

OVW Child Custody Differentiation Project
Progress Summary
Battered Women's Justice Project

Overview of the Project

For years now, survivors and advocates have complained that the family court system is failing to adequately protect the safety and wellbeing of children – and their battered and battering parents – in child custody cases where domestic violence is alleged. In 2009, in an effort to respond to that reality, OVW and BWJP entered into a two-year cooperative agreement to develop a framework to help family court practitioners better identify, understand and account for the context and implications of domestic violence in child custody cases. That cooperative agreement was extended for an additional two years, through September 2013.

BWJP and its project partner, Praxis International, assembled a national workgroup, a blue ribbon team of representatives from the National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts, as well as scholars and expert practitioners from across the country. The national workgroup has provided critical leadership and guidance for the project since its inception.¹

BWJP and Praxis (working closely with NCJFJC) designed, coordinated and completed a number of major activities in the first two years of the project, including: (1) a comprehensive literature review²; (2) an in-depth assessment of a family court system in rural Northwest Ohio; (3) a rigorous analysis of child custody evaluations; (4) a series of stakeholder interviews and focus groups; and (5) consultations with dozens of nationally and internationally recognized researchers, attorneys, judicial officers, and family court practitioners. Those activities produced a number of key findings and recommendations for improving the way family courts approach, address and respond to domestic violence. Those findings and recommendations are summarized in two reports.³

The activities and reports are important for several reasons. First, the institutional analysis of the Henry County Family Court system provided a roadmap for the development of a concrete, community-driven work plan to improve the institutional response to domestic violence. Second, the project activities led to the development of an evidence-based conceptual framework for identifying, understanding and accounting for the context and implications of domestic violence in child custody cases that is suitable for replication in other communities. Third, project activities and reports form the basis for ongoing development of policies, protocols and practice guides to help family court practitioners across disciplines improve safety for battered parents and their children during and beyond court proceedings. Finally, project activities are

¹ See *Draft Guiding Principles*, for example.

² See *National Custody Project General Overview*

³ The two reports are entitled, *Report of the Henry County, Ohio Child Custody and Domestic Violence Safety and Accountability Audit* and *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations*, and are available for review at www.bwjp.org

guiding the development of state-of-the-art training material and opportunities for family court practitioners across the country.

What We Have Learned Thus Far

Several themes have emerged from the work we have completed to date. These themes are consistent with and supported by the prevailing research in the field, as well as the experiences of the family court practitioners and litigants across the country with whom we have met.

1. Ill-defined terminology

There is very little agreement among practitioners about the meaning of commonly used terminology like *domestic violence*, *high conflict*, *parental alienation*, and *best interests*. This inconsistency in terminology leads to a lot of confusion and misunderstanding.

2. Lack of clarity regarding professional roles and functions

In addition to ill-defined terminology, we also observed that practitioners often lacked clarity about their own roles and functions within the family court system. For example, some evaluators perceived their function to be strictly about determining what parenting arrangement would be in the best interests of the child, while other evaluators saw their role as facilitating a settlement between the parents. We saw many, many examples of this sort of confusion about who was responsible for what within the family court system.

3. Inconsistent screening, assessment and assumptions about domestic abuse

While most family court practitioners appeared to engage in some sort of screening for domestic violence, we saw very little evidence that practitioners routinely used any standardized protocol or tool to determine the nature and context of domestic violence. Instead, we observed that many practitioners simply relied on their own gut feelings or instincts to determine whether domestic violence has occurred and imposed their own personal assumptions about domestic violence when making sense of what was going on.

4. Poorly informed decision-making

We saw that big decisions were being made by practitioners in all court settings in the face of tremendous factual uncertainty – and in some cases, on the basis of wildly inaccurate information – with very few opportunities for the parties to challenge the “facts” or correct the record. We also saw that the paucity of reliable information and inconsistent assessments led to poorly informed decision-making.

5. Disconnected interventions and services

In what Jill Davies refers to as “service-defined” as opposed to “survivor-defined” interventions, we also saw that the interventions and services offered were often disconnected from what people actually needed.

While each of the foregoing themes emerged through our work as discrete problems, over time we began to appreciate how they were really interconnected and how the momentum of these problems – and the way they compounded one on top of the other – propelled many family court cases completely off track.

