

# **RIGHTS OF FOREIGN NATIONALS**

**2010  
EDITION**

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## PREFACE

The purpose and goal of the Oregon State Bar and the Editorial Review Board in producing *Rights of Foreign Nationals* is to address the law as it affects foreign nationals living in the state of Oregon. The book briefly addresses issues related to travel in and out of the country and issues and procedures relating to how to stay in the country. However, it is not intended to be a primer on immigration law, as that would require multiple volumes much larger than this modest work. Immigration law is based on a host of interrelated statutes, regulations, nonbinding memoranda, nonbinding Adjudicators' Field Manual guidelines, policy statements, and more.

Rather, we have created a resource that addresses issues affecting the daily lives of foreign nationals already living in Oregon, as well as some issues that need to be addressed before one's foreign national client arrives in the United States. This publication combines relevant state statutes, rules, and cases addressing foreign nationals who are dealing with issues such as domestic relations, employment issues, personal injuries, and criminal offenses. This book draws on the experience of seasoned immigration lawyers as well as experts in other substantive areas, and allows them to share their knowledge with their colleagues. It is designed to help lawyers avoid potential pitfalls, and highlights areas in which standard advice for a citizen client might be inappropriate for a noncitizen client.

*Rights of Foreign Nationals* provides an aid to two distinct groups of lawyers. The first group is Oregon lawyers practicing in other fields of law who encounter immigration issues that affect cases they're working on. This book is intended as a reminder to determine the immigration status of the client at the beginning of the case. For example, domestic relations lawyers involved in custody cases in which one party is a foreign national; employment lawyers whose clients are foreign nationals in Oregon for limited periods to work and are injured on the job; and criminal defense lawyers whose clients are foreign nationals that have violated state laws. This book is intended to be an aid to those lawyers who only occasionally deal with immigration issues and need a resource to turn to for answers when a foreign national seeks their counsel. It will help them spot red flags in their client's cases and identify when it is necessary and prudent to consult an immigration lawyer.

The second group this book will aid is Oregon lawyers who practice immigration law. This publication will be a resource that pulls diverse state-related information together in one place. Such a source does not currently exist, and we believe it will be a valuable tool for these lawyers. It will help them identify when it is necessary to consult a lawyer practicing in another substantive area of law.

We would like to thank the bar for initiating this project and for including us in it. We would also like to thank all of the authors, without whom this book would not have become a reality.

Dagmar Butte  
Dick Ginsburg  
Teresa A. Statler  
*Editors*

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## I. INTRODUCTION

### A. (§5.1) Scope of Chapter

This chapter is organized by first examining the law of family (§§5.3–5.18), then moving to the law of marriage and its dissolution (§§5.19–5.35). The rights and responsibilities pertaining to marriage and children is almost, but not entirely, a matter of state law. Thus, most of the material in FAMILY LAW (Oregon CLE 2002 & Supp 2008), JUVENILE LAW (Oregon CLE 2007), and ADMINISTERING OREGON ESTATES (Oregon CLE 2004 & Legislative Supp 2006) will be applicable to foreign nationals without change. This chapter seeks to pull together law bearing uniquely or directly on foreign nationals and family law, and focuses on material either not covered in those books, or material in need of expansion or updating.

This chapter, with few exceptions, does not seek to treat the topic of international or transnational family law litigation (often called conflicts of law), two-forums, or choice-of-law in any systematic manner. There is yet to be an attorney’s treatise on international family law litigation because every case necessarily considers the interaction, which will be unique, of two country’s laws, and therefore the subject is immensely broad and complex. This chapter will not attempt to fill that gap. For more detailed information on international family law see JEREMY D. MORLEY, INTERNATIONAL FAMILY LAW PRACTICE (2009), and D. MARIANNE BLAIR, MERLE H. WEINER, BARBARA STARK, & SOLANGEL MALDONADO, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW (2d ed 2009).

Many federal and sister state cases are cited in this chapter because Oregon’s courts and legislature have not addressed many of the questions having to do with foreign nationals’ issues. These cases are not mandatory precedent for Oregon courts. Therefore, state court judges are not required to adhere to the rules set forth in these cases.

**PRACTICE TIP:** As will be mentioned many times in this chapter, having the benefit of an attorney’s advice in the “other” country is essential, and the optimum attorney is one with international family law experience. Often, these latter attorneys are

located only in larger population centers, and they will need to work with both the Oregon attorney and the local counsel.

**B. (§5.2) Terminology**

(1) *Foreign judgment*—A judgment of a sister U.S. state.

(2) *Foreign country judgment*—A judgment or final order rendered by a court in a country outside the United States.

(3) *U.S. State*—One of the 50 major political subdivisions comprising the United States, as well as the District of Columbia.

(4) *State party*—a country that has signed, ratified, and entered into force a treaty.

(5) *Foreign national*—A person owing allegiance to a foreign country, one who is not a citizen of the United States or a permanent resident alien.

(6) *Alien*—“[A]ny person not a citizen or national of the United States.” Immigration and Nationality Act §101(a)(3) (8 USC §1101(a)(3)).

(7) *Resident alien*—An alien who has a legally established domicile in the United States.

## II. FAMILY

**A. (§5.3) Origins of the Family and Family Law**

In the English language the word *family* comes from the Middle English *familie*, and from the Latin *familia*. The term is defined as a household or a group of persons living under one roof, usually of common ancestry or adoptive. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed 2003). Because this leaves open the precise nature and definition of “the family,” it must be clearly defined.

Therefore, governments, of either a secular or religious origin, have historically defined *family* and *marriage* as the key integrative factor in the relatedness of persons.

The United States is a secular society, comprised chiefly of immigrants who bring with them many religious traditions. But religion, religious beliefs, and religious principles of law may not be embraced in the governance of federal or state polity. Government is more inclined to define family by functional means. A prime example of this is federal benefits law regarding taxation and immigration. In approaching the analysis of the government's role in defining family, one must distinguish the definition of *family* from the definition of *marriage*. Typically, government eschews functional definitions of marriage, as it is heavily legislated by both the state and federal governments.

#### **B. (§5.4) Law of the Forum or Domicile**

In the United States, it is generally the law of the party's domicile or law of the forum that governs family and marriage. EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 630 (4th ed 2004) (citation not verified).

Oregon applies the law of domicile in its courts. In family law, when a judicial decision is to be made, the law of where the person is domiciled is seen as the most salient connection. There is identity of "forum and applicable law," and, therefore, few problems involving conflicts of laws. CONFLICT OF LAWS, *supra*.

The individual states of the United States generally apply their state law when a legal action is either brought in any state, or when legal relationships need to be determined in an administrative or other executive branch function. Marriage and divorce are considered matters reserved to the states rather than to the federal government. *Sosna v. Iowa*, 419 US 393, 404, 95 S Ct 553, 42 L Ed2d 532 (1975). Whether any state executive branch agency will accept another definition of *family*, such as in the context of awarding a state benefit, is usually a matter of an administrative agency rule promulgated pursuant to an enabling statute.