

CANADA / JUDGMENT

S.S. v. M.O.

2025 BCSC 795

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 795 S.S. v. M.O.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.S. v. M.O.,

2025 BCSC 795

Date: 20250430

Docket: E180065

Registry: Vancouver

Between:

S.S.

Claimant

And

M.O.

Respondent

And

D.D. Ltd.

Respondent by Counterclaim

Before: The Honourable Justice E. Sigurdson

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

February 20-21, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2025

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- [1] This decision addresses two questions arising in a family proceeding. The first and most critical is whether the best interests of the two children of the marriage require that changes be made (on an interim basis) respecting their parenting. The second is whether issues raised by one of the parties about the separation agreement were made too late and are outside the legislated limitation period.

I. Summary of Decisions

- [2] I heard four applications in this family law matter over a two-day hearing on February 20-21, 2025. These reasons address two of those applications, and due to the interplay of these applications, a third application is also dispensed with. I summarize all four here.
- a) The respondent M.O. made an application to set aside a May 15, 2017 separation agreement (the "Separation Agreement Application"). On February 21, 2025, I made an oral ruling in respect of this application, determining that the questions advanced in the Separation Agreement Application about the validity of the separation agreement were not suitable for summary disposition and should be addressed at trial. Whether this application may ultimately proceed is subject to my decision on the application to strike based on limitations discussed below.
 - b) The claimant S.S. made an application to enforce a document disclosure demand (the "Documents Application"). On February 21, 2025, I gave an oral ruling ordering that M.O. provide authorization permitting S.S. to obtain M.O.'s academic records from Simon Fraser University, and that M.O. provide more complete disclosure of financial records.
 - c) S.S. made an application to implement certain recommendations from a s. 211 report on an interim basis to prevent the potential harm to the children by alienation from their mother (the "211 Application"). I gave an oral ruling on this application on March 17, 2025. I allowed the application and made interim orders implementing certain recommendations made in the s. 211 report, with reasons to follow. My reasons on the 211 Application are detailed below.

- d) Finally, S.S. made an application to strike portions of M.O.'s October 23, 2023 amended counterclaim for being time-barred and an abuse of process (the "Limitations Application"). If successful, the Limitations Application would dispense with the Separation Agreement Application. As addressed in my reasons below, I am allowing the Limitations Application and conclude that it is determinative of the Separation Agreement Application.

II. Background

- [3] On March 17, 2025, I canvassed the views of counsel respecting whether to use the parties' initials in the style of cause and my reasons for judgment to protect the privacy of the parties' young children. The parties did not disagree that this was appropriate. Therefore, I will refer to the parties by the initials of their first name and surname in the judgment and the style of cause. The children are identified by their first initial only.
- [4] S.S. is 47 years old. M.O. is 53 years old. They married on September 13, 2003, and separated in about April 2017.
- [5] S.S. (mother) and M.O. (father) have two children: P., age 12 and D., age 9.
- [6] S.S. is self-employed as a jeweller with her company, D.D. Ltd., which is a defendant by counterclaim. M.O. is unemployed and lives with his parents, and attests he acts as a full-time caregiver for his parents.
- [7] S.S. and M.O. signed a comprehensive separation agreement on May 15, 2017 (the "Separation Agreement").
- [8] The original notice of family claim filed by S.S. on January 9, 2018, only included a request for a divorce. M.O. filed a response to family claim and a counterclaim on December 22, 2022. In the counterclaim, M.O. seeks to address parenting arrangements, specifically an order containing the following provisions:
- a) the children reside primarily with S.S.;
 - b) M.O. has parenting time with the children two nights per week, with an additional two weeks during the summer holiday;
 - c) a schedule for Christmas parenting time; and
 - d) allocation of parenting responsibilities under s. 41 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [9] The counterclaim also sought to confirm the Separation Agreement, obtain an unequal division of family property, and other orders.
- [10] On October 23, 2023, M.O. filed an amended counterclaim. The amended counterclaim seeks to set aside the Separation Agreement on the following bases:

- a) S.S. failed to disclose income, property, debts or other information relevant to the negotiation of the agreement;
 - b) S.S. took improper advantage of M.O.'s vulnerability, including his ignorance, need or distress;
 - c) M.O. did not understand the nature or consequences of the agreement;
 - d) other circumstances that would render a contract to be voidable; and
 - e) significant unfairness of the Separation Agreement.
- [11] The amended counterclaim also seeks additional parenting time of two nights per month, as well as certain other orders.
- [12] In a consent order dated September 4, 2024, Associate Judge Dick ordered--amongst other orders--that Dr. Ellie Bolgar prepare a s. 211 report, which was submitted on December 22, 2024 (the "211 Report").
- [13] As outlined above, these reasons address two applications: the 211 Application, in which I have determined that it is in the best interests of the children, on an interim basis, to impose certain recommendations arising from the 211 Report; and the Limitations Application, which I allow, and which ultimately disposes of the issues raised in the Separation Agreement Application.
- [14] I am advised the parties estimate that a 10-day trial is necessary. They were unable to obtain dates until June 2026. I am further advised that if the issues respecting the validity of the Separation Agreement are addressed with these applications, the trial estimate is likely to be shorter. If so, the parties may be able to secure earlier dates.

III. The 211 Application

- [15] The 211 Application seeks an interim order that temporarily suspends M.O.'s parenting time and makes changes to the parenting schedule, as well as other orders reflected in the 211 Report.

A. Facts

- [16] S.S. and M.O. are joint guardians of P. and D. During the relationship, S.S. was the primary caregiver for the children. M.O. struggled with substance use, including addiction to alcohol. During the relationship, M.O. would cycle in and out of phases of substance use. After separation, S.S. has maintained the role as primary caregiver. Meanwhile, M.O. continued to struggle with addiction, but states that, as of the date of hearing, he has maintained sobriety since June 11, 2022.

- [17] After the Separation Agreement was signed in 2017, M.O. experienced a relapse. During this period, he was charged and convicted with assault of his girlfriend in April 2018. He was incarcerated for eight months. M.O. also relapsed in 2022, and as a result, did not have parenting time with the children for several months.
- [18] In about November 2022, M.O.'s condition began to stabilize, and he requested a regular parenting schedule.
- [19] On April 17, 2023, the parties attended a judicial case conference, through which they were able to arrange additional parenting time with M.O. The new schedule involved alternating weekends with a mid-week visit. This schedule was followed until, as S.S. describes it, circumstances deteriorated significantly.
- [20] On July 23, 2024, the parties appeared before Dick A.J. on an application brought by M.O. for an interim parenting time schedule and various other orders. Associate Judge Dick granted a consent order, upon which M.O. gained additional parenting time on alternate Wednesdays overnight. The consent order further required the parties to obtain a s. 211 report, for which Dr. Bolgar was proposed by M.O. and agreed to by S.S. The parties were entitled to bring the issue of parenting time before the court for review following completion of the report.
- [21] In addition to S.S.'s expressed concerns about the impact of M.O.'s approach on the children's schedule and their relationship with S.S., and the disruptive effect of mid-week parenting exchanges, two specific events relevant to the deterioration of present parenting conditions were in evidence before me.
- [22] In October 2024, M.O. requested additional time with the children on his birthday. S.S. agreed on the condition she would have make-up time with them. Following the additional time with M.O, he refused to provide that make-up time.
- [23] On December 20, 2024, during a period in which the parties had agreed S.S. would have parenting time, M.O. pulled the children from school. He alleged that S.S. had abused the children the previous day, and raised those allegations with police and social services. He refused to return the children. M.O. communicated the substance of his allegation to Dr. Bolgar, and stated that on December 19, 2024, S.S. "got drunk" and pushed P. down the stairs, hit D. on the cheek, locked them in a dark room, and denied them the opportunity to call M.O. He repeated these allegations to police and the Ministry of Children and Family Development ("MCFD").
- [24] In her affidavit, S.S. attests these allegations are false. She does not deny she had a disagreement with the children on December 19, 2024. She describes events leading to a conflict with the children, resulting in P. kneeling S.S. in the groin, and her reflexively pushing him away, where he fell against stairs, not down them. She vehemently denies she abused or has been abusing the children and raises the concern that this false allegation is being advanced because M.O. does not want the 211 Report to be released. RCMP and MCFD have not communicated to S.S. respecting any ongoing investigation.

