

# Is the right to have contact with the children and spouses still permitted?

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### Violation of fundamental rights or just legitimate measures?

#### Legal basis, interpretation and critics:

Regulation 98 (connected to sec 2 Z 1 of the COVIDMeasuresAct, BGBl. I No. 12/2020) which is in force since 16<sup>th</sup> March 2020 includes a prohibition to access public places to prevent the further spreading of COVID-19. The regulation provides for an exception stated in sec 2 Z 5 COVID MeasuresAct for outdoor public places, which may be entered alone, with persons living in the same household or with pets, but a distance of at least one metre must be kept from other persons. This regulation was initially valid until end of 22<sup>nd</sup> March 2020, but will be likely extended.

A strict interpretation of this regulation would mean that parents who are not living in the same household together with their children are no longer allowed to see them and also lifepartners or companions (regardless of gender) are no longer allowed to see their partner for a long time. The question arises whether a strict interpretation of the regulation is intended, especially since Federal Chancellor Sebastian Kurz and Health Minister Rudolf Anschober stated in the media, that "couples with separate residences may see each other and parents may also pick up and see their children if they do not live in the same household". Whether private visits are permitted according to this statement is yet unclear. High penalties of up to EUR 3,600.00 per violation has been threatened, a clarification would be useful.

#### Concerning fundamental rights

Among most important fundamental rights as constitutionally guaranteed for every individual "in times of Corona" are:

- The right on individual freedom (BVG personal liberty; Art. 5 EMRK);
- the right on free choice of residence and stay (Art. 6 Abs. 1 StGG; Art. 2 Abs. 1 4. ZPEMRK);
- the right on freedom of employment (Art. 6 StGG);
- the right on data protection (§ 1 Data-Protection-Act);
- the right on respect for private and family life (Art. 8 EMRK);
- the right on freedom for association and assembly (Art. 12 StGG).

Article 8 EMRK states that everyone has the right to private and family life, right to home and free correspondence which needs to be respected. Any intervention by the public authority which restricts the exercise of these rights is only permissible if such intervention is provided by law and is required as a constitutional measure in a democratic society due to interests of national security, public policy, economic well-being of the country, the maintenance of law and order and the prevention of criminal offences, the protection of health and morals or the protection of the rights and freedoms of others.

According to case law of the EGMR, a broad concept of the family must be assumed to include not only the core family (i.e. parents, minor children and spouses) but also other forms of family connections such as (unmarried) partners with a stable relationship, adult children, grandparents and grandchildren, siblings, uncles and aunts, and nieces and nephews.

Each parent and child has the right to see or meet each other and couples who do not live together in the same household has the right to stay in contact.

#### Contact to children in particular

The purpose within the right of contact with children is to maintain the bond between child and parent and to support a close relationship in order to prevent personal distance. A further, general accepted purpose of the right of contact is that the parent being entitled to contact may convince him or herself of the child's state of health and education by personal contact.

Meanwhile, other forms of contact, such as telephone calls, skype contacts, letters or e-mail correspondence are also approved, as well as the exchange of gifts (sec 187 (1) ABGB) are generally accepted. Under certain circumstances, like a large physical

distance between the places of residence of the child and the parent telephone or skype calls are necessary means for maintaining the personal relationship. The specific form of contact must be assessed in the context of the child's welfare and the individual case.

The fact that the current situation – in particular for reasons to maintain public health – requires the limitation of personal contacts with the own children and life partners according to the measures described above may justify the measures as long as those measures are qualified as proportionate. The question is how long and in which extent these measures may uphold legally.

Amnesty International considers the actual measures in Austria and other European countries to combat coronavirus to be reasonable and proportionate. It is necessary to react with the so-called "least severe measures". The challenge lies undoubtedly in the balance between the personal freedom and the concerns of the general public.

The police will be likely granted extensive discretionary power to the permitted measures (such as the imposition of fines). Although there is the right to have these measures (especially under the Epidemic Law) reviewed by calling the Constitutional Court in order to receive legal protection, the contact with close persons may have already been broken down or alienation has occurred. It is, therefore, necessary to assess such measures on a regular basis

Should you have any questions on COVID-19 connected to family or inheritance law, please contact our expert Attorney at Law Dr. Birgit Leb, MBA.

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*We point out that the legal situation can change constantly, but we are keeping our efforts to maintain the contents up to date.*

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