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## 8. Achieving compliance with post-divorce parenting contact arrangements in the Netherlands: problems and potential solutions

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### 1. INTRODUCTION

This chapter considers how the Dutch family justice system seeks to ensure compliance with the agreements that parents make in order to arrange contact with their children after divorce. In the Netherlands – as in many other countries – there is continuing general concern about a proportion of children who lose contact with one parent after divorce. The controversial issue of ‘parental alienation’ has recently attracted considerable political attention. In this context, the Dutch Parliament has commissioned research into the legal and non-legal reasons for non-compliance with contact arrangements and the (in)adequacy of the existing legal remedies.

In the Netherlands, about 70 000 children experience their parents’ divorce or separation each year. Parents continue to exercise joint parental responsibility after divorce or separation in both formal and informal relationships. Children have the right to be cared for and raised by both parents (Civil Code, Article 1:247),<sup>1</sup> which implies a right to contact with both parents. The right to contact also exists between children and a parent without parental responsibilities (Civil Code, Article 1:377a). The right to contact is further protected by Article 8 of the European Convention on Human Rights (ECHR), Article 9 of the United Nations Convention on the Rights of the Child (UNCRC) and Article 24 of the European Charter. Since 2009, separating parents with minor children have been legally obliged to make a parenting plan, including arrangements on child residence and contact arrangements. Research shows that although the percentage of parental arrangements has significantly increased since 2009, compliance with these arrangements has not improved. In the event of non-compliance, parents can go to court to settle disputes. The court has at its disposal a whole arsenal of specifically designed interventions and programmes. Eventually, if compliance cannot be achieved, the court can employ various sanctions, including criminal ones. There is an ongoing polarised debate about the efficiency of such sanctions, the need for harder sanctions and more extensive use of criminal law.<sup>2</sup> The answers to these questions lie outside the legal domain and require a multi-disciplinary approach.

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<sup>1</sup> Dutch Civil Code. For an English translation, see I Sumner and H Warendorf, *Family Law Legislation of The Netherlands, A translation including Book 1 of the Dutch Civil Code, procedural and transitional provisions and private international law legislation*. Antwerp: Intersentia 2003.

<sup>2</sup> Parliamentary Papers II, 33 836, nos 26 and 27, and the letter of the Minister to the Second Chamber in 2021, 33 836, no 60, p 3.

This chapter is based on the results of commissioned research into the legal remedies to achieve compliance as well as the reasons and explanations for non-compliance.<sup>3</sup> The research has a multi-disciplinary mixed-method design, combining legal-dogmatic, comparative law,<sup>4</sup> social science and empirical methods. These include a study of relevant legal and social science literature; analysis of published relevant Dutch case law;<sup>5</sup> semi-structured interviews with 12 legal professionals, nine social field professionals, 18 parents and 12 (older) children; a study of 32 files of the Dutch Child Care and Protection Board; and analysis of already collected data.<sup>6</sup>

In section 2 of this chapter, we address the legal possibilities and obligations for parents to make agreements on contact with their minor children after divorce. We also provide empirical information illustrating how the relevant legal provisions work in practice. In section 3, we provide insight into the results of our social science research into the reasons and explanations for non-compliance with parental agreements. In section 4, we discuss the existing legal possibilities (sanctions and other legal remedies) to achieve compliance with both formal agreements and informal agreements. These include agreements of separating parents both in formal relationships (marriage and registered partnerships) and in informal relationships. Typically, parents make agreements in the form of a parenting plan; however, this chapter also addresses non-compliance with more informal agreements.

## 2. MAKING CONTACT AGREEMENTS: THE COMPULSORY PARENTING PLAN

The literature study reveals that almost all formal agreements that separating parents make take the shape of a parenting plan. The mandatory parenting plan was introduced in 2009 as part of the Act Promoting the Continuation of Parenting and a Careful Separation Process.<sup>7</sup> One of the aims of this Act is to promote ‘continued parenting’ after divorce: it emphasises that both parents are responsible for the care, upbringing and development of their children, and that they should make agreements about this in a parenting plan. The legislature hoped that forcing parents to make a parenting plan prior to filing a divorce petition would:

- induce parents to think about the consequences for the children at an early stage;
- force parents to record their thoughts about these consequences in the form of a binding agreement; and
- lead to a reduction in conflicts and follow-up proceedings involving the children, because agreements made by the parents themselves would be better respected than court-imposed decisions.<sup>8</sup>

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<sup>3</sup> MV Antokolskaia, CG Jeppesen de Boer, GCAM Ruitenbergh, WM Schrama, IE van der Valk and P Vrolijk, *Naleving van contact-/omgangsafspraken na scheiding, Een rechtsvergelijkend en sociaal-wetenschappelijk perspectief*. The Hague: Boom juridische uitgevers, 2019.

<sup>4</sup> The comparative law part is not reflected in this chapter.

<sup>5</sup> Searched in the rechtspraak.nl database: <https://uitspraken.rechtspraak.nl/>.

<sup>6</sup> *Gezinnen & Scheiding 2006–09, KIES 2009–14, Scholieren & Gezinnen 2013*.

<sup>7</sup> *Wet bevordering voortgezet ouderschap en zorgvuldige scheiding*, Official Journal (*Stb*) 2008, 500.

<sup>8</sup> WODC Report 2019, pp 15–16.

One of the most important policy choices made by the legislature regarding the mandatory parenting plan was a ‘one size fits all’ approach. In principle, all parents must agree on a parenting plan, regardless of whether they are ending a formal or informal relationship or filing a unilateral divorce petition or a joint request; and regardless of the level of conflict. Further, the decision to make the parenting plan a mandatory element of the divorce petition in order to facilitate agreement early on made the parenting plan a ‘gateway’ to divorce proceedings.<sup>9</sup> However, our research has shown that this early timing of the preparation of the parenting plan can sometimes lead to problems – not least because practical matters have not always been settled by this point and (one of the) parents might not (yet) have accepted the divorce.<sup>10</sup>