- [25] On December 22, 2024, Dr. Bolgar submitted the 211 Report, which included materials and interviews up to December 21, 2024.
- [26] Following an urgent application on December 23, 2024, Justice Morishita found there had been a wrongful denial of parenting time by M.O. and ordered the children be returned to S.S. Circumstances for the return of the children to S.S.'s care were set out in the order, and the parties were ordered to resume the schedule agreed to for parenting time after the holidays, with compensatory parenting time for S.S.
- [27] S.S. filed an application on January 8, 2025, seeking interim orders for implementation of various recommendations made by Dr. Bolgar in her 211 Report, which S.S. says pertain to the immediate wellbeing of the children. The orders sought include:
- a) an interim order pursuant to s. 40(3)(a) of the FLA, that S.S. will have all the s. 41 parental responsibilities for the children, pending the trial;
 - b) an interim order pursuant to s. 16.1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), that the children's parenting time with M.O. be suspended for 30 days;
 - c) an interim order pursuant to s. 16.1 of the Divorce Act that, following the 30-day suspension, a parenting schedule is implemented where the children spend every other weekend with M.O.;
 - d) an order pursuant to s. 224 of the FLA that M.O. attend an independent medical examination ("IME") with Dr. Maire Durnin-Goodman; and
 - e) an order pursuant to s. 224 of the FLA that M.O. immediately begin attending regular counselling.
- [28] S.S. also sought orders including:
- a) an order pursuant to ss. 40 and 222 of the FLA that M.O. direct the children not to call him while they are at school, and that if he receives a call from them, he directs it to S.S.;
 - b) an order that telephone and FaceTime communication orders made by Dick A.J. on July 23, 2024 (and amended by Justice Masuhara on November 4, 2024) be suspended pending the trial; and
 - c) an order pursuant to s. 222 of the FLA that a copy of the 211 Report be provided to the children's school.
- [29] M.O. opposed all of these orders on the basis that the 211 Report should not be accepted.
- [30] On March 17, 2025, I ruled as follows:
- a) On an interim basis, S.S. will have all the s. 41 parental responsibilities for the children, pending the trial.
 - b) For 30 days, M.O.'s parenting time is suspended.

- c) After 30 days, the parenting schedule is ordered to be modified such that the children will spend every other weekend with M.O.
- d) M.O. is ordered to commence and engage in regular counselling to address emotional regulation, distress tolerance and any other issues which will assist him in his parenting, including managing his addictions, if applicable. As recommended by Dr. Bolgar, M.O. is ordered to attend counselling at the Vancouver Dialectical Behaviour Centre. A copy of Dr. Bolgar's report will be provided to M.O.'s counsellor. The costs of counselling will be borne by M.O.
- e) M.O. is ordered to attend an IME with Dr. Durnin-Goodman to assess M.O. in respect of his alcohol use disorder or any other addictions. A copy of Dr. Bolgar's report will be provided to Dr. Durnin-Goodman. The parties will share the costs of the IME.
- f) M.O. is to direct the children not to call him from school, and if he does receive a call, he is to direct it to S.S.
- g) S.S. will provide a copy of the 211 Report to the children's school.
- h) Telephone and FaceTime communication orders made by Dick A.J. on July 23, 2024 (and amended by Masuhara J. on November 4, 2024) are amended by this order, pending the trial, as follows: following the 30-day suspension period, on alternate Wednesday nights, S.S. will facilitate a FaceTime call with M.O. at approximately 8:00 pm. If the parties agree, FaceTime calls may be scheduled on the other Wednesday nights. Given the concern expressed in the 211 Report about M.O.'s use of phone and FaceTime calls to interrogate the children, and intrude, control and judge S.S.'s parenting, M.O. is expressly ordered not to do so in scheduled FaceTime calls.
- i) S.S. will have costs of this application in any event of the cause.

B. Analysis

1. Material Change in Circumstances

- [31] The current parenting arrangement is reflected in an interim order. To vary an interim order, there must be a material change in circumstances, and a court must consider the consequence of leaving the change to be addressed at trial: *R.A.B. v. T.L.B.*, 2022 BCSC 2244 at para. 37. The July 23, 2024 order made by Dick A.J. also included a provision for leave to bring the issue of parenting time before the court for review after the completion of the 211 Report by Dr. Bolgar. S.S. submits there has been a material change in circumstances because the 211 Report indicated the children were at imminent risk of alienation.

[32] The guiding consideration is the best interests of the children. I find the best interests of the children are indeed engaged, and accordingly it is appropriate to make interim orders respecting parenting time, the conduct of parenting time, parenting responsibilities, and requiring M.O. to take certain steps to improve his ability to parent effectively and safely. I also conclude there has been a material change in circumstances, in that the status of the parenting arrangements has significantly deteriorated since the July 23, 2024 order.

2. Dr. Bolgar's Report

[33] As noted above, the parties obtained an order by consent on November 4, 2024, that pursuant to Rule 13-4(3) of the Supreme Court Family Rules, B.C. Reg. 169/2009, Dr. Ellie Bolgar shall prepare a full s. 211 report, for which the parties shall cooperate and share costs.

[34] The 211 Report states it was carried out pursuant to the parties' consent and agreement, and under s. 211 of the FLA. This provision requires the assessment of one or more of the following: the needs of the children; the views of the children; and each party's ability and willingness to satisfy the needs of the children. The 211 Report states that its goal is to provide psychological information to the parties, counsel, and the court relevant to the best interests of the children.

[35] The 211 Report was prepared with the benefit of:

- a) an assessment of each parent respecting their ability to exercise parental responsibilities;
- b) an assessment of the children respecting their needs and views;
- c) an assessment of family violence, variables affecting parenting, environmental contributions, conduct affecting the children's safety, security and well being; and
- d) an assessment of psychological dynamics and the parties' ability to cooperate on issues affecting the children.

[36] In carrying out the assessment, Dr. Bolgar considered:

- a) documents submitted by the parties, including materials prepared for litigation;
- b) telephone and in-person interviews with the parties;
- c) psychological testing;
- d) observations of the parties' parenting with the children in their residences;
- e) observations of children both at home and at Dr. Bolgar's office; and
- f) interviews with collateral contacts.

- [37] Dr. Bolgar's report conducts a thorough review of the relationships of the children with each of their parents, and considers numerous aspects of the parents' behaviour and its implications for the children's best interests.
- [38] In my observation, Dr. Bolgar does not sugar-coat her conclusions about either parent or the children. Neither S.S. nor M.O. is portrayed as perfect nor as villains. The children are depicted in a realistic light and understood within the context that they are being parented.
- [39] On the whole, I found the 211 Report to be balanced, measured, and appropriately concerned with the situation in which the children are currently being parented.

a) Dr. Bolgar's Observations

- [40] I rely on the following observations of the parties' parenting made by Dr. Bolgar in determining what recommendations should be applied on an interim basis. I am compelled to take these key observations seriously in assessing what is in the best interests of the children.
- [41] The 211 Report specifies that both parents love their children and present with positive qualities; both want the best for P. and D. and are committed to their well-being. It also notes that both parents have personal issues which have an impact on their parenting. While both parents struggle in their respective ways, it was clear from the 211 Report that the critical concern for the children's best interests stems from M.O.'s conduct and his ability to co-parent without undermining S.S. and damaging the children's relationship with her.

i. The Claimant

- [42] S.S. has been the primary parent throughout the children's lives. During M.O.'s absence due to addiction and incarceration, S.S. was solely responsible for all of the children's activities and care, and was financially, emotionally, and physically responsible for them. She has maintained a close relationship with the children until the last year.
- [43] S.S. presented as intelligent, kind and pragmatic. She presented as warm, caring and valuing harmonious relationships. She was cooperative and followed the process. She has at least an average level of intelligence with no indication of a thought disorder.
- [44] S.S. has relatively good insight into her own challenges and she appears to have adequate judgment. She exhibited anxiety associated with concerns about the children.
- [45] She is hardworking and high achieving. She has high expectations of herself and others. She tends to lack empathy for others' shortcomings in meeting those expectations. She is resilient, and does not harbour anger or resentment but focuses on future goals.
- [46] S.S. tends to be sensitive when unjustly criticized or blamed, and can be self-critical. Although she is assertive and stands up for herself, she prefers to avoid conflict and argument.

- [47] S.S. manifests some signs of trauma.
- [48] In parenting, S.S. takes an accepting approach to P. and D. and was attentive and sensitive to them. She used an authoritative parenting approach, used appropriate language, and demonstrated patience. The children enjoyed time with her and responded positively. S.S. is the stronger parent in terms of the children's need for stability. The children's safety in S.S.'s care is not a concern. She is more organized with their routine, and appears to be supportive of the children's relationship with their father.

ii. The Respondent

- [49] During the children's early years, M.O. struggled with addiction, was incarcerated, and was in treatment for periods of time. He did not have responsibility for the children during a significant period of time.
- [50] M.O. is charming and outspoken and makes a favourable impression. While he was cooperative, he was also controlling of the process and disregarded directions given to him respecting clear boundaries for communication. He tended to vociferously push his views and repeat himself. He presents as someone who badgers others through repetition, sarcasm and denigration when emotionally stimulated.
- [51] M.O. is of at least average intelligence without any indication of a thought disorder. However, he has poor insight into his own challenges. He tends to be unapologetic, and justifies his conduct due to his disability to avoid consequences. He presents as having rigid and inflexible views.
- [52] The information about M.O.'s occupation was contradictory: he reported that his full-time responsibility is to care for his children and his elderly parents. His sister disagreed and said that M.O.'s parents are self-sufficient.
- [53] M.O. expresses himself in a strong and outspoken manner without understanding the impression this may have on the children. He presents as resentful.
- [54] M.O. acknowledges that alcohol has caused problems in his life. He has used alcohol as a stress management tool, and it has caused interpersonal problems.
- [55] M.O. has been engaged in an ongoing campaign to paint S.S. as an inadequate parent and to alienate the children from her. He speaks negatively about S.S. to the children, and seems to encourage negative behaviour toward her. M.O.'s personality, strongly expressed opinions, rewards, and tendencies toward self-aggrandization leave P. with the impression that he must align with his father. D. has confusion around parental preference.
- [56] In his parenting, M.O. has a permissive style. Dr. Bolgar did not observe a structure being in place. M.O. adores the children, especially P., and is entertaining. M.O.'s parenting style disrupts the routine and structure established by S.S. M.O. tends to interrogate the children, intrude, control and judge S.S.'s parenting of the children during her parenting time.

iii. The Children

- [57] The 211 Report observes that the children are being negatively impacted by their parents' conflict. Dr. Bolgar made various observations regarding the effects of this conflict on the children, which cause her concern. These effects include signs of anxiety and apparent confusion about how to appropriately navigate their parental relationships.
- [58] Dr. Bolgar observed that the parents have different approaches to parenting with different routines and expectations. Dr. Bolgar noted a concern that the children seemed to be developing a relationship with their father that was focused on taking care of his needs and supporting his agenda to increase parenting time. Dr. Bolgar also observed that M.O.'s role modeling of angry comments and denigration of S.S. is having an effect on the children, and this is not in their best interests.
- [59] Dr. Bolgar noted concerning behaviours on the part of the children in relation to their mother. P. told Dr. Bolgar that his mother abused him, and presented with obvious struggle and avoidance of eye contact and responses that sounded rehearsed or orchestrated. He did not show emotion and looked blankly when saying that he did not want to live with his mother. D. communicated cheerfully that she never wanted to see her mother and reported she would not miss her, although she talked about positive experiences with her. D. expressed confusion about reporting violence by her mother and stated that she does not really understand what her father is asking from her. She said she is not afraid of her mother, but described instances of spanking. Dr. Bolgar reported that D. discussed telling her teacher and social worker that she is being hit by her mother, but stated that although it does not happen this was not a lie because she says what her father says to say.
- [60] The 211 Report explains that in their interviews, both children expressed they enjoy spending time with their father. Dr. Bolgar identified that P. tends to take on his father's views and behaviour through his sensitive nature and desire for a relationship with his father. He appears to avoid his father's pressure, anger and rejection by adopting his perspectives or not disagreeing with him. Both children also made comments in their interviews with Dr. Bolgar suggesting they had been coached by their father to make claims of abuse against S.S. While in my view this finding was notable, it was not over-emphasized by Dr. Bolgar. I observed that rather than fixing her opinions on individual comments or events, Dr. Bolgar's observations and recommendations appear to take a holistic approach based on all the information before her from all the various sources.

b) Conclusions

- [61] In summary, while Dr. Bolgar assessed both parents and identified that neither are perfect, her observations give rise to concerns about the children's best interests vis-à-vis M.O.'s parenting. In particular:

- a) The children are not alienated from either parent at this time, but the behaviour of M.O. puts the children at risk, particularly in respect of how he communicates about S.S. Of gravest concern, M.O. appeared to Dr. Bolgar to be on a campaign to paint S.S. as inadequate and to alienate the children from her.
- b) M.O. is not equipped with emotional regulation skills, and as a result he resorts to forms of manipulation, controlling behaviour, and threatening others. He does not appear to have insight into his behaviour, so he is not expected to change without intervention.
- c) S.S. presents as the stronger parent in terms of the children's need for stability, being better organized with their routine and supportive of their relationship with their father.

[62] Dr. Bolgar made a range of recommendations, some of which were pursued on the 211 Application. Dr. Bolgar's recommendations are summarized as follows:

- a) A detailed parenting plan, which does not increase M.O.'s parenting time at present due to a range of concerns.
 - b) Suspension of M.O.'s parenting time for a period of 30 days, followed by a schedule where M.O. spends every other weekend with the children.
 - c) Monitoring of M.O.'s condition by a physician addictions specialist.
 - d) That M.O. attend therapy at the Vancouver Dialectical Behaviour Centre for emotional regulation and distress tolerance.
 - e) That M.O. and the children attend therapy together to correct the children's negative perspective of S.S.
 - f) That the parties hire a parenting coordinator.
 - g) That the parties should work with a professional on co-parenting.
 - h) That the children should attend therapy.
 - i