The Challenges

Our big challenge has been to figure out a way to get these cases back on track – or to keep them from going off track in the first place. In other words, we came to understand our task as developing a model to more closely align institutional practices with the realities of people’s lives - to close the gaps between what the people who are drawn into the family court system need and what the system is set up to provide.

Upon careful reflection and deliberation, we observed that those gaps could be broadly grouped into two primary categories. The first has to do with **informed and responsible decision-making** and the second has to do with **accountability and due process**.

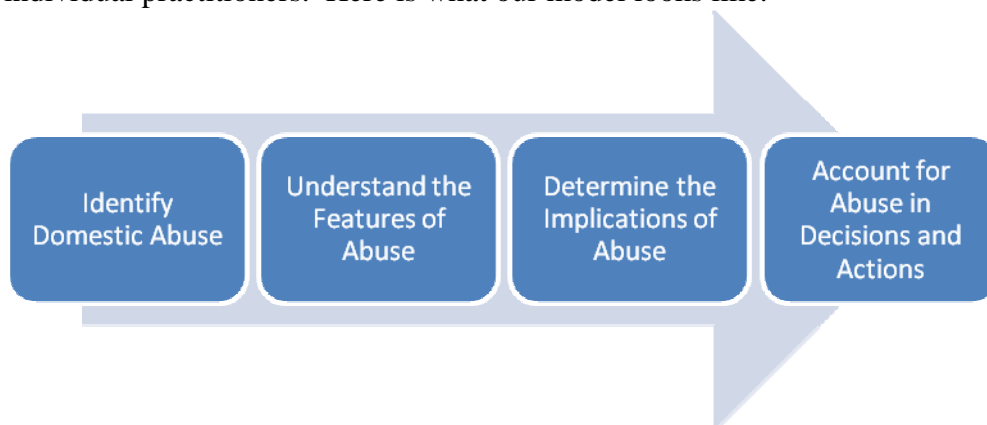
Problem One: Flawed Decision-making

With respect to decision-making, we found that a lot of things are being done in family court – not only by judges, but by lawyers and mediators and guardians and CASAs and custody evaluators – and by the parties themselves – in the context of widespread factual, legal and procedural uncertainty and sometimes on the basis of misinformation, speculation and false assumptions – especially when it comes to domestic violence.

A Solution: Our Conceptual Framework for Guiding Practice

To confront this fundamental problem, we developed a four-part conceptual framework – and a number of practice aids – to help parties and practitioners *gather, synthesize and analyze critical information about the context and implications of domestic violence* in order to improve informed decision-making across disciplines and court settings.

Our conceptual framework serves as roadmap, of sorts, for informed decision-making for anyone and everyone who becomes involved in a domestic violence-related child custody case. It works for parties, advocates and practitioners of every variety. It recognizes that everyone who touches a domestic violence-related custody case has a job to do – has some action to take or some decision to make. Those actions and decisions need to be grounded in the real life experiences of the parties whose lives are being adjusted in family court – and not driven by presumptions that effectively marginalize the best interests of the child or by the personal biases and beliefs of individual practitioners. Here is what our model looks like:



1. Identifying Domestic Violence.

The first step is to identify domestic violence. Several tools currently exist to help practitioners identify domestic violence. Most tools are designed for a specific purpose and a specific practice setting. Different tools look for different things for different reasons. Each has its own strengths and limitations. Consequently, it is important for practitioners to know what they are looking for and why – and to use tools that are designed to get at what they need. It is also important for the people being screened to know why the information is being sought, how it will be used, who will have access to it, and where it might show up later in the family court process. Based on these lessons, BWJP and local practitioners developed the Initial Domestic Violence Screening for Family Court Practitioners and the Domestic Violence Interview Guide. They are designed to help practitioners accomplish the first three steps of the conceptual model – that is, to identify abuse, understand its features, and determine its implications.

2. Understanding the Features of Domestic Violence.

Our conceptual model recognizes that it isn't enough for practitioners to simply identify domestic violence. Identifying domestic violence is an important first step, but just knowing that abuse has occurred or is still occurring does not tell practitioners everything they need to know in order to make informed decisions and take informed action. They need to know more specifically what is actually going on – what the features and characteristics of the violence are. They need to know who is doing what to whom and to what effect. And, in the context of a family law case, they need to know what is going on with respect to parenting and the health, safety and wellbeing of the children, as well as the parent who is subjected to abuse.