Earlier research showed that the majority of married and unmarried parents succeed in making a parenting plan. If no parenting plan is attached to the divorce petition, the petition is, in principle, inadmissible. This potentially risks violating Article 6 of the ECHR, which safeguards access to the court. To remedy this, a so-called ‘escape clause’ was introduced into the Code of Civil Procedure:<sup>11</sup> if the parents – despite all their efforts – are unsuccessful in making a parenting plan, the judge has discretion to render the divorce petition admissible. Analysis of the published case law by Tomassen-van der Lans shows that it is only due to the broad interpretation and wide application of the escape clause that the parenting plan requirements do not impede access to the courts.<sup>12</sup>

Legal professionals, interviewed within the framework of this research, mentioned the following reasons why some parents fail to make parenting plans:

- the aggrieved feelings of one parent;
- conflicts in other areas (e.g., financial matters; accusations made by one parent towards the other);
- the personality characteristics of one parent;
- psychological problems;
- an inability to deal with emotions; and
- threats made by the parent entitled to legal aid ‘to litigate the other parent to bankruptcy’.<sup>13</sup>

Parenting plans must be made not only by parents who dissolve a formal relationship, but also by those with minor children who end an informal relationship.<sup>14</sup> However, as the termination of an informal relationship involves no formal procedure, it is virtually impossible to control whether the parents have fulfilled this requirement. That said, if one or both parents subsequently wish to bring a child-related conflict to court, the absence of a parenting plan will play its part. According to the law, the judge should order that the proceedings be stayed until the parents have made and presented a parenting plan. This leads to a rather absurd situation, making access to court conditional upon reaching an agreement on the very subject of the dispute that the parties wish to have adjudicated. Unsurprisingly, this provision is a ‘dead

<sup>9</sup> WODC Report 2019, pp 18–19.

<sup>10</sup> WODC Report 2019, p 308.

<sup>11</sup> Article 815, paragraph 6, Dutch Code of Civil Procedure.

<sup>12</sup> M Tomassen-van der Lans, *Het verplichte ouderschapsplan: regeling en werking*. BJU, 2015, pp 42–43.

<sup>13</sup> WODC Report 2019, Chapter 5.

<sup>14</sup> Article 1:247a, Dutch Civil Code.

letter',<sup>15</sup> as the judges make frequent use of the possibility not to order a stay of the procedure if delay would not be in the best interests of the child.<sup>16</sup> De Bruijn's research shows that about 50 per cent of former cohabiting parents make a written parenting plan and about 25 per cent make an oral agreement. Just 13 per cent make no agreement at all; while a very small proportion of interviewees indicated that they did not remember what kind of agreement they had made.<sup>17</sup>

According to the law, the parenting plan should at least contain agreement on the child's residence; contact between the parent and the child; child support; and how information will be shared and the parents will consult each other.<sup>18</sup> It is up to the parents to choose between a detailed, tailored plan and a standard plan. Studies by Tomassen-van der Lans and De Bruijn compared the agreements made in more recent parenting plans with those made before the parenting plan became compulsory in 2009. Both studies show that on the one hand, the agreements in a parenting plan usually contain more detailed arrangements than those made before 2009. On the other hand, a significant percentage of contact agreements contain vague arrangements, such as contact 'as will be agreed later' or 'when the child wants it'.<sup>19</sup> According to Tomassen-van der Lans, there is no link between more detailed agreements and increased compliance, as her study shows that more concrete and detailed plans do not result in fewer follow-up proceedings brought by parents.<sup>20</sup> There is a justified concern that a part of these parenting plans contains standard arrangements downloaded from the Internet. Thus, some parents may see the parenting plan merely as a necessary formality to start divorce proceedings and not as a guideline for arranging their parenting after divorce.<sup>21</sup>

Tomassen-van der Lans concludes that the parenting plan does not seem to have achieved the goals intended by the legislature. Her research reveals that the total number of follow-up proceedings initiated by the parents within two years of the divorce in the sample from before and after the introduction of the mandatory parenting plan remained stable, at about 9 per cent of all cases. In the pre-parenting plan sample, half of these follow-up proceedings were initiated pertaining to agreements voluntarily made by the parents at the time. In the post-parenting plan sample, the number of follow-up proceedings concerning the parenting plan increased to 75 per cent of all follow-up proceedings. In both samples, 50 per cent of all follow-up proceedings involved contact. There are also indications that even parents who have drawn up a detailed parenting plan may start legal proceedings; and that more proceedings are started

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<sup>15</sup> Scholars had warned the legislature of this danger even before the rule was adopted. M Antokolskaia and L Coenraad, *Afspraken met betrekking tot kinderen bij scheiding van ongehuwde/niet-geregistreerde ouders - Een rechtsvergelijkend onderzoek in opdracht van het Ministerie van Justitie*. WODC 2006. <https://repository.wodc.nl/handle/20.500.12832/1/browse?type=author&value=Coenraad%2C+L.M>

<sup>16</sup> Article 1:253a, paragraph 3, Dutch Civil Code.

<sup>17</sup> S de Bruijn, *Reaching agreement after divorce and separation, Essays on the effectiveness of parenting plans and divorce mediation*. PhD 2017, pp 41–43. <https://www.bing.com/search?q=S.+de+Bruijn%2C+Reaching+agreement+after+divorce+and+separation%2C+Essays+on+the+effectiveness+of+parenting+plans+and+divorce+mediation%2C+proefschrift%2C+2017%2C+p.+42&cvid=d270f3281dc24eea90f5a7d817a59b57&aqs=edge..69i57.1734j0j1&pglt=43&FORM=ANNTA1&PC=ACTS>

<sup>18</sup> Article 815, paragraph 3, Dutch Code of Civil Procedure.

<sup>19</sup> Tomassen-van der Lans (2015). S de Bruijn (2017), p 18. WODC Report 2019, p 31.

<sup>20</sup> Tomassen-van der Lans (2015), pp 120–21.

