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STATE OF WASHINGTON
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Supreme Court No. 101410-4

In the
Supreme Court of the State of Washington

In re the Marriage of

DOMINIKA RIETSCHIN,

Petitioner

v.

AXEL RIETSCHIN,

Respondent.

PETITION FOR REVIEW

Court of Appeals No. 82473-2-I;
Kings County Superior Court No. 19-3-03895-4 SEA

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I. IDENTITY OF PETITIONER

The Petitioner in this proceeding is Axel Rietschin ("Petitioner"), the husband in the underlying marriage dissolution proceeding and the Appellant in the Court of Appeals. The Superior Court found that it had subject matter jurisdiction over the parties' dissolution and the Court of Appeals affirmed.

II. DECISION

Petitioner seeks this Court's review of the decision of the Court of Appeals, Division One, in Case No. 82473-2-I, dated July 11, 2022, affirming the Superior Court's determination that it had subject matter jurisdiction over the parties' marriage. A true and correct copy of the Court of Appeals' decision is appended hereto as Attachment "A".

III. ISSUE PRESENTED FOR REVIEW

Petitioner seeks review of the Court of Appeals' decision pursuant to RAP 13.4(b)(4) based on the following issue:

1. WHETHER THE SUPERIOR COURT ERRED IN DETERMINING THAT IT HAD SUBJECT MATTER JURISDICTION OVER THE PARTIES' MARRIAGE.

IV. STATEMENT OF THE CASE

While the circumstances of the proceedings and facts of the case are summarized in the attached Court of Appeals opinion, Petitioner would like to emphasize certain facts that were disregarded in the Court of Appeals.

On April 10, 2019, Respondent Dominika Rietschin ("Respondent") filed a petition for dissolution of marriage in the trial court. Clerk's Papers [CP] 12. In the petition, Respondent stated that she and Petitioner, along with their minor children A.R. and K.R., moved to King County, Washington, on or about June 3, 2014. CP 5. Petitioner, who worked as an engineer at Microsoft, came to the United States on a L-1A nonimmigrant visa[1] for intracompany executives. CP 93, 215. Respondent and the children came on L-2 visas as

[1] 8 U.S. Code § 1101(a)(15)(L)

Petitioner's dependents.[2] Respondent testified that Petitioner had a L-1 visa and she and the children had L-2 dependent visas. VRP 371-373. Petitioner and Respondent separated on or about September 30, 2018. CP 5.

Petitioner testified that he was a Swiss citizen and only has a Swiss passport. VRP 459. He never applied for American citizenship or permanent residency in the United States. VRP 459. He was a temporary worker, "like a tourist in this country." VRP 461. The plan always was to return to Switzerland; the only thing that had changed was the anticipated date of return. VRP 570- 71. Petitioner also kept his apartment in Geneva, Switzerland, and rented it to students. VRP 569.

Petitioner maintained that his children are Swiss, not American: "We are all here on a temporary manner, and they will return to their home country whenever I return," as he was the primary visa holder. VRP 533-34, 572, 574. Petitioner

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[2] 9 FAM 402.12-16(A)(U)

testified that the children wanted to return to Switzerland with him. VRP 549-50

While litigating a proposed parenting plan, Petitioner noted that Respondent "knew it would take three to five years to establish myself professionally in America, and that we never had plans to stay in the country indefinitely, as the horizon of our nonimmigrant status extended to a maximum of seven years[3]." CP 758. Petitioner stated that Respondent was aware that he "was not very inclined to change [their] status to permanent residency, although [he] left that option open." CP 758. Petitioner would later repeat this point: "***I feel the need to repeat we are not Americans and I have no intent to reside here permanently***." CP 861 (emphasis added).