We have learned that figuring out how domestic violence shapes the way people parent is one of the least understood – and often overlooked – dimensions of battering. We have also learned that analyzing the impact of parenting in the context of domestic violence on children is also extremely challenging. BWJP is working with local practitioners to help connect domestic violence to parenting – to link coercive controlling abuse to the parties' respective parenting capacities, the safety and well-being of the children, and the practical realities of co-parenting. The three Parenting Charts reflect our current work in this area. They are meant to help practitioners recognize and understand the quality and characteristics of the batterer *as a parent* and to assess the effects of those qualities and characteristics on the children and the other parent.

3. Determining the Implications of Domestic Violence.

The third step of our conceptual model is to determine the implications of the violence. It says, “Now that you know what's going on, what does it mean for the task or decision at hand?” For instance, if the practitioner is trying to come up with a parenting plan, s/he needs to ask what the consequences of the violence are for parenting. What risks and problems does the violence create for the parents and for the children? What kinds of things are standing in the way of constructive parenting and healthy childhood development?

This step of our conceptual model is what has come to be known as “the big black hole.” We call it that because it is the step that seems to be most often overlooked. When practitioners bypass this critical stage of analysis, they often tend to fill in that empty space with other things, like their own personal assumptions, biases and belief systems. When this occurs, outcomes are

driven more by practitioners' assumptions, biases and belief systems than by the actual circumstances on the ground.

Recent research supports this view. Three important studies suggest that, in the context of custody evaluations at least – the outcomes of family law cases have more to do with the evaluators' beliefs than what is actually going on in the family.⁴

The confluence of burgeoning social science research, field experience, and lessons learned from the custody project points to the need to better determine and articulate the implications of domestic violence in family law cases. By this we mean, “What impact does domestic violence have on the decision or task at hand? What difference does it make? What does it mean for the people whose lives are being adjusted through this family court process?” For instance, does the violence mean that the children live in an atmosphere of fear, uncertainty or instability at home and, if so, is there anything the institution can do to account for and correct that? Or, does the violence mean that the battered parent lacks trust or confidence in the abuser's parenting, and, if so, is there anything the institution can do to account for and address that?

Our work on the custody project suggests that the implications of domestic violence are always unique to the specific circumstances of the parties and the case. They don't come from a predetermined list, but from a constellation of things that are going on in the lives of the parties. We anticipate that a large part of our technical assistance in the family court demonstration initiative will involve working with sites to develop policies, protocols and practice guides to capture this critical information.

4. Taking Informed Action.

One of the things our project activities highlights is that the family court system is often more focused on “divvying things up” (including the children) than it is on “making things work.” When institutional attention turns to “divvying things up” – to dividing and allocating aspects of the child's life between the parents – it does not always tend to the very immediate things that get in the way of “making things work” for the child and the parents. For instance, it does not always account for post-separation abuse, or ongoing coercive control, or parenting practices that jeopardize the child's safety and well-being, as well as the safety and well-being of the battered parent.

To address this problem, the last stage of our conceptual model is to make informed decisions and take informed actions that fully account for the features and implications of domestic violence. In this way, family court practitioners will be better able to address the underlying conditions that allow the violence – and its implications – to persist long after the family court case is officially closed. In an attempt to help practitioners do this, we have developed a Domestic Violence Planning Guide. It, too, is designed to help practitioners analyze the implications of domestic violence for purposes of informed decision-making. It helps people

⁴ Megan Haselschwert, et al. (2010), Custody evaluators' beliefs about domestic violence allegations during divorce, *Journal of Interpersonal Violence*; Michael Davis, et al. (2010), Custody evaluations when there are allegations of domestic violence: Practices, beliefs and recommendations of professional evaluators, *National Institute of Justice Report*; Daniel Saunders, et al. (2011), Custody evaluators' beliefs about domestic abuse allegations, *National Institute of Justice Report*.

take the information they've gathered from the interview guide and the parenting charts and use it to craft responsible parenting recommendations, dispute resolution strategies and court interventions that work. We have also begun work on helping practitioners link the implications of the violence to the best interests of the child standards which are enshrined in law.⁵

An unexpected benefit of the tools

We learned some very important things as we began vetting and testing these practice aids. It quickly became apparent that, as a class, the battered mothers and advocates with whom we consulted were much more interested in what we were doing – and found these materials of much more immediate use – than many of the practitioners we worked with (who were engaged, but somewhat reluctant to change their everyday practices). Battered mothers, especially, recognized the utility of these documents – largely because they saw themselves and their lives reflected there – in ways that the professionals did not. They also said that some of these documents helped them think through and organize their thoughts about what information they wanted to convey to whom and when and why. Just as the power and control wheel helped survivors articulate their experience of battering to an unenlightened criminal justice system 25 or 30 years ago – so, too, might some of these sorts of materials help survivors articulate their experience of parenting in the context of battering to an often hostile and disbelieving family court system. So, a first line strategy for improving advocacy in family court might be to use these sorts of documents to help prepare battered parents for meetings with lawyers, custody evaluators, guardians ad litem, mediators and other family court practitioners.