<sup>21</sup> WODC Report 2019, pp 46–47.

later as a result of the level of detail in the parenting plan.<sup>22</sup> The implication is that these agreements are not met in practice and/or that the parents cannot agree on their revision. This means that the introduction of the obligatory parenting plan has not led to increased compliance with the agreements. The study by De Bruijn confirms the conclusions of Tomassen-van der Lans that the introduction of the mandatory parenting plan has not reduced the number of follow-up proceedings.<sup>23</sup>

Research conducted by Van der Valk and Spruijt (2013),<sup>24</sup> Spruijt and Kormos (2014)<sup>25</sup> and De Bruijn (2017) provides insight into the possible influence of the parenting plan on non-legal conflicts between the parents. The former two studies – based on self-reporting by adolescents – found higher levels of parental conflict and lower levels of wellbeing in the sample of families from after the introduction of the mandatory parenting plan. De Bruijn's findings regarding parental conflict – based on reporting by parents – are more nuanced. His research shows that on the one hand, the level of tension between divorced parents has increased since 2009; but on the other, the number of extreme cases of parental conflict has decreased. De Bruijn's final conclusion on this point is that the overall effect of the parenting plan on parental conflict has been positive. Apart from this, De Bruijn concludes that the introduction of the mandatory parenting plan seems to have had virtually no effect on the wellbeing of the child.<sup>26</sup> At the end of the day, all evaluations suggest that the mandatory parenting plan in its current form does not seem to have met the objectives of the legislature.

### 3. REASONS FOR NON-COMPLIANCE: BRIEF RESULTS FROM SOCIAL SCIENCE RESEARCH

This part of our research involved four different methods: a brief literature study; research on the files of the Dutch Child Care and Protection Board;<sup>27</sup> semi-structured interviews;<sup>28</sup> and analysis of existing data from research on divorced families.<sup>29</sup>

Poor compliance with contact agreements between parents may have a negative effect on the children. The data analysis shows that the greatest negative impact of poor compliance with contact arrangements relates to loyalty issues for children. These outcomes were also found in the research on the 32 files of the Dutch Child Care and Protection Board, as well

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<sup>22</sup> Tomassen-van der Lans (2015), pp 120–21 and Table 5.19. This is more of a suggestion given the fact that there are too few cases to support a firm conclusion.

<sup>23</sup> S de Bruijn (2017), p 57, p 60 and Table 3.2, p 56.

<sup>24</sup> E Spruijt and I van der Valk, *Het ouderschapsplan en de effecten voor de kinderen*. WODC 2013.

<sup>25</sup> E Spruijt and H Kormos, *Handboek scheiden en de kinderen*. Bohn Stafleu van Loghum 2014, pp 133–34 and Table 6.4.

<sup>26</sup> S de Bruijn (2017), pp 19–21.

<sup>27</sup> This file study concerned a total of 32 files, 19 of which involved agreements included in a parenting plan and 13 of which involved other agreements. Twenty of these files concerned parental responsibility and contact cases, while 12 concerned (child) protection cases. WODC Report 2019, pp 132–34.

<sup>28</sup> Semi-structured interviews were held with clinical and/or youth care professionals with experience of complex divorces, and with 18 parents and 12 young adult children from separated families. WODC Report 2019, p 160.

<sup>29</sup> The datasets of three different studies on Dutch divorced families were used to determine which variables are related to non-compliance with agreements. WODC Report 2019, p 364.

as in the interviews with professionals and parents.<sup>30</sup> In addition, the analysis of the existing datasets clearly shows that quality of parenting, quality of the parent-child relationship, and parental conflict significantly correlate with poor compliance.<sup>31</sup> Further, from the interviews with children, it is clear that they regularly suffer from the problems between their parents concerning contact.<sup>32</sup>

The seemingly simple question of compliance and its causes is difficult to answer. Even on the basis of all the research data, it is not always clear who exactly is not complying with the contact agreement and whether this can be attributed to either of the parents. Instead, in most instances, a range of events arise, with parents acting and reacting, and it is not clear how and why the non-compliance started.<sup>33</sup> There are only few indications of situations in which it is predominantly one parent who is not complying with the agreement, at the cost of the other. These exceptions involve situations in which a child does not want to have contact with one of the parents. That is, in case of very restrictive gatekeeping, this can result in a situation where a child no longer wants to see one of their parents.<sup>34</sup> Children may then develop such severe loyalty conflicts that they may choose one parent over the other. This is referred to as 'parental alienation'; but there is as yet little agreement on this phenomenon among both clinical professionals and scientists, and convincing empirical evidence is lacking thus far.<sup>35</sup> In addition, there are indications that the phenomenon of child contact refusal may involve mutual behaviour on the part of the parents, and is thus rooted in the family system instead of in the behaviour of a specific parent.<sup>36</sup> The different parts of our social science study all clearly indicate that poor compliance is usually the result of mutual negative interactions between the parents. Only a very small proportion of non-compliance is caused by the active and negative behaviour of one parent only. In most cases, the relationship between the parents is characterised by mutual distrust, mutual allegations and a pattern of negative interaction. Poor

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<sup>30</sup> WODC Report 2019, pp 229–38, pp 138–58, p 181.

<sup>31</sup> WODC Report 2019, p 212.

<sup>32</sup> WODC Report 2019, pp 194–95.

<sup>33</sup> WODC Report 2019, pp 234–35.

<sup>34</sup> L Ganong, M Coleman and A Chapman, 'Gatekeeping after separation and divorce', 2012, in L Drozd, M Saini and N Olsesen (eds), *Parenting Plan Evaluations: Applied Research for the Family Court*, pp 308–45; WG Austin, M Kline Pruett, HD Kirkpatrick, JR Flen and JW Goulds, 'Parental gatekeeping and child custody/child access evaluation part I: Conceptual framework, research, and application', *Family Court Review* 2013, 51, pp 485–501; GM Fosco and JH Grych, 'Adolescent triangulation into parental conflicts: longitudinal implications for appraisals and adolescent-parent relations', *Journal of Marriage and Family* 2010, Vol 72, pp 254–66; JJ Harman, DA Hines and E Kruk, 'Parental alienating behaviors: an unacknowledged form of family violence', *Psychological Bulletin* 2018, Vol 144, pp 1275–99.

<sup>35</sup> RA Gardner, *The parental alienation syndrome: A guide for mental health and legal professionals* (2nd ed), Creskill, NJ: Creative Therapeutics, Inc, 1998; JB Kelly and JR Johnston, 'The alienated child. A reformulation of Parental Alienation Syndrome', *Family and Conciliation Courts Review* 2001, Vol 39, pp 249–66; JN Bow, JW Gould and JR Flens, 'Examining parental alienation in child custody cases: A survey of mental health and legal professionals', *The American Journal of Family Therapy* 2009, Vol 37, pp 127–45.

