

Children's photos from the contact weekend on the net? Allowed?

Problem outline

The proud father puts photos of his underage child on the Internet for the last contact weekend and also sends various pictures via WhatsApp to acquaintances and friends who show the child in the family environment. The mother doesn't like this for several reasons, in particular because she doesn't want the father to present the weekends with the child as particularly funny in the upright custody and contact proceedings and thus try to prove the good contact with his child to possible witnesses. Of course, even the minor child has no idea about the distribution and publication of these photographs.

Are these procedures to be accepted or are there legal possibilities to prevent this?

Consent by the person depicted

The sole holder of the right to his own image is the person depicted himself; this is also the case if the person depicted is still a minor. If necessary, the consent can be substituted by third parties (here by the legal representative). The consent of the legal representative is possible, for example, if a legitimate interest is not violated. If a legitimate interest is violated, the distribution must not take place anyway. Representation is also possible in the case of highly personal rights.

If the minor child himself is able to see and judge, consent can only be given himself. In addition, the consent of the parents must be required if the encroachment on the personal interests of the child is serious or detrimental (cf. § 173 (1) ABGB analogously). Otherwise – if the legitimate interest of the minor is violated – the publication must be omitted and substitution by the legal representative is not possible.

The assessment as to whether a child is capable of insight and judgement is always made on a case-by-case basis. In the case of mature minors (14+) it is presumed that they are capable of insight and judgement. The decision must also take into account whether the publication has far-reaching consequences. Consent must be obtained personally and in an informed manner.

In principle, the parent with custody rights is entitled to representation. If both parents are entitled to custody, then each parent can represent the other alone. However, the requirement of agreement applies (§ 137 (2) ABGB), according to which the parents of the child must in principle proceed by agreement in the case of important decisions and should coordinate in this respect. If the parents with joint custody rights are not in agreement, the guardianship court will decide.

Legitimate interest and balancing of interests

Whether or not there is a claim to post photographs must first be objectively examined. The question is whether the interests of the person depicted should be regarded as worthy of protection. The text associated with the picture must also be appreciated. Account must also be taken of how the viewer understands the image that reaches the public.

What is decisive here is that the right to one's own picture should prevent the exposure, abandonment of one's private life, humiliation and degradation of the person depicted.

In any case, the distribution of images that violate the private and intimate sphere of the person depicted is not permitted, especially in the areas of health, sexual life and life in and with the family. This is the case, for example, with humiliating, exposing and degrading pictures or videos (also "public shaming" or bullying on the Internet).

Distribution or publication may be permitted if a balance of interests shows that the person who published the photo is also interested in it. If no legitimate interest is violated, publication is probably permitted.

General consents (already in advance) are to be seen critically and rather inadmissible.

Application of data protection law

The data protection law is applicable to the processing of special categories of personal data and in this case consent is absolutely necessary. Essentially, this includes all data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the processing of genetic, biometric data to uniquely identify a natural person, health data or data concerning sex life or sexual orientation of a natural person.

Exceptions

The production of purely private recordings is permitted and is not covered by the EU data protection basic regulation and the data protection law (so-called "budget exception"). The publication of such photos at irregular intervals on social media (Facebook, Twitter, Instagram, etc.) is also not covered by data protection.

However, if the "household exception" is exceeded, the basic data protection regulation and the data protection law are applicable again, so that in this case again the consent of the data subject is necessary.

Access to social networks

The social networks have special access regulations, which, however, are limited to a succinct examination of the minimum age. As a rule, no proof of age – for example in the form of an official ID card – is required. For example, access to Facebook and Instagram is only permitted from the age of 13; however, it is sufficient to enter the age. Beyond this, there are no special protection provisions for young people.

Legal basis and resulting claims

There is an absolute right to privacy to protect the personality and the person as a whole. This covers congenital rights which are already plausible from reason (cf. § 16 ABGB). As a result, a claim for injunctive relief and damages can be asserted.

The right to one's own image is protected under § 78 Copyright Act. Inadmissible publications can be prosecuted by omission, removal, claim to publication of judgement and damages. Included are all acts of distribution according to which it can be assumed that the picture will be made accessible to several persons. Finally, under the Media Act, claims for compensation and counterstatement may also be made against the media owner (including the minor child himself).

The basic data protection regulation can demand a right to information, the right to deletion, damages, administrative penalties and fines.

According to Article 8 ECHR, private and family life, housing and correspondence are particularly protected.



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