Problem Two: Inadequate Systems of Accountability and Due Process

The second big (but related) problem we discovered during the first phase of our project has to do with accountability and due process. In order to appreciate the scope the problem, it's helpful to take a step back and look at the overall organization of the family court system – which has undergone a major transformation over the past few decades. Essentially what we see is a gradual decentralization of functions within the system as a whole – with a considerable amount of out-sourcing to private, non-judicial actors.

What was, in the past, a process that was wholly contained within the walls of the courthouse has become a process that exists almost entirely outside the confines of the court itself. Whereas parties once could expect that their claims would be heard by a judge and decided on the evidence, parties now encounter a system where access to the judge is increasingly rare. This is due, in part, to a number of forces – including mounting caseloads, diminished institutional resources, and criticism of the adversarial system – that have conspired to privilege alternative methods of dispute resolution over more traditional adjudicatory processes. Viewed from an institutional perspective, we see a number of glaring problems with this arrangement.

The problems are most evident when we compare the institutional organization of the family court system to that of the criminal justice system. Over the years, advocates have done a lot of work in the criminal justice system developing a coordinated community response (CCR) to domestic violence. They've encouraged law enforcement, prosecutors, probation officers and

⁵ See *Ohio Best Interests of the Child Analysis*

others to join forces to enhance victim safety and offender accountability. Though by no means perfect, advocacy within the criminal justice system has improved exponentially and our ability to effect positive change has grown as CCRs have become more sophisticated and responsive. We really can't say the same thing about the family court system. That's due, in part, to the contrasting hallmarks of the criminal and family court systems.

A. State v. Private Actors

If we look closely, we see that the criminal justice system is comprised largely of state actors. Police, prosecutors, probation officers, child protection workers, and (in many jurisdictions) victim-witness staff are – more or less – official arms of the state. Their authority is constitutionally or statutorily defined. That is to say that the law tells the police and the prosecutor what they are authorized to do. The police officer knows that he is authorized to make an arrest upon probable cause. He also knows that he is not authorized to put on the state's case – because that's the prosecutor's job. All of that is defined by law.

By contrast, the family court system is comprised mostly of private, independent actors – like mediators, guardians ad litem, CASAs, attorneys, custody evaluators, and parenting coordinators. Most of these actors do not function as an arm of the state, but operate as private citizens. Their authority is not constitutionally derived, but purely discretionary.

B. Constitutional v. Professional Limits on Authority

In our criminal justice system, there are clearly defined constitutional and statutory limits on the authority of state actors. The police, for instance, may not conduct an unreasonable search – or engage in excessive force – or compel a suspect to incriminate himself. The prosecutor may not deprive a defendant of his right to confront witnesses – or withhold exculpatory evidence. If a state actor exceeds his or her authority, the law provides a remedy (at least in theory). So, people who are drawn into the criminal justice system enjoy certain constitutional and statutory protections from government over-reaching – and that's important.

By contrast, family court professionals act outside of the constitution, which means that litigants enjoy few, if any, meaningful protections from over-reaching. Most family court practitioners are self-regulated – they are mostly in business for themselves – and not governed by law, but by professional standards that are largely created and overseen by the professions themselves.

C. Clear Chains of Command v. Independent Action.

There are relatively clear chains of command in the criminal justice system. A line officer is accountable to her commanding officer – and an assistant prosecutor is answerable to the chief prosecutor. If we need to implement a new policy or protocol in the criminal justice system, we call the chief prosecutor, or the sheriff, or the chief of police and – assuming they agree – they can issue a directive from the top that everybody below must follow. If the chief discovers that her directive isn't being followed, she can discipline those fail to comply (again, at least in theory).

