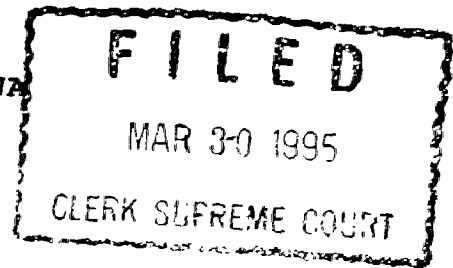


IN THE COURT OF APPEALS OF IOWA

No. 4-609 / 94-1036



IN RE THE MARRIAGE OF ZHI LI AND
MING FANG ZHAO

Upon the Petition of
ZHI LI,

Appellee,

And Concerning
MING FANG ZHAO,

Appellant.

Appeal from the Iowa District Court for Johnson County,
Thomas L. Koehler, Judge.

Ming Fang Zhao appeals from the dismissal of this
dissolution proceeding. **REVERSED AND REMANDED.**

Patricia C. Kamath, Iowa City, for appellant.

Bruce D. Nestor, Iowa City, for appellee.

Considered by Donielson, C.J., and Habhab and Cady,
JJ., but decided en banc.

CADY, J.

Zhi Li and Ming Fang Zhao were married in the People's Republic of China on December 20, 1987. They are both natives of China. The parties had a child, Zhe Li, born on December 1, 1988.

Li moved to Iowa City, Iowa, in June 1990 in order to become a student. He held an F-1 Visa, which required him to swear under oath that he maintained a residence abroad that he had no intention of abandoning. Zhao joined her husband in the United States in 1992. At that time she had an F-2 Visa, which was conditioned on her status as Li's spouse.

In March 1993, Li was charged with domestic abuse assault for striking Zhao. By a plea agreement, Li pled guilty to a charge of assault and was given a deferred judgment. He was placed on probation.

On July 26, 1993, Li filed a petition for dissolution of marriage. In the petition he alleged he was a resident of Johnson County.

In response to Zhao's motion for temporary child support, Li filed a motion contesting the court's jurisdiction over the parties' child, who was still living in China. The district court found Zhao was attempting to secure her own Visa and was trying to have the child brought to the United States. The court also noted Zhao had no intention of returning to China and was anticipating that the child would live in the United States. Zhao later obtained an F-1 Visa.

On the day scheduled for the dissolution trial, Li filed a motion to dismiss the action for lack of subject matter jurisdiction. He claimed that because neither party held their residence or domicile within Iowa, the Iowa courts did not have subject matter jurisdiction. Li argued that in order to obtain their Visas, both he and Zhao had to swear to maintain a residence abroad which they had no intention of abandoning.

The motion was submitted to the court on argument. No evidence was presented. The district court found the parties' Visas showed they had no intention of remaining in the United States. The court concluded it did not have subject matter jurisdiction and dismissed the case. Zhao appealed.

The Iowa district court cannot adjudicate a dissolution of marriage unless there is jurisdiction over the specific marriage involved. In re Marriage of Bouska, 256 N.W.2d 196, 198 (Iowa 1977). Jurisdiction of the marriage relationship depends on domicile, either the matrimonial domicile or the actual good-faith domicile of one of the parties within the state. Larson v. Iowa District Court, 243 N.W.2d 617, 618 (Iowa 1976) (citing Bennett v. Tomlinson, 206 Iowa 1075, 1077, 221 N.W. 837, 839 (1928)). Under Iowa Code section 598.9 (1993), if the averments as to residence are not fully proved in a dissolution proceeding, the district court must dismiss the action.

The terms "residence" and "domicile" are considered to have much the same meaning under chapter 598. In re Marriage of Vogel, 271 N.W.2d 709, 711 (Iowa 1978). To have a residence or domicile within the meaning of chapter 598, one must have a fixed habitation with no intention of leaving it. In re Marriage of Kimura, 471 N.W.2d 869, 877 (Iowa 1991).

A foreign citizenship does not bar one from establishing a domicile or residence for dissolution of marriage purposes. Id. at 878. It is legal residence, not citizenship, that is a statutory condition for bringing a dissolution of marriage proceeding in this State. Id. Zhao's Chinese citizenship does not bar her from establishing a domicile in Iowa.

