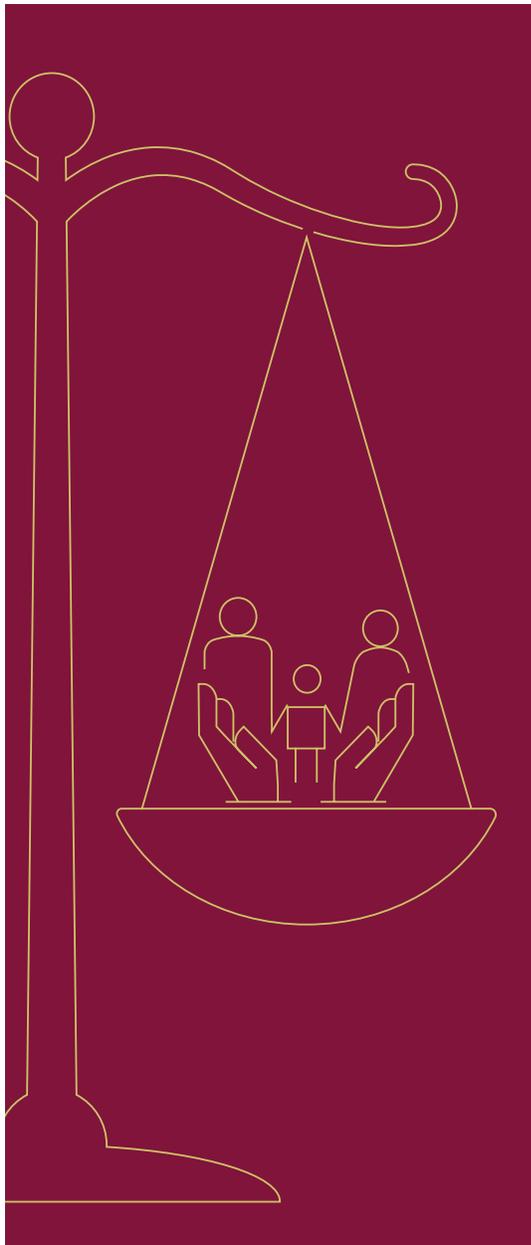


LEGAL BULLETIN

Protecting a Child's Gender Identity and Family Violence: *LS v BS*, [2022 ONSC 5796](#)



Introduction

What counts as family violence? Legislation and case law make it clear that family violence includes emotional, physical, psychological, mental, and financial abuse. In this case, the court stated family violence may also include the misuse of medical records pertaining to a child's gender identity.¹ Misuse of medical records pertaining to a child's gender identity could cause psychological harm.

Background

This case involved a dispute over the parenting arrangements of two children, ages 13 and 14. This case was a decisions about the production of medical records.

The 14-year-old child, 'B', uses they-them pronouns. The 13-year-old child, "E", is exploring her gender identity with a view to transitioning. After the parties separated in 2016, the father made parental alienation allegations and sought reunification therapy, which was ordered but was later abandoned by the parties.²

The mother alleged the father was violent, controlling, and had traumatized the children, which explained the poor father-child relationships.³ Most notably, the mother and children alleged that the father was abusive towards E in part because of her gender identity.⁴ In one example, the mother stated the father twice choked E to the point of unconsciousness because of his inability to accept her gender identity.⁵

¹ *LS v BS*, [2022 ONSC 5796](#) at para [212](#).

² *Ibid* at paras [107-109](#).

³ *Ibid* at paras [4](#), [111](#).

⁴ *Ibid* at paras, [7](#), [182](#).

⁵ *Ibid* at para [7](#).