Most family court professionals, on the other hand, are independent agents. If we want mediators, lawyers and evaluators to use the practice guides we've created, we have to convince each individual mediator, every individual lawyer and each individual evaluator to change his or her practice. There is no chief mediator, or head lawyer, or chief custody evaluator to whom all others must report.

D. Standardized Work Practices v. Self-Directed Work Practices

In the criminal justice system, standardized work practices are established to ensure that every worker handles his or her job in a similar fashion. In other words, a 911 operator cannot show up to work one day and simply decide to re-invent her job. She cannot decide for herself that she'd rather not answer the phone, or enter information into the CAD system, or dispatch a crew to the scene of an emergency. Her work has been standardized so she knows what she's supposed to do – and when and how to do it. This sort of standardization ensures that what one particular 911 operator does is essentially the same as what every other 911 operator does.

The same is not true for practitioners in family court system. They have almost unfettered freedom to re-invent their jobs as they go along – to decide, for themselves, how they are going to approach each case, how they view their roles and their relationships to the parties, what information they think is important and what information they'd prefer to ignore, and what priorities they choose to establish.

E. “On the Record” v. “Off the Record”

Most of what happens in the criminal justice system is “on the record.” With limited exceptions, the police generally cannot conduct a search without a warrant (i.e., a record). The prosecutor can't establish proof beyond a reasonable doubt based on information that hasn't been offered into evidence. A defendant's guilt cannot be determined by some secret tribunal, but only in a public trial before a jury of his peers. With few exceptions, the things that happen in the criminal justice system are supposed to occur “in the sunshine” – out in the open – on the record – so an appropriate review can be conducted if need be.

By contrast, a significant amount of work in the family court system occurs “off the record” – in the dark and behind closed doors. Non-judicial family court professionals are not constrained by the rules of evidence or the rules of civil procedure, and there is very little opportunity for parties to put on a case, much less challenge inaccurate, unreliable or misleading information.

F. Appealable Decisions v. Non-Appealable Actions

A closely related issue is that most decisions that are made in the criminal justice system are appealable. If a criminal defendant believes that there wasn't probable cause for his arrest – or that his conviction was based on inadmissible evidence – or that the terms of his sentence amount to cruel and unusual punishment, he has a right to file an appeal.

By contrast, if a party to a custody action does not agree with a family court practitioner – with what is contained in a custody evaluation report, for instance, or with the way mediation was

conducted – there is no efficient way to challenge the process, or correct misinformation, or complain about the result directly. While s/he may appeal a *decision of the court*, in order to prevail, s/he must establish that the *judge* committed some error. An error committed by a *non-judicial* actor ordinarily cannot sustain an appeal.

G. Coordinated v. Uncoordinated Interventions.

Finally, and in no small part due to the concerted efforts of the battered women’s movement, the criminal justice response to domestic violence has become increasingly more coordinated. The system as a whole has come to recognize the importance of a well-organized CCR – and communities across the country have embraced this fundamental principle, which is reflected in criminal justice policies, protocols and trainings.

The services performed by family court practitioners, on the other hand, are largely uncoordinated. There are very few linkages in place that encourage – or even allow – family court practitioners to engage with one another in any kind of genuine, productive, non-adversarial manner to promote the safety and well-being of battered mothers and their children.

By virtue of all of these institutional hallmarks, we have – as a movement – been able to effectively advocate for enhanced victim safety and offender accountability in the criminal justice system. At the same time, we can see how challenging advocacy on behalf of battered mothers and their children can be in the family court system.

But we don’t have to look outside of the family court system to see the structural problems that accompany the increasing privatization of child custody and visitation cases. In traditional adversary proceedings, the parties put on a case – which is made on the record. A judge decides the merits of the case based on the evidence in accordance with the rules of evidence and civil procedure. A judge commits error when she bases her decision on inadmissible hearsay evidence – or relies on evidence that has not been entered into the record – or disregards competent, credible evidence that has been offered into evidence – or denies the parties an opportunity to challenge or cross-examine a witness or evidence – or considers privileged information without a knowing and voluntary waiver. Likewise, a judge commits error when he engages in *ex parte* communications – or fails to protect the procedural rights of a party – or takes any substantive action off the record or without adequate notice to the parties. When a party believes that a judge may have committed such an error, he or she may prosecute an appeal *as of right*. This right to appeal is so fundamental that, except in very limited circumstances, a party cannot be penalized or sanctioned in any way for attempting to correct a perceived procedural error.