<sup>36</sup> M Saini, JR Johnston, BJ Fidler and N Bala, 'Empirical studies of alienation', 2016, in L Drozd, M Saini and N Olsesen (eds), *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press 2012, pp 374–430; V Maes, *Ouderverstotingssyndroom*, What's in a name? <https://www.linkedin.com/pulse/ouderverstotingssyndroom-whats-name-vanessa-maes>.

compliance thus seems to relate more to negative partner dynamics than to personal problems affecting only one parent.<sup>37</sup>

The data analysis and the analysis of the interview data with parents and young adults likewise confirm that parental conflicts are an important factor in non-compliance, since in the case of parental contact agreements, a higher conflict level goes hand in hand with a lower compliance rate. This pertains to conflicts both before, during and after the divorce. Further, more ‘traditional’ roles and task division in the initial parental relationship seem to be related to greater compliance with agreements. This also seems to apply to situations with a more equal division of care during the initial relationship combined with co-parenting after divorce. Problems can particularly arise in scenarios where parents want to (partly) change these initial roles after a divorce – especially if the father wants more equal care after a traditional division of tasks. Interparental conflicts – and consequential non-compliance – are then more likely to arise.

Based on the literature study, several risk factors for a complex divorce were identified: a poor relationship quality during the relationship, often marked by a high conflict level; a relationship history consisting of patterns of negative exchange between the parents; poor negotiation skills; and a negative conflict resolution strategy. There are also indications from the literature that post-traumatic stress disorder, attachment problems, personality problems, addiction problems and autism spectrum disorder problems can play a role in the development of serious relationship issues and thus of complex divorces. Further, parents who are more self- than child-oriented also appear to have a higher risk of mutual conflicts after the divorce. Problems related to violence or addiction can additionally play a role in complex divorces.<sup>38</sup> Finally, it is obvious both from the empirical literature and from the analysis of interview data with professionals and parents that parents who have not yet accepted the divorce generally have more conflicts and problems with compliance. This lack of acceptance is often expressed in all kinds of emotions surrounding the divorce, such as anger, sadness and grief.<sup>39</sup> The networks of both parents can play an escalating role in this.<sup>40</sup>

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<sup>37</sup> WODC Report 2019, p 342.

<sup>38</sup> RV Gutterwijk, ME van der Hoek, EM Scholte and CHZ Kuiper, ‘Scoping review naar indicatoren die conflictueuze scheidingen onderscheiden van ‘normaal verlopende’ scheidingen’, *Tijdschrift voor Orthopedagogiek* 2017, Vol 56, pp 459–79; N van Oosten and A van As, *Notitie risico- en beschermende factoren voor conflictscheidingen*, Utrecht: Movisie en Nederlands Jeugdinstituut, 2018; IE Van der Valk, G Van den Berg, MC Van der Veldt and I Anthonijsz, 2019, *Revisie Richtlijn Scheiding en problemen van jeugdigen voor jeugdhulp en jeugdbescherming*, Utrecht: Beroepsvereniging van Professionals in Sociaal Werk, Nederlands Instituut van Psychologen, Nederlandse vereniging van pedagogen en onderwijskundigen.

<sup>39</sup> RE Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation*. 2nd Edition, New York: Guilford Press, 2011; S Maldonado, ‘Cultivating forgiveness: Reducing hostility and conflict after divorce’, *Wake Forest Law Review* 2008, Vol 43, pp 441–504; SL Demby, ‘Parenting Coordination: Applying Clinical Thinking to the Management and Resolution of Post-Divorce Conflict’, *Journal of Clinical Psychology* 2016, Vol 72, pp 458–68.

<sup>40</sup> MM Visser, C Finkenauer, KS Schoemaker, ES Kluwer, R van der Rijken, J van Lawick, H Bom, JC de Schipper and F Lamers-Winkelmann, ‘I’ll never forgive you: High conflict divorce, social network, and co-parenting conflicts’, *Journal of Child and Family Studies* 2017, Vol 26, pp 3055–66.

#### 4. LEGAL INSTRUMENTS TO ACHIEVE COMPLIANCE

In case of non-compliance, a parent can resort to various legal instruments provided for by the Dutch family justice system in order to encourage or enforce compliance.

In this context, the Dutch government has a strong sense of its positive obligation under international human rights law to safeguard the right of contact between parents and children. This obligation arises from Article 8 of the ECHR, Articles 9(3) and 16 of the UNCRC and Article 24, paragraph 3 of the EU Charter.<sup>41</sup> With respect to the implementation of the right to contact, the positive obligation based on European Court of Human Rights case law is that the Dutch authorities must do their utmost to preserve or restore the relationship between a child and a parent. Thus, the authorities must take all necessary steps to ensure that contact is maintained. Measures to safeguard contact between parent and child should be taken without delay: speed is of great importance, since the passage of time may have irreparable consequences for the mutual relationship between parent and child. The use of sanctions to effect contact should not be excluded, although sanctions that may harm the child are undesirable. The best interests of the child are not merely a primary consideration, but are paramount in deciding on the matter. The judiciary – together with the Dutch Child Care and Protection Board and social workers – plays an important role in this respect. The Supreme Court has held that the judge must take an active stance in order to ensure that a parent and child have contact, to which end there are several instruments of relevance.<sup>42</sup>

Dutch law provides for a whole range of (legal) instruments that can be used to safeguard contact (see Table 8.1).<sup>43</sup>

If a contact arrangement is not respected and the parent cannot solve the problems themselves, the case must be brought to court. In contact cases, the judge often asks the Dutch Child Care and Protection Board for an investigation. During this investigation, the Board can start trial contact under the supervision of a professional. The judge will then assess whether the parents could come to an agreement with the help of mediation or by ordering a parenting investigation.<sup>44</sup> If that does not work out, the court can try several other instruments, such as supervised contact schemes, or appoint a special guardian to the child. Sanctions such as the imposition of a financial penalty come into play only if such ‘voluntary’ interventions fail or if there is a clear contraindication. Other instruments are not frequently used. In addition, when resolving disputes about contact, the court can provide tailored solutions and give the parents a chance to solve the problems (partly) by themselves. For example, the judge can establish a provisional contact arrangement and postpone the final decision until it is clear whether this will work. This offers the possibility of hearing the parents’ views on the implementation of this provisional arrangement before a final decision is taken.<sup>45</sup>

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<sup>41</sup> See, for example, ECtHR 11 June 2013, Appl 20255/12 (*Prizzia v Hungary*); ECtHR 17 April 2012, Appl 805/09 (*Pascal v Romania*).