The father denied the assault even though he had been criminally charged.⁶ The father also expressed that he did not consent to E receiving hormone therapy and counselling.⁷ During the proceedings, he suggested he may try to block the treatment from continuing. Due to his “anti-trans” behaviour, the mother prevented the

father from accessing the children’s healthcare records.⁸ The father sought the release of the children’s healthcare records. The court denied the father’s request and explained that in some cases, the production of records may be harmful, not only how they are used.⁹

Best Interests and Access to Children’s Information

Decisions in family law cases involving children must give primary consideration to the best interests of the child.¹⁰ This includes a consideration of any family violence that has occurred. The definition of family violence comes from the legislation that governs the proceeding.¹¹ In addition to the legislation, the courts are free to find that other conduct not contemplated by the statutes constitutes family violence. In this case, the Court noted that misuse of records could be psychological harm, which is an enumerated form of violence.¹²

Because the best interests of children is the primary concern, there is a general view that both custodial and non-custodial parents (meaning both parents, regardless of their decision-making responsibility arrangement) should have access

to information about a child to ensure they act in the child’s best interests.¹³

However, Justice Finlayson noted that in some cases, giving a parent access to the child’s private health and counselling records may cause greater harm.¹⁴ The court noted that the children in this case were emotionally vulnerable and there were risk factors for increased harm, particularly as E faced the emotional, physical, and mental challenges of transitioning. E objected to the disclosure of her records.¹⁵

Justice Finlayson also noted that while some medical information about a child may be necessary to make a family law decision, exceptions could be made where “opening up the child’s private health records, [risks] exposing the child to emotional harm in the process”.¹⁶

Gender Identity and Family Violence

The *Children’s Law Reform Act* requires the court to protect the children’s physical, emotional, and psychological safety, security, and wellbeing when making an order in the children’s best interests.¹⁷ Family violence has an impact on these factors: in particular, the court must consider whether an individual engaged in family violence is able to meet the needs of the child.

The mother alleged that the father would publish any material from the children’s private records

in order to harass and discredit the children.¹⁸ While Justice Finlayson did not think the mother brought sufficient evidence for this claim, he did find that the father’s comments during the litigation suggested he might use the records to harm the children.¹⁹

There is a formal analysis the court must complete in determining whether to release a child’s records.²⁰

⁶ *Ibid* at para 52.

⁷ *Ibid* at para 6.

⁸ *Ibid*.

⁹ *Ibid* at para 20.

¹⁰ *Ibid* at 72.

¹¹ The *Divorce Act* governs proceedings where the parties were once married to each other while the *Children’s Law Reform Act* governs proceedings where the parties were not married to each other. The provisions in the respective Acts are almost identical.

¹² *LS v BS*, *supra* note 1 at para 212.

¹³ *Ibid* at para 73.

¹⁴ *Ibid* at para 20.

¹⁵ *Ibid* at paras 101, 113.

¹⁶ *Ibid* at para 25.

¹⁷ RSO 1990, c C.12, s 24(2).

¹⁸ *LS v BS*, *supra* note 1 at para 115.

¹⁹ *Ibid* at para 116.

²⁰ *Ibid* at “Part III: Analysis.”

This analysis is extensive and is not the subject of this bulletin.²¹ However, the analysis, coupled with the father’s conduct during the proceedings, indicated to the court that the children’s records should not be released.

The court made some helpful comments about family violence and gender identity in the analysis. Perhaps most helpful is the statement

Relevance

This decision recognizes that the conventional forms of family violence are not the only forms of family violence. As noted in the case, the court is not precluded from finding that specific modes of conduct fit within the legislative definition of

that “**the misuse of such information could amount to family violence.**”²² Physical and psychological abuse, including threats and harassment, were issues in the case that the court also cautioned against. The court’s decision against the children’s records disclosure aimed to protect them from the harms that may ensue if the records were released to their father.

family violence.²³ Misusing records of a gender questioning child could cause psychological harm to that child. The Court cautioned that “misuse of such information could amount to family violence.”²⁴

²¹ To explore what the court considers when deciding whether to release a child’s records, see paras 56-214..

²² *LS v BS*, *supra* note 1 at para [212](#).

²³ *Ibid*.

²⁴ *Ibid* at para [212](#).

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