That which would be considered *error* if committed by a judge is, in many cases, standard operating procedure for non-judicial family court practitioners in a privatized system of justice. Most non-judicial family court practitioners – including custody evaluators, psychological evaluators, guardians ad litem, court-appointed special advocates, and parenting coordinators – base their conclusions and recommendations on unsworn, sometimes privileged, hearsay evidence. Much of the information they collect is gathered through interviews with the parties and other collateral sources, like teachers, doctors, counselors, case workers, family, friends and

neighbors. Those interviews are conducted behind closed doors and off the record. The parties are not present to hear the evidence or to challenge or cross-examine the source. Most non-judicial family court practitioners are free to consider or disregard whatever information they choose, even over a party's objection, without having to explain, justify, or document their reasoning. For most non-judicial family court practitioners, *ex parte* communications – that is, communications that are conducted off-the-record and outside the presence of both parties – are the rule, not the exception. The parties are not entitled to notice and enjoy few, if any, protectable procedural rights in extra-judicial family court processes. Consequently, parties often have no meaningful or effective way to correct a perceived mistake or irregularity committed by a non-judicial family court practitioner.

It might be argued that private, non-judicial family court practitioners do not stand in the same relation to the parties as a judge – that they are merely witnesses in a case as opposed to decision-makers – so the procedural safeguards that govern more traditional adversary proceedings are justifiably inapplicable to the processes in which they are engaged. However, research shows – and field experience confirms – that the conclusions and recommendations of evaluators, guardians ad litem and other auxiliary service providers are highly influential and often determinative of case outcomes, whether those outcomes are achieved through settlement or established by order of the court.⁶ Moreover, in many jurisdictions, reports by non-judicial officers are considered by the court outside the setting of a formal hearing, without the benefit of sworn testimony by the author, and without either party ever offering the reports into evidence.⁷ Consequently, even though non-judicial family court practitioners are not *judges*, they often function as *de facto decision-makers* in family law cases. In fact, in many jurisdictions, they enjoy quasi-judicial immunity and cannot be sued for the decisions they make and the actions they take.⁸

So, in thinking about advocacy for survivors and their children in the family court system, it is helpful to draw upon a question that Ellen Pence consistently posed, which is "how does the organization of work in this institution produce a false or inaccurate account of battered women's and children's experience of domestic violence that not only fails to protect them, but actually puts them at greater risk of harm?" When we put all of this together, we can see that one answer to Ellen's question is that the family court system relies on outsiders to describe, define, and judge the way battered mothers and children experience domestic violence – if that's even done at all – without the benefit of competent, reliable information – and without the evidentiary, constitutional, and procedural safeguards that ordinarily attend traditional court processes. This is the "problematic" that should be the focus of BWJP's continuing work on the National Custody Project.

⁶ See, e.g., Michael S. Davis, et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators*, National Institute of Justice, Award No. 2007-WG-BX-0001, November 2010.

⁷ See, e.g., 23 Pa.C.S. §5334 (2011).

⁸⁸ See, *Surprenant v. Mulcrone*, 44 A.3d 465, 163 NH 529 (2012) (a guardian ad litem is entitled to absolute quasi-judicial immunity because her function was "integral to the judicial process."); *Shimota v. Phipps-Yonas*, A11-2167 (Minn.App. 08/27/2012) (a parenting coordinator is entitled to quasi-judicial immunity because the functions she was appointed to perform were judicial in nature).

What's next:

BWJP continues to work closely with the Henry County Family Court system to implement its locally-defined work plan. That work plan includes: (1) applying the conceptual framework to all family court settings; (2) coordinating the work of court-based and ancillary services through the development of policies, protocols and practice guides; (3) training judges and family court practitioners on the dynamics of domestic violence and their effect on parenting and children; (4) analyzing the efficacy of third-party evaluations; (5) integrating the voices of children and survivors in family court proceedings; (6) developing tools, resources and services for battered parents and pro se litigants that will assist them in navigating the family court system; and (7) identifying additional barriers, gaps and desired changes. In conjunction with the family court there, a process for identifying domestic violence in new cases is being tested.⁹

BWJP, together with our partners, hopes to work in the future with other communities who want to implement these new approaches and try out the guides and tools. And a new phase of the work needs to be directed at the second big category of problems we have identified: the inadequate systems of accountability and lack of due process that exist outside the confines of traditional adjudicatory family court proceedings.

⁹ See the *Case Planning Conference* materials and forms