<sup>42</sup> HR 17 January 2014, ECLI:NL:HR:2014:91.

<sup>43</sup> WODC Report 2019, p 50.

<sup>44</sup> Compare MR de Boorder and HE Meijwes, ‘*Omgangproblematiek opgelost?*’, *REP* 2012 (3), p 125.

<sup>45</sup> For example, HR 17 January 2014, ECLI:NL:HR:2014:91, ro 35; WODC Report 2019, pp 55–56.



Table 8.1 *Instruments to safeguard contact*

Instruments to promote compliance with contact agreements	
Amending contact agreements	By parents themselves
	With the help of mediation
Family law instruments	By court order
	Mediation
	Forensic mediation (parenting investigation)
	Supervised contact schemes
	Safe contact houses
Civil (family) law	Appointment of special guardian ( <i>guardian ad litem</i> ) to the child
	Inclusion of a contractual financial penalty clause in the parenting plan
	Contact under supervision of the Child Care and Protection Board
	Suspension, limitation or termination of spousal/child support
	Transfer of parental responsibility
	Change of child residence
	Deprivation of parental responsibility
	Financial penalty
Criminal law	Imprisonment of the parent taking hostage
	Forcible removal of the child
	Imprisonment or fine for unlawful removal of the child from the authorised parent (Article 279 of the Criminal Code)

The measures discussed in this section are focused on achieving compliance with established contact arrangements. Sometimes they are also aimed at restoring trust between the parents and improving their mutual communication.

#### 4.1 Amending Contact Agreements

If the parents will not or cannot comply with the agreement, the first (obvious) step is often to consider the possibility of changing the contact arrangements. In principle, the parents are free to amend their agreement. De Bruijn's research shows that since 2009, agreements between parents are amended more often.<sup>46</sup> If one or both parents wish to modify the contact arrangements but cannot reach agreement themselves, they can take their dispute to court. The court can begin by referring them to mediation in the hope that they will be able to reach agreement. If this does not work, the court can amend the contact arrangements by making a contact order. There is a great deal of case law on the amendment of parenting plans. Much of this relates to modifications related to changed factual circumstances, such as a move by one of the parents or a new job, home or partner. Relocation seems to be an important source of legal proceedings regarding contact agreements.<sup>47</sup>

<sup>46</sup> S de Bruijn, *Reaching agreement after divorce and separation, Essays on the effectiveness of parenting plans and divorce mediation*, Dissertation 2017, p 60.

<sup>47</sup> WODC Report 2019, pp 37–39.

## 4.2 Family Law Instruments

In recent years, several special tailor-made instruments – such as contact mediation, forensic mediation (parenting investigations), various supervised contact schemes and safe contact homes – have been developed to (re)establish child-parent contact after divorce.

These are part of a package of instruments. Since 2015, local municipalities have been responsible for ensuring the availability of mediation, forensic mediation, safe contact homes, supervised contact schemes and the necessary infrastructure. This decentralisation was implemented amid budgetary cuts. The package of available instruments and the accessibility of those instruments, in terms of both costs and the length of waiting lists, differ by municipality.<sup>48</sup> In 2016, the Council for the Judiciary recommended the creation of a uniform package of basic instruments that would be available countrywide.<sup>49</sup> However, the system seems to be completely jammed currently and waiting lists for some interventions exceed a year.

### 4.2.1 Mediation

Mediation can be used to improve interparental communications and reinstate compliance with the parenting plan. Some parenting plans include a mediation clause encouraging parents to seek mediation in case of disagreement or non-compliance.

There is little (recent) research available on the effects of mediation in relation to parental contact problems. In the past, research has shown that mediation can have a positive effect, as with the help of mediation a number of parents were able to reach agreement, adapt their arrangements and improve their mutual communications.<sup>50</sup>

### 4.2.2 Forensic mediation

Forensic mediation is a special form of mediation in which the judge orders one or more experts to conduct an investigation into the family using mediation techniques.<sup>51</sup> The parents do not have to agree to this measure. The purpose of the parenting investigation is twofold: on the one hand, it gives the parents a chance to reach agreement with the help of a mediator; while on the other, it provides the judge with the information needed to make an order if the parents cannot reach agreement.<sup>52</sup> On average, a parenting investigation takes more than a year, during which an average of five meetings are held between the parents and the expert(s). In more than one-third of cases, the children are actively involved. Evaluation has shown that the parents manage to reach (partial) agreement with the help of forensic mediation in about 50 per cent of such cases.<sup>53</sup> Parents who reached (partial) agreement with the help of forensic mediation were more positive about their relationships with their ex-partner and children than those who did

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<sup>48</sup> WODC Report 2019, p 56.

<sup>49</sup> Raad voor de rechtspraak, *Visiedocument Rechtspraak (echt)scheiding ouders met kinderen*, 10 October 2016, p 33.

<sup>50</sup> BES Chin-A-Fat and M Steketee, *Bemiddeling in uitvoering: evaluatie experimenten scheidings- en omgangsbemiddeling*, Utrecht: Verwey-Jonker Instituut 2001. WODC Report 2019, pp 57–58.

<sup>51</sup> In difficult cases, sometimes more than one expert is appointed, such as a behavioral scientist and a lawyer.

<sup>52</sup> ES Kluwer, *Het ouderschapsonderzoek: een aanpak bij vechtscheidingen*, Raad voor de rechtspraak, Research Memoranda 2013, no 1, p 92.

