1996, Judge Hammett issued an order determining decedent Frederick Demientieff's sole heir to be his surviving spouse. The Judge found that Arnold Demientieff's claim to be decedent's adopted son was controlled by this Board's decision in Nicholai, in which the Board held that 25 U.S.C. § 372a (1994) applies in the State of Alaska, and that the Department could not recognize adoptions that were not proven in accordance with the requirements of that statute. Judge Hammett enclosed instructions on filing a petition for rehearing under 43 CFR 4.241 with his order.

The Judge also provided the Board with a copy of a letter from Arnold. The letter is typewritten and has a typewritten date of May 8, 1996, at the top. There is no indication of the person or organization to whom Arnold sent this letter, which begins simply: "Dear Sirs." The letter is signed by Arnold, and the date "6/17/1996" appears under the signature.

In addition, Judge Hammett provided TCC's July 9, 1996, motion seeking to intervene. The motion states that TCC disagrees with the decision in Nicholai.

In his August 15, 1996, order, Judge Hammett stated that there was no evidence that Arnold had properly filed his letter with the Superintendent, Fairbanks Agency, Bureau of Indian Affairs (Superintendent). He noted that he received a copy of the letter on June 17, 1996, by facsimile transmission (fax), and received the original document on Saturday, June 22, 1996, by express mail. Judge Hammett stated that he knew of no regulation which authorized the filing of a petition for rehearing by fax, rather than by the procedures established in 43 CFR 4.241. He therefore concluded that the letter was not a timely filed petition for rehearing.

Nevertheless, Judge Hammett addressed the merits of Arnold's letter, holding that the issue of adoption was addressed in his April 22, 1996, order. As to TCC's motion to intervene, Judge Hammett stated that he was bound by Nicholai.

Because TCC has clearly set forth its objection to Judge Hammett's order, the Board sees no reason to delay resolution of this appeal and instead addresses the matter on the materials presently before it. Assuming arguendo that (1) a timely petition for rehearing was filed in this case; (2) TCC, as a P.L. 93-638 contractor providing probate services, has standing to appeal from a probate decision, in general, and without the concurrence of the Superintendent, in particular; (3) TCC has standing to object to the denial of rehearing requested by another person; and (4) TCC has standing to file an appeal with the Board when it failed to file a petition for rehearing with the Administrative Law Judge, the Board would still affirm the orders below.

Nicholai thoroughly considered the question of whether section 372a applies in the State of Alaska. The Board was well aware that a decision holding that the section applied in Alaska would change the way in which that section had previously been interpreted by the Hearings Division of the Office of Hearings and Appeals. It decided Nicholai on the basis of excellent briefs on both sides of the question, and thoroughly set forth

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its reasons for concluding that the Hearings Division's prior interpretation of the section was erroneous. The Board does not intend to revisit this issue at this time.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from Judge Hammett's August 15, 1996, order denying rehearing is docketed, and that decision is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge

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