Respondent conceded that as of December of 2019, she no longer was authorized to work in the United States pursuant to the terms of her nonimmigrant temporary status. VRP 385, 441. She would need new immigration status to obtain a new

[3] 9 FAM 402.12-14(C)(U)

employment authorization document (EAD). VRP 386-87, 437. Respondent conceded that when she filed for divorce, she had an L-2 visa, which she could not qualify for if she were not the spouse of a primary L-1 visa holder like Petitioner. VRP 385. Respondent also conceded that Petitioner kept his apartment in Geneva so that he could move back there at any time. VRP 73-74, 404.

After the court of appeals issued a decision finding it had subject matter jurisdiction over the parties' marriage, Petitioner filed a Motion for Reconsideration on July 29, 2022 requesting that the court of appeals reconsider its decision as Respondent was always a temporary resident of Washington and could never stay indefinitely anywhere in the United States without breaking the law. Petitioner emphasized that Respondent was never domiciled in the United States, and therefore never domiciled in the State of Washington. Petitioner argued that he and Respondent were never immigrants under 8 U.S. Code § 1101(a)(15)(L), and that they were temporarily admitted into

the United States under a nonimmigrant via classification L. Petitioner emphasized that Respondent never changed her visa classification to that of a permanent resident or petitioned for such change. Petitioner requested that the trial court reconsider its decision and determine that any orders or judgments the trial court issued regarding Petitioner, Respondent, and their children are regarded as nullities as though they never existed. However, the trial court denied this motion in a September 6, 2022 decision.

On September 6, 2022, the trial court also withdrew its initial opinion dated July 11, 2022 and filed a new opinion. The September 6, 2022 opinion made the following change where the initial opinion dated July 11, 2022 stated the following: “However, Axel presented no legal support for his argument that the trial court cannot adjudicate a divorce unless the parties are U.S. citizens.” This sentence was replaced and amended as follows by the September 6, 2022 version of the decision: “However, Axel presented no legal support for his

argument that the trial court cannot adjudicate a divorce if the parties are present in the U.S. on temporary nonimmigrant visas."

It is important to note that the initial July 11, 2022 opinion by the court of appeals incorrectly stated that Petitioner argued that the court did not have jurisdiction because he is a Swiss national. This was not the argument set forth by Petitioner, as Petitioner has always argued that the court did not have jurisdiction because Petitioner and Respondent were in the United States temporarily, and therefore could not establish domicile here. The September 6, 2022 amended opinion by the court of appeals accurately reflects the argument set forth by Petitioner based on the changes made to such opinion, wherein the court of appeals concedes that Petitioner and Respondent were in the United States temporarily.

On September 23, 2022, Petitioner filed a Motion for Reconsideration regarding the trial court's amended decision.

In his motion, Petitioner argued that the trial court did not have jurisdiction over temporary nonimmigrants, and he cited to 22 CFR § 41.31 and 8 U.S. Code § 1101(a)(15)(L) as authority for his argument that temporary nonimmigrants are precluded by law from staying permanently in the country, from which it follows they are precluded to establish domicile, as domicile is predicated on a permanent stay. Petitioner therefore argued that the trial court had no jurisdiction over the parties' marriage and legally they could not be domiciled in the United States. As a result, Petitioner again requested that the trial court reconsider its decision and nullify such orders, judgments, and decrees in this matter. Despite, such arguments, the trial court denied Petitioner's second Motion for Reconsideration.

V. ARGUMENT

A. DISCRETIONARY REVIEW SHOULD BE GRANTED AS THE TRIAL COURT ERRED WHEN IT DETERMINED THAT IT HAD JURISDICTION OVER THE PARTIES' MARRIAGE.

This Court should grant discretionary review because the Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Specifically, the public interest in this decision has the potential to affect numerous nonimmigrants admitted under L, H, and similar temporary work visas and other temporary residents in the State of Washington, such as tourists.

i. The Trial Court Did Not Have Subject Matter Jurisdiction.