<sup>53</sup> ES Kluwer, *Het ouderschapsonderzoek: een aanpak bij vechtscheidingen*, Raad voor de rechtspraak, Research Memoranda 2013, no 1, p 9.

not reach agreement. However, on the whole, the empirical research does not show a positive effect on the relationship between the parents when forensic mediation is compared to regular procedures.<sup>54</sup> The interviews conducted during our study reveal that opinions on the use of forensic mediation are somewhat divided and this instrument is infrequently used.<sup>55</sup>

### 4.2.3 Supervised contact

Various schemes of supervised contact are often used and were experienced positively by the respondents in our study.<sup>56</sup>

If contact arrangements are not complied with, the courts regularly use the most informal of the schemes – the supervised contact arrangement – as an intermediary measure. In order to apply this measure, the parents must agree that contact will take place under the supervision of a third party. Supervised contact is considered where there are safety concerns on the part of the other parent, a risk of child abduction, problematic behaviour of the parent seeking contact or other issues. There are several providers of supervised contact arrangements. Supervision is provided by specially trained volunteers. The measure usually lasts three to six months. The main advantages of supervised contact are its informality and flexibility. If necessary, the volunteer can pick up and drop off the children at times that are convenient for the parents. The goal of this instrument is for the parents to regain trust in each other so that they can continue contact without supervision.<sup>57</sup> One provider claims that about 75 per cent of participating parents succeed in continuing contact without supervision.<sup>58</sup>

### 4.2.4 Safe contact houses

Safe contact houses are neutral and safe places where a parent and a child can have contact without the parents having to see each other. In many respects, this instrument resembles supervised contact arrangements. The most significant difference is that safe contact houses are institutions, and thus lack the informality and flexibility of supervised contact arrangements. One parent must bring the child to the safe contact house at the stipulated time and the other parent must be there on time. Safe contact houses are much more commonly used in the Netherlands than supervised contact arrangements. The contact between parent and child is always supervised by the safe contact house staff and the parent is not allowed to leave the house with the child. The goal is that the parents will be able to continue with the contact arrangements without support.<sup>59</sup>

The interviews conducted for this study show that, without exception, legal professionals are positive about safe contact houses. However, it was acknowledged that this is a rather

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<sup>54</sup> ES Kluwer, *Het ouderschapsonderzoek: een aanpak bij vechtscheidingen*, Raad voor de rechtspraak, Research Memoranda 2013, no 1, pp 7, 8.

<sup>55</sup> WODC Report 2019, pp 59–60.

<sup>56</sup> WODC Report 2019, p 62.

<sup>57</sup> <https://www.humanitas.nl/programmas/bor/waarom-bor/>

<sup>58</sup> *Methodiek BOR Humanitas*, §7. In 2009, C Knipping and M Waaijenberg (*Begeleide Omgangregeling Twente. Anker voor kinderen*, B&A Groep 2009) concluded that supervised contact arrangements provide for social return for both children (better school performance, reduced behavioural problems), parents (more trust, less concern about the child) and professionals (fewer appeals against professionals).

<sup>59</sup> See, for example, <https://www.omgangshuiszeist.nl/>; <https://www.tussenthuisutrecht.nl/>; <https://www.omgangshuishouten.nl/>.

'heavy' instrument that should be used only when there are good reasons to do so (eg, safety concerns). Although there is no data on the effectiveness of this instrument, it is clear that supervised contact in safe contact houses provides the parent with a real possibility to see their child (again).<sup>60</sup>

#### 4.2.5 Special guardian

In addition to these specially designed, tailor-made instruments, family law contains a range of instruments that are not specifically intended for the enforcement of contact arrangements, but that can be used for this purpose.

A judge can appoint the child a special guardian (guardian *ad litem*, *bijzondere curator*) if they think the parents no longer have the child's best interests in mind and are no longer able to represent the interests of the child in the proceedings on the enforcement of contact arrangements. The judge will decide whom to appoint as a special guardian: this could be a lawyer, but also a behavioural scientist. There are indications that a behavioural scientist acting as special trustee in complex divorce situations can achieve better results than a lawyer.<sup>61</sup> The special guardian represents the child both in and out of court. Furthermore, a special guardian can play a mediating role between the parent(s) and the child and can share the opinions of the child with their parents. If the child experiences a loyalty conflict, the special guardian can help to determine the genuine opinion of the child.<sup>62</sup> The use of a special guardian in contact-related disputes is relatively new and much remains unclear about the effectiveness of this instrument. Some professionals interviewed during our study had positive experiences with appointing a special guardian and suggested that this instrument should be used more often.<sup>63</sup>

#### 4.2.6 Civil (family) law instruments

If none of the aforementioned instruments helps, the judge can impose one or more sanctions. Some of these sanctions – such as including a contractual financial penalty in a parenting plan;<sup>64</sup> placing contact under the supervision of the Dutch Child Care and Protection Board; suspending, limiting or terminating spousal/child support; transferring parental responsibility; changing the child's main residence; or terminating parental responsibility – are specific family law sanctions. Others – such as the imposition of a financial penalty; the imprisonment of a parent; or forcible removal – are general civil law sanctions, designed to put a debtor under pressure in order to enforce a kind of specific performance.<sup>65</sup>

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<sup>60</sup> WODC Report 2019, p 62.

<sup>61</sup> M Valenkamp, E Sondorp and A van Montfoort, *Pilot bijzondere curator/gedragsdeskundige in de rechtbank Zeeland-West-Brabant, locatie Breda. Het belang van het kind in complexe scheidingen, Raad voor de rechtspraak*, Research Memoranda 2017, no 1, pp 17, 18.

<sup>62</sup> Hof Amsterdam 9 February 2010, ECLI:NL:GHAMS:2010:BL5778.

<sup>63</sup> WODC Report 2019, pp 65–66.

<sup>64</sup> As far as we know, the possibility of including such a clause in a parenting plan is hardly ever used and thus is not discussed in this chapter. WODC Report 2019, pp 80–81.

<sup>65</sup> WODC Report 2019, pp 63, 81, 82.

Limiting parental responsibility and placing a child and/or contact under the supervision of the Dutch Child Care and Protection Board is a child protection measure that limits the parental responsibility of one or both parents. It is permitted only if:

- the child is growing up in a way that seriously threatens their development and the parent(s) are not prepared to accept the necessary support;<sup>66</sup> and
- the judge can clearly demonstrate the necessity and proportionality<sup>67</sup> of the measure.<sup>68</sup>