Once a domicile is established, it continues until a new one is established. Id. at 877. A new domicile is established by: (1) a definite abandonment of the former domicile; (2) actual removal to, and physical presence in the new domicile; and (3) a bona fide intention to change and to remain in the new domicile permanently or indefinitely. Julson v. Julson, 255 Iowa 301, 305, 122 N.W.2d 329, 331 (1963). Such residence must be in good faith and not for the purpose of obtaining a divorce only. Korsrud v. Korsrud, 242 Iowa 178, 182, 45 N.W.2d 848, 850 (1951).

Zhao claims she has established a new domicile in Iowa. In her brief she states she has abandoned her former

domicile in China, she is physically present in Iowa, and she has a bona fide intention to remain in Iowa indefinitely. She believes the district court should have allowed her to present evidence to support her claim she considers Iowa her new domicile.

Domicile or residence is largely a matter of intention. Miller v. Miller, 242 Iowa 706, 709, 46 N.W.2d 732, 733 (1951). Because it is essentially a matter of intent, precedents are of slight assistance and the determination of the place of domicile depends upon all the facts and circumstances in each case. Julson, 255 Iowa at 305, 122 N.W.2d at 331.

We believe the district court should have held an evidentiary hearing in this case. We note that no certain length of time is necessary to fix residence. See Holmes v. Holmes, 186 Iowa 336, 345, 170 N.W. 793, 796 (1919). It is sufficient if a person makes up his or her mind to permanently stay in a new home and to make it his or her domicile. Cooper v. Cooper, 217 N.W.2d 584, 588 (Iowa 1974). Thus, it is possible Zhao's intent could have changed after she acquired the F-1 Visa.

Furthermore, in the case of In re Marriage of Vogel, 271 N.W.2d 709 (Iowa 1978), the court considered the parties' Immigration Record to Canada, which stated the parties sought admission to Canada for permanent residence. Id. at 712. The court noted the signing of such a document is not to be taken lightly. Id. The

court, however, did not rely upon the Immigration Record alone, but also looked at the duration of the parties' sojourn in Canada, their purchase of a Canadian farm, and their affidavits. Id.

We conclude Zhao's Visa alone should not have been relied upon to show she had not established domicile in Iowa. A party's place of domicile depends upon all the facts and circumstances in the case. In this case, Zhao should be permitted to present any facts which support her claim she considered Iowa to be her domicile.

We determine the decision of the district court should be reversed and the case remanded for an evidentiary hearing on the issue of domicile or residence. We do not retain jurisdiction. Costs of this appeal are assessed to Zhi Li.

REVERSED AND REMANDED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.

The trial court dismissed this dissolution action finding it lacked subject matter jurisdiction over the marriage of the parties, citizens of the Peoples Republic of China residing in the United States under F-1 visas. The majority has remanded to the trial court to take further evidence before determining their domicile or residence. I would affirm the trial court.

The dispositive issue is whether F-1 aliens can, under federal and Iowa law, form the intent necessary to be domiciled in Iowa. F-1 is one class of nonimmigrant aliens defined by United States Code Annotated section 1101 as:

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

8 U.S.C.A. § 1101(a)(15)(F)(i) (West Supp. 1994). (Emphasis added.) Both spouses have F-1 visas and their immigration status is based on a promise not to abandon their residence in China.

By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Elkins v. Moreno, 435 U.S. 647, 665, 98 S. Ct. 1338, 1349, 55 L. Ed. 2d 614, 628 (1978). Moreover, since a nonimmigrant alien who does not maintain the condition attached to his status can be deported, it is also clear Congress intended, in the absence of an adjustment status, nonimmigrants in restricted classes who sought to establish domicile would be deported. Id. at 665-66, 98 S. Ct. at 1349, 55 L. Ed. 2d at 628. (Emphasis added.)

The majority correctly cites In re Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991), as holding one need not be a citizen to establish domicile or residence in Iowa for dissolution of marriage purposes. Kimura is not dispositive. The person seeking to establish domicile or residence in Iowa in Kimura was a permanent resident alien. His immigration status provided him with an ability to establish his residence in the United States. An F-1 does not.

I, too, distinguish In re Marriage of Vogel, 271 N.W.2d 709 (Iowa 1978), cited by the majority. The parties in Vogel were United States citizens.