RCW 26.09.030 provides that a divorce proceeding may be initiated either by or against a resident of the State of Washington. Petitioner maintained throughout the proceeding that he was Swiss, and that he always intended to return to his

home country. While Respondent alleged that she wished to stay in the United States indefinitely, she was a nonimmigrant alien residing temporarily. Because the record shows that neither Petitioner nor Respondent intended to remain, or could remain, in the United States permanently before the Petition for Dissolution was filed, neither was domiciled in Washington for jurisdictional purposes. Therefore, the Superior Court never had jurisdiction over the divorce proceeding and its decree should have been reversed or nullified.

Subject matter jurisdiction over divorce proceedings exists if one party is a resident of Washington during the proceedings. *Marriage of Robinson*, 159 Wn. App. 162, 164 (2010). Residence here means "domicile in fact," an intent to reside "presently" in Washington. *Marriage of Ways*, 85 Wn.2d 693, 697 (1975); *Robinson*, 159 Wn. App. at 164. Domicile requires physical presence and intent to reside. *Id*. "Domicile: . . . the place of an individual's true, fixed, and permanent home." 20 CFR 725.231.

Stated another way, domicile consists of physical presence at a particular place, along with the absence of any intention to establish domicile elsewhere. *See Thomas v. Thomas*, 58 Wn.2d 377, 380 (1961). Domicile means an intent to make a home at the present moment, not an intent to make a home in the future. *In re Lassin's Estate*, 33 Wn.2d 163, 167 (1949); *Robinson*, 159 Wn. App. at 168.

While it is possible for an immigrant to the United States to establish domicile in a state such as Washington, the problem in this case is that Respondent could not have had a true intent to do so because, as a temporary nonimmigrant, objectively she had no way of accomplishing that goal. First, the record on appeal contained ample testimony to prove that no one in the family, including Respondent, intended to reside in Washington permanently. Petitioner testified before the trial court multiple times that he and the family were not and could not be permanent residents of Washington. In two separate pleadings, he expressed the family's desire to return to Switzerland once

his work obligations in the United States ended. CP 758, 861. He also testified multiple times about his intent to ultimately return to Switzerland. VRP 459-61, 533-34, 569-71.

Petitioner's testimony was corroborated by other evidence. Gabriella Diez-Gomez, who has known the family since their time in Switzerland, testified repeatedly that they never intended to remain permanently in the United States and that the trip was strictly temporary for Petitioner to advance his career and support the family. VRP 235, 237-38. While Respondent's assertions that the family intended to permanently remain in the United States is based entirely on her own perception of events and other people's intent, Petitioner's testimony corroborates the perception of other people involved in the family's lives, including friends from their native country.

Second, at the time the divorce was pending, Respondent was only authorized to be in the United States temporarily, by virtue of her L-2 dependent visa. Upon divorcing Petitioner,

Respondent no longer would be his dependent and her L-2 visa would automatically become void as a consequence. She would no longer be authorized to remain in the United States. Thus, Respondent was not capable of becoming a permanent resident of Washington. The worker-dependent visa Respondent had was always temporary and was set to end upon the marriage's dissolution.

Respondent's "intent" to reside in Washington was illusory. She never had the ability to establish a domicile in Washington independent of her marriage to Petitioner and the dependent visa she received being his spouse, and even if she had, a court cannot assert jurisdiction based on future events. The trial court never had jurisdiction over this matter. Its judgment of divorce, as well as the rulings on custody, support, and distribution, should have been vacated by the Court of Appeals for lack of subject matter jurisdiction over the parties and their marriage.

ii. *The Court of Appeals Decision Was Erroneous***.**

The Court of Appeals erroneously affirmed the trial court's rulings and that the trial court had jurisdiction over the matter. Despite Petitioner setting forth critical facts that demonstrated Respondent was not capable of being domiciled in Washington due to her immigration status being that of a temporary nonimmigrant, and therefore could not have possessed the requisite intent, the Court of Appeals determined that Respondent's presence and alleged intent to stay indefinitely were sufficient for the trial court to adjudicate the dissolution pursuant to RCW 26.09.030.