Placing a child under supervision is a general measure that can be applied in all cases where the parents are (temporarily) unable to deal with a threat to the child's development, but where there are not (yet) sufficient grounds for full termination of their parental responsibility. The Dutch Supreme Court allows supervision in case of non-compliance only under strict conditions,<sup>69</sup> where the level of conflict between the parents is so high that they do not communicate at all, greatly distrust each other, and disqualify each other in the eyes of the child and thus threaten the child's development.<sup>70</sup> Despite this high threshold, the sanction is regularly used in contact cases. A guardian is then appointed to ensure that the threat to the child's development is removed. The guardian is entitled to give the parent(s) written instructions concerning the care and education of the child, which must be followed by the child and the parent(s) (Civil Code, Article 1:263, paragraphs 1–2). These instructions may relate to the arrangement of contact. If the written instructions are not followed, the guardian can ask the court to impose a coercive sanction.<sup>71</sup> Research by the National Ombudsman and the Children's Ombudsman shows that placing a child under supervision in contact cases is often used at a very late stage and that it would be better if it were used earlier. However, the same research indicates that the measure can lead to the further escalation of conflicts between the parents, and that its effectiveness in contact cases requires evaluation.<sup>72</sup> The case law shows that in many cases, placing a child under supervision does not solve the contact problems and the judge must thus resort to other instruments.<sup>73</sup>

The possibility of suspending or modifying the obligation to pay child support is very rarely used, as this could directly harm the financial welfare of the child. The possibility of suspending or modifying the obligation to pay spousal support meets with less resistance among professionals and seems to be used more often. However, this financial sanction can also have consequences for the child's financial welfare, as the family normally has a single budget accumulating all income of the family members.<sup>74</sup>

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<sup>66</sup> Article 1:255, Dutch Civil Code.

<sup>67</sup> See, for example, HR 21 April 2017, ECLI:NL:HR:2017:766; HR 19 February 2016, ECLI:NL:HR:2016:295; HR 13 April 2001, ECLI:NL:HR:2001:AB1009; P AJ Th van Teeffelen, *De omgangsondertoezichtstelling, wanneer wel en wanneer niet?*, EB 2018/69.

<sup>68</sup> P Vlaardingerbroek, *Omgangsondertoezichtstelling nader bezien*, EB 2017/78, p 188.

<sup>69</sup> HR 19 February 2016, ECLI:NL:HR:2016:295.

<sup>70</sup> HR 21 April 2017, ECLI:NL:HR:2017:766.

<sup>71</sup> Article 1:263, paragraph 3, Dutch Civil Code.

<sup>72</sup> *Rapport Nationale ombudsman en Kinderombudsman, De ondertoezichtstelling bij omgangsproblemen*, rapportnrs, 2012/166 and KOM5A/2012, pp 30–34.

<sup>73</sup> For example, Hof Arnhem-Leeuwarden 3 May 2016, ECLI:NL:GHARL:2016:3579, Rb Oost-Brabant 27 July 2016, ECLI:NL:RBOBR:2016:4105. WODC Report 2019, p 73.

<sup>74</sup> WODC Report 2019, pp 78–80.

Changing the child's primary residence from one parent to the other is a rather drastic intervention, especially for the child. That is why this instrument is used only as an *ultimum remedium* and only where it is in the overall best interests of the child.<sup>75</sup>

The possibility of transferring parental responsibility to the other parent is sometimes used in practice. In this case, the parental responsibility of the parent with whom the child resides is terminated and the other parent is granted sole parental responsibility. This measure can be applied alone or in conjunction with the transfer of the child's primary residence. The Supreme Court has ruled that, due to the drastic nature of this measure, it should be used only as a measure of last resort. Thus, the court's decision must be fully motivated and all general conditions for the transfer of parental responsibility must be met.<sup>76</sup> According to the case law, non-compliance with a contact agreement in itself is insufficient for termination of parental responsibility. Therefore, transfer of parental responsibility happens only in very severe cases where non-compliance is just one of the factual circumstances.

As these instruments are rarely used, little information on their effectiveness emerged from the sources studied in this research. However, the analysis of case law suggests that sometimes the mere threat of the transfer of child residence and/or parental responsibility to the other parent can persuade the reluctant parent to cooperate.<sup>77</sup>

On top of these specific and general family law measures, there are general sanctions of civil procedural law. These were not developed for family law cases, but are rather intended to exert pressure on a debtor in order to enforce a kind of specific performance in civil cases where monetary compensation would not provide an appropriate remedy. This makes their application in contact cases a rather tricky proposition.

The imposition of a financial penalty on the reluctant parent is the instrument that is most commonly used. The parent can be ordered by the court to pay a stipulated amount of money for each act of non-compliance, potentially even per day. The penalty can thus rise into the thousands of euros. This instrument is often used in the early stages if a parent does not consent to the application of voluntary measures (eg, supervised contact schemes). Our interviews with legal professionals indicate that penalties can be effective in cases where a parent is able but unwilling to comply with contact arrangements. From the literature, it follows that this tool is particularly effective when agreements are violated incidentally. Furthermore, the effectiveness of this remedy is strongly determined by the financial situation of the parent who violates the agreement.<sup>78</sup>

The reluctant parent can also be imprisoned for up to one year for non-compliance with contact arrangements. Because this measure both infringes the personal freedom of the parent and leaves the child without the care of the imprisoned parent, it may be applied only in very extreme cases. However, the Supreme Court has explicitly ruled that imprisonment of the parent is permitted in contact/enforcement cases.<sup>79</sup> Case law and our interviews show that this instrument is hardly ever used in practice. Its effectiveness is thus largely unknown.<sup>80</sup>

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<sup>75</sup> For example, Hof Arnhem-Leeuwarden 28 November 2013, ECLI:NL:GHARL:2013:9085. WODC Report 2019, pp 76–77.

<sup>76</sup> HR 9 July 2010, ECLI:NL:HR:2010:BM4301.

<sup>77</sup> WODC Report 2019, pp 74–77.

<sup>78</sup> BES Chin-A-Fat, *Effectuering van omgang in rechtsvergelijkend perspectief*. Amsterdam: Vrije Universiteit 1999, p 49. WODC Report 2019, pp 82–84.

<sup>79</sup> HR 14 July 2006, ECLI:NL:HR:2006:AW2200.

<sup>80</sup> WODC Report 2019, pp 84–87.