The cases cited to by the Court of Appeals in support of its decision are readily distinguishable from the present matter. The Court of Appeals did cite to some cases that specifically addressed the issue of whether a person with a nonimmigrant visa may still establish domicile for purposes of a residency requirement for dissolution of marriage. However, none of those cases were Washington case law, and thus they are not

binding precedent.[4] The Court of Appeals did not rely on any binding case law from Washington State to establish that Respondent was domiciled in this state as a nonimmigrant with a temporary visa.

Moreover, those cases from other states have distinguishable facts. In *Maghu v. Singh*, 181 A.3d 518 (Vt. 2018), a Vermont case, the husband's taking steps to secure permanent-resident status supported a conclusion that the husband intended to reside in the state indefinitely. Here, Respondent was not capable for taking steps to secure her permanent residency in Washington due to her temporary nonimmigrant visa status.

In the California case *In re Marriage of Dick*, 15 Cal.App.4th 144, 154 (1993), cited to by the Court of Appeals,

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[4] The out-of-state cases cited by the Court of Appeals are *Maghu v. Singh*, 206 Vt. 413, 181 A.3d 518 (2018); *In re Marriage of Dick*, 15 Cal.App.4th 144, 156 (1993); *Bustamante v. Bustamante*, 645 P.2d 40, 42 (Utah 1982); *Abou-Issa v. Abou-Issa*, 229 Ga. 77, 79, 189 S.E.2d 443 (1972); *Alves v. Alves*, 262 A.2d 111, 115 (D.C. 1970).

the court held that the husband's nonimmigrant status did not preclude a finding of residence under California law for purposes of obtaining a dissolution of marriage. However, that finding was supported by distinguishable facts where one party was a U.S. Citizen. *Id.* at 152. Similar facts do not exist in this matter.

In the Utah case *Bustamante v. Bustamante*, 645 P.2d 40 (Utah 1982), the matter was remanded back down to the trial court to determine whether the immigrant wife met the residency requirement for jurisdiction purposes in a divorce matter. The court stated it "express[ed] no opinion" regarding that issue, and therefore it is questionable how the Court of Appeals relied on this case when making its decision. Additionally, the wife was qualified as an 'immigrant' in this case.

Given that the aforementioned cases are not binding precedent and that they contain facts that are distinguishable

from this matter, the Court of Appeals erred in finding that the trial court had jurisdiction over this divorce matter.

iii. Pursuant to Federal Law, Respondent Could Not Be Lawfully Domiciled in the United States as a Temporary Nonimmigrant.

Petitioner set forth an argument before the trial court, in his declaration submitted to the court on or about November 15, 2019, about the effect that the parties' L visas had on the parties' ability to establish domicile in the United States. He explained that Respondent and their children would be required to leave the United States in the event Petitioner's visa expires or is revoked for any reason. Respondent would lose her dependent status, visa, and work authorization at the time of the parties' dissolution of marriage as her L-2 dependent status was granted on the sole basis that she was married to Petitioner[5]. She would therefore be required to leave the country.

Qualified foreign nationals may be granted L-1 status to "to enter the United States temporarily" to render services to

[5] 9 FAM 402.12-16(A)(U)

certain U.S. employers in a capacity that is managerial, executive, or involves specialized knowledge. 8 U.S.C. § 1101(a)(15)(L). The spouse and minor children of an L-1 nonimmigrant may be granted L-2 status as a dependent of the L-1 employee. *Id.*

The L status is granted on a temporary basis and an individual with such visa is considered to be a "nonimmigrant". A nonimmigrant is "a noncitizen who is admitted to the United States for a specific temporary period of time." USCIS Policy Manual, Volume 2, Part A, Chapter 1, https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-1. Every nonimmigrant who applies for admission to the United States "must agree to abide by the terms and conditions of his or her admission." 8 C.F.R. § 214.1(a)(3)(i).

The L-2 status by itself is a nonimmigrant status that only authorizes a **temporary stay** in the United States. Although applicants for L status may seek, or have sought, permanent residence in the United States, the L status by itself is not an

immigrant status and does not grant permanent residence as those who enter the United States on an L-1 or L-2 status are granted a temporary nonimmigrant status for up to three years (unless an extension of stay is granted). 9 FAM 402.12-13; *see also* 9 FAM 402.12-14. The total maximum stay allowed for L applicants is limited to either five years or seven years, depending on the nature of the L-1 principal's employment. *Id*. Therefore, L-1 or L-2 status by itself does not provide authorization to remain in the United States on a permanent basis.

Furthermore, because the L-2 status is a temporary nonimmigrant status, the foreign national is required to attest that they will depart the United States at the end of their temporary stay. "At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of stay, or upon abandonment of his or her authorized nonimmigrant status…the nonimmigrant alien's failure to comply with those departure requirements…may

constitute a failure of the alien to maintain the terms of his or her nonimmigrant status." 8 C.F.R. § 214.1(a)(3)(ii).

Nonimmigrants cannot stay in the United States indefinitely: 9 FAM 102.3-14 (U) N DEFINITIONS "d. (U) Nonimmigrant: "A foreign born person who is coming to the United States temporarily for a particular purpose **but does not remain permanently** . . ." (emphasis added).

Although "temporary" is not specifically defined by either statute or regulation, it generally signifies a limited period of stay[6]. The fact that the period of stay in a given case may exceed six months or a year is not in itself controlling, if you are satisfied that the intended stay has a time limitation and is not indefinite in nature. "The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such

[6] 9 FAM 402.2-2(D)(U)

conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States." 8 U.S. Code § 1184(a)(1). The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status. . ." 8 U.S. Code § 1258(a).

Pursuant to 8 USC § 1101(a)(31): "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." To reside in the United States on a permanent basis, an L-2 nonimmigrant would need

to apply for lawful permanent resident status. The lawful permanent resident (LPR) status requires qualification under a separate immigrant petition. USCIS Policy Manual, Volume 7, Part A, Chapter 1. https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-1. Foreign nationals "who are present in the United States and who are beneficiaries of approved immigrant petitions may generally file an application with USCIS to adjust their status to that of an LPR, or they may depart the United States and apply for an immigrant visa abroad." *Id*.

Although there are several dozen different ways for a noncitizen to adjust status, the nonimmigrant L status category does not provide a path to LPR status as it is not an immigrant category, but rather a nonimmigrant category that provides temporary authorization to remain in the United States. Unless a foreign national separately benefits from an immigrant petition, they cannot seek permanent residence in the United States on the basis of holding L-1 or L-2 status, which is

temporary in nature and listed as a nonimmigrant visa under 8 U.S.C. § 1101(a)(15)(L).

Respondent, who had a temporary nonimmigrant L-2 visa, never changed her classification to that of a permanent resident. She never petitioned for permanent residency based on her education, pleaded national interest to obtain a green card, or asked her employer, a large multinational corporation, to petition on her behalf. She never testified or otherwise mentioned she ever attempted to secure permanent residency. Her alleged intent to stay in the United States since 2014, is not corroborated any steps she took to materialize it. Therefore, she could never establish domicile and the trial court lacked jurisdiction.

It is important to note the September 6, 2022 amended opinion by the court of appeals concedes that Petitioner and Respondent were in the United States temporarily. As a result of this fact admitted by the court, Petitioner and Respondent could not have been domiciled in the United States.

iv. As Temporary Nonimmigrants, the Parties Were Never Part of the "Governed" By State and Federal Government.

The claim that Respondent was domiciled in Washington State is precluded by law. The trial court was precluded from adjudicating a divorce matter if the parties are present in the United States on temporary nonimmigrant visas.

Wash. Const, Article 1, Clause 1 states that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." The trial court was required to demonstrate that it has jurisdiction over the parties and, for that, the trial court must show a statute that explicitly extends "the governed" (Wash. Const, Art. 1, Clause 1) to "temporary nonimmigrants" (22 CFR § 41.31 and 8 U.S. Code § 1101(a)(15)(L)) - in particular to lawfully admitted temporary nonimmigrants precluded by law to establish domicile, and to vote.

Absent a statute explicitly extending Wash. Const. Art. 1 Clause 1 to temporary nonimmigrants, the trial court had no authority over the parties in the matter as they were never citizens nor lawful permanent residents of the United States. The parties do not have the same rights as citizens, and it follows that they do not have the same obligations.

For example, registering to vote or possessing a firearm is a felony for temporary nonimmigrants per RCW 29A.84.010 and RCW 9.41.171, while these are rights of United States citizens and lawful permanent residents. Temporary nonimmigrants cannot work in the United States without authorization from the federal government, and Respondent could not work at all under the B-2 tourist status (22 CFR § 41.31) she was supposedly under at the time of trial, let alone on her long-expired L-2 dependent status (9 FAM 402.12-16(A)(U).)

Respondent's L-2 temporary nonimmigrant status and her authorization of stay in the U.S. expired on June 21, 2020.

The B-2 “visitor” status she later sought, and which was used in court as evidence that she took steps to secure her stay beyond the divorce, would have already expired at the time of trial, but was ultimately denied. In any case, a B-2 temporary visitor status does not grant their holders the right to reside permanently in the United States. Therefore, the parties were never part of “the governed” and could not be domiciled in this country.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant discretionary review of the Court of Appeals’ decision pursuant to RAP 13.4.

This document contains 4377 words, excluding the parts of the documents exempted by the word count by RAP 18.17.

Respectfully submitted this 27th day of October 2022.

THE APPELLATE LAW FIRM

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<u>**PROOF OF SERVICE**</u>

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on October 27, 2022 I caused the following document(s):

PETITION FOR REVIEW

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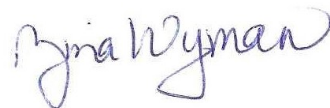
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on October 27, 2022.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of:	
AXEL RIETSCHIN, Appellant,	No. 82473-2-I
and	UNPUBLISHED OPINION
DOMINIKA RIETSCHIN, Respondent.	

CHUNG, J. — Axel Rietschin appeals the trial court's dissolution of his marriage to Dominika Rietschin.[1] Axel asserts that the superior court lacked subject matter jurisdiction over the parties' marriage because they were both foreign nationals who intended to return to their home countries at some time in the future. RCW 26.09.030 allows anyone who is, or is married to, a Washington resident, to seek a divorce in this state. Residence in this context means domicile, which requires both residence in fact and an intent to make a place of residence one's home. Here, evidence at trial showed that ever since they moved to Washington for Axel's work, Dominika and Axel were both physically present in Washington, Dominika considered Washington her home, and she intended to stay here. The evidence established her domicile was Washington. Therefore, the trial

[1] Because the parties shared a last name, we refer to them by first name for clarity. We intend no disrespect.

court had authority to adjudicate the dissolution and issue attendant orders relating to property division and child custody and support.

We affirm.

FACTS

Dominika, a Polish citizen, and Axel, a Swiss citizen, married in Switzerland in 2012. In 2014, Dominika, Axel, and their two children moved to Washington for Axel's work. They rented a house and shipped their belongings from Switzerland. They enrolled the children in local public schools and got them involved in after-school activities and summer camps, established medical care, engaged in cultural and community activities, and registered their vehicles in Washington. They both held jobs in Washington. They borrowed money toward the purchase of a home here, though the purchase fell through due to inspections.

Dominika and Axel separated in October 2018, and Dominika filed for dissolution in April 2019. Axel contested the court's jurisdiction over the dissolution proceedings, arguing that because he was in Washington on a "temporary" work visa, he and his dependents were not domiciled here. At trial, Dominika testified that Axel's job was a permanent position—an opportunity for him to make his career—and that the parties had no concrete plans or date to return to Switzerland. She recounted that she viewed the family's 2014 relocation to Washington as "a new beginning." She further stated that her personal intent was to remain permanently in Washington with her two children she had with Axel, her fiancé, and her new baby. Axel characterized his status as a temporary worker as "like a tourist in this country." He testified that the plan was always to return to

Switzerland, and the only thing that changed was the anticipated date of return. Axel kept his apartment in Geneva and rented it to students.

The trial court determined that the domicile requirement was met and that it had jurisdiction to dissolve the parties' marriage. After finding it had jurisdiction, the court then dissolved the parties' marriage and divided property according to the parties' Swiss marital contract. The court also awarded Dominika custody and primary decision-making authority over the children and ordered Axel to pay child support. Further, the court awarded Dominika attorney fees based on the parties' need and ability to pay and imposed sanctions and civil penalties against Axel for repeated failure to comply with court orders.

Axel appeals the trial court's exercise of jurisdiction over the divorce proceedings.

ANALYSIS

I. Domicile and Subject Matter Jurisdiction

Axel contends that the trial court lacked subject matter jurisdiction over the dissolution because the parties were not residents of Washington.[2] A trial court's decision as to subject matter jurisdiction is a question of law that we review de novo. Conom v. Snohomish Cnty., 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

[2] Though the parties use the term "subject matter jurisdiction," the state constitution vests the superior court with subject matter jurisdiction over matters including "of divorce, and for annulment of marriage." Const. art. IV, sec. 6. "Subject matter jurisdiction is the authority of the court to hear and determine the type of action before it." In re Marriage of Robinson, 159 Wn. App. 162, 167, 248 P.3d 532 (2010) (citing In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976)). We note that a "[tribunal] does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." Marley v. Dep't of Labor & Indus., 125 Wn. 2d 533, 539, 886 P.2d 189 (1994). More precisely, then, the issue here is whether the court had authority pursuant to RCW 26.09.030 over the dissolution based on either spouse's residency in the state.

RCW 26.09.030 requires that in order for a party to file a petition for dissolution in Washington, either the petitioner or the petitioner's spouse must be a resident of the state. Residence, in this context, means "domicile." See In re Marriage of Strohmaier, 34 Wn. App. 14,16, 659 P.2d 534 (1983); Sasse v. Sasse, 41 Wn.2d 363, 365, 249 P.2d 380 (1952) (construing predecessor statute). "Domicil[e] is a jurisdictional fact," and this court conducts a de novo review of the jurisdictional facts. In re Marriage of Robinson, 159 Wn. App. 162, 168-69, 248 P.3d 532 (2010) (citing Mapes v. Mapes, 24 Wn.2d 743, 753, 167 P.2d 405 (1946)).

"The indispensable elements of domicile are residence in fact coupled with the intent to make a place of residence one's home." Strohmaier, 34 Wn. App. at 17. Domicile is primarily a question of intent, which may be shown by both the parties' own testimony and by surrounding circumstances. Mapes, 24 Wn.2d at 748. "[T]he more extrinsic and corroborative evidence [a party] can introduce which is consistent with [their] stated intention, the more likelihood there is that the trier of the fact will believe [them]." Marcus v. Marcus, 3 Wn. App. 370, 371, 475 P.2d 571 (1970) (internal quotation marks omitted) (quoting Thomas v. Thomas, 58 Wn.2d 377, 381, 363 P.2d 107, 110 (1961)). "'[T]he intention to make a home must be an intention to make a home at the moment, not to make a home in the future.'" Strohmaier, 34 Wn. App. at 17 (quoting In re Estate of Lassin, 33 Wn.2d 163, 167, 204 P.2d 1071 (1949)).

Here, the undisputed evidence of Dominika's years lived in Washington, combined with the testimony regarding her subjective intention to remain and make a permanent home here support the trial court's finding that she is domiciled in the state. Dominika stated that she sought a divorce in Washington rather than Switzerland "[b]ecause I live

in United States." She testified that she did not want to return to Switzerland or Poland because "I live here currently, I have three children, and I am in a happy relationship. I don't have reason, frankly, to go back to Europe."

Axel argued that Dominika's intent was illusory, as her immigration status was linked to his and she had no legal right to remain in the country without him. According to Axel, Dominika has no legal way to effectuate her intent. However, Axel presented no legal support for his argument that the trial court cannot adjudicate a divorce if the parties are present in the U.S. on temporary nonimmigrant visas.

We reject Axel's argument based on immigration status and future intent. Neither U.S. citizenship nor U.S. legal status is required to establish domicile for purposes of a dissolution proceeding; Washington's statute, RCW 26.09.030, requires only residency.[3]

The parties' testimony and corroborating evidence presented below unequivocally established Dominika's intent to make Washington her home beginning in 2014 and continuing throughout the dissolution proceedings. The longstanding rule is that "[o]nce acquired, domicile is presumed to continue until changed." Strohmaier, 34 Wn. App. at 17. The burden of proving a change in domicile rests upon the one who asserts it, and the change in domicile must be shown by substantial evidence. Id. Intent to make a home in the future is not relevant to the determination of domicile. See Strohmaier, 34 Wn. App. at 17. Axel's speculation about Dominika's future immigration status after their divorce is

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[3] Other jurisdictions that have addressed the issue have held that a person with a nonimmigrant visa may still establish domicile for purposes of a residency requirement for dissolution. See, e.g., Maghu v. Singh, 2018 VT 2, 206 Vt. 413, 181 A.3d 518; In re Marriage of Dick, Cal. App. 4th 144, 156, 18 Cal. Rptr. 2d 743 (1993); Bustamante v. Bustamante, 645 P.2d 40, 42 (Utah 1982); Abou-Issa v. Abou-Issa, 229 Ga. 77, 79, 189 S.E.2d 443 (1972); Alves v. Alves, 262 A.2d 111, 115 (D.C. 1970). Further, under ER 413(b), evidence of a party's immigration status is inadmissible unless it is essential to proving an element of a cause of action.

insufficient to meet his burden of proving a change in her domicile by substantial evidence.

Because the court's jurisdiction over a dissolution requires only one party to be a resident, Dominika's residence alone was sufficient for the trial court to adjudicate the dissolution pursuant to RCW 26.09.030 and to issue the attendant rulings on property, parenting and child custody, and maintenance.[4] Thus, we affirm the trial court's rulings in this matter.

II. Attorney Fees

Dominika requests fees on appeal. This court has authority to award attorneys' fees where authorized by statute, agreement, or equitable grounds. In re Marriage of Greenlee, 65 Wn. App. 703, 707, 829 P.2d 1120 (1992). RCW 26.09.140 specifically provides for attorney fees on appeal. In deciding whether to award fees under this statute, we "examine the arguable merit of the issues on appeal and the financial resources of the respective parties." In re Marriage of Griffin, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). RAP 18.1(c) also requires the timely filing of a financial affidavit supporting a party's request for fees based on need.

Dominika timely filed an affidavit of financial need. Axel failed to counter with an affidavit proving his inability to pay. In re Marriage of Fox, 58 Wn. App. 935, 940, 795 P.2d 1170 (1990). Therefore, we grant Dominika's request for attorney fees on appeal.[5]

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[4] Axel conceded in his reply brief and at oral argument that the trial court had personal jurisdiction over him as well as subject matter jurisdiction to make child custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Chap. 26.27 RCW. As such, we need not separately address the trial court's authority or jurisdiction to decide property distribution, child support, and parenting/visitation rights.

[5] Because Dominika established a right to fees under RCW 26.09.140 and RAP 18.1, we need not address her arguments on alternative bases for fees.

Affirmed.

Chung, J.

WE CONCUR:

Coburn, J.

Verellen, J. P.T.