The judge can also order the forceful removal of a child with the assistance of the police and transfer the child to the other parent. This remedy can be rather traumatic for the child and the police are also seldom eager to perform this task. From our sources, it is not clear how often this method is used and what its overall effects are. If the child is actually transferred, it is effective in that the parent and child will see each other at that time. It is also possible that the threat of this measure can elicit the intended effect.<sup>81</sup>

#### 4.2.7 Criminal law instruments

A parent with parental responsibility can report a failure on the part of the other parent to comply with a contact arrangement to the police. According to the case law of the Supreme Court, non-compliance with contact arrangements can constitute a criminal offence under Article 279 of the Criminal Code.<sup>82</sup> The Public Prosecutor will decide on prosecution. Article 279 of the Criminal Code describes the criminal offence of unlawful withdrawal of a child from the lawful authority of a parent or another person. The punishment is usually a community service order. The provision can be applied both in cases where divorced parents have joint parental responsibility and in cases where only one of them has parental responsibility. In March 2018, a Guideline on the Criminal Procedure for the Withdrawal of a Minor from Lawful Authority came into force.<sup>83</sup> The extent to which this instrument is effective in contact cases cannot be determined. Figures from the Public Prosecutor's Office confirm that it is regularly used in practice.<sup>84</sup> The literature and interviews reveal that opinions are divided when it comes to the desirability of such application. By and large, the legal professionals interviewed were not in favour of the use of criminal law for the enforcement of contact arrangements. Some interviewees suggested that criminal law is only appropriate for contact cases when everything else has failed, as an *ultimum remedium*. The incorporation of a new specific offence of non-compliance with contact arrangements into the Criminal Code was not supported by any of the respondents.<sup>85</sup>

Our research thus demonstrates that a multitude of legal measures and options are available within the fields of family law, private law and criminal law. The conditions and legal framework for their operation are not clear in all cases; but it is clear that their actual use differs considerably. A clearer perspective or policy on the use of these instruments and options, and the optimal order in which they should be used, is missing. Moreover, it is unknown which instruments ultimately result in actual contact between the child and their parent. The more severe private law measures and criminal measures might eventually result in contact, but they do not end the conflict between the parents. They might have a negative impact on mutual trust between the parents and their cooperation. It seems that only the measures originating from the family law field are primarily aimed at resolving the underlying problems in the relationship between the parents.

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<sup>81</sup> WODC Report 2019, pp 87–89.

<sup>82</sup> HR 15 February 2005, ECLI:NL:HR:2005:AR8250; HR 11 February 2014, ECLI:NL:HR:2014:302; HR 14 April 2015, ECLI:NL:HR:2015:942. WODC Report 2019, pp 89–90.

<sup>83</sup> *Richtlijn voor strafvordering onttrekking minderjarige aan wettig gezag*, *Staatscourant* 2018, no 13539.

<sup>84</sup> *Kamerstukken II*, 2017–18, 33 836, no 26, p 23; WODC Report 2019, pp 91–94.

<sup>85</sup> WODC Report 2019, pp 92–96.

Another concern is the fragmentation of the support offered to parents and children, which has been decentralised to local authorities since 2015. A uniform support service would help; as would better access to and information on support services. Professionals working in this field could be further educated and instructed in this regard.<sup>86</sup>

## 5. CONCLUSION

Based on the different aspects of our research, a number of approaches can be identified as potential ways to improve compliance with contact agreements in the Netherlands. Fundamental to this is an approach that is not primarily focused on ensuring compliance, but rather on resolving the underlying problems between the parents.

In supporting parents in reaching agreement, the diverse natures of different groups of parents should be taken into account. A more tailored approach linked to the parents' specific needs in terms of counselling, supervision, support, interventions and treatment would seem to be more successful. To this end, three groups of parents can be identified. The first group consists of parents who communicate well and have a low level of conflict. They should generally manage to reach agreements themselves. The second group is the most problematic. From both the comparative law analysis<sup>87</sup> and the national part of the study, it appears that about 10 per cent of parents in such cases have a high level of conflict and multiple risk factors, such as drug and/or alcohol abuse, domestic violence, serious mental problems and/or low IQ. These parents will generally be unable to reach agreement. This group should be identified at an early stage and referred to more rapid adjudication by the court. The group seems to be system resistant: in the other countries researched, the problems of this group were not resolved by the measures put in place to address them. This group needs extra care and attention; heavier, more targeted interventions; and contact supervision. The third group consists of parents who have problems with their communication and a medium level of conflict, and need support in reaching agreement. The current (legal) system in the Netherlands does not seem to address the needs of this group. It would be helpful here to promote and facilitate agreements through parental education on divorce, access to information and easily accessible, tailored support, including financial means for mediation. It might also be constructive to separate the divorce and its effects from the agreements on the children. The parents themselves could make these agreements without any time pressure and would end up in court only as a last resort if they failed to reach agreement.

The social science component of our research is in line with the findings from the legal component. Early diagnosis is important, combined with a diversified approach for the various groups of families and tailored support which is suited to the specific needs of each family. It is striking that in many of these complex divorce cases, relatively little support and psychological counselling were provided to the parents. A valid and reliable tool for screening parents going through a divorce is essential in order to identify those who are at high risk of a complex divorce. Recently, a number of tools have been developed for professionals to make a more adequate diagnosis.

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<sup>86</sup> WODC Report 2019, pp 98–100.

<sup>87</sup> Not reflected in this chapter.



Given the overall results of this research, the answer to addressing non-compliance with contact agreements does not seem to involve the use of the existing legal instruments. While a complete package of legal instruments is already available in relation to the enforcement of contact agreements, these instruments are mostly targeted at the result (ie, contact or no contact), rather than at the underlying problems that are causing the non-compliance. The use of these instruments – in particular, the more severe ones – may be detrimental to the relationship between the parents and may negatively impact on the child's best interests. Strikingly, there is almost no insight on the courts' actual use of the various instruments, in terms of their respective advantages and disadvantages and the optimal time in the process to use them. The legal and social professionals who were interviewed during our research shared the view that the use of criminal law sanctions against non-compliant parents is not a good idea. One of the reasons is that it can escalate the existing problems between the parents; in such cases, counselling and support would be a better response. This implies that government policy would be better aimed at tackling the underlying conflicts between the parents through alternative means. Government policy should seek to prevent parents from moving their conflicts into the legal domain, fighting each other through the courts and thus getting stuck in a negative pattern of behaviour. Supportive measures such as supervised contact and interventions aimed at de-escalating parental conflict and tackling other problems could help. However, it is clear that the government is under political pressure to introduce a sanctions-based approach, including criminal law. This does not suggest a very hopeful outlook for the future.<sup>88</sup>

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<sup>88</sup> Letter of the Minister to the Second Chamber in 2021, 33 836, no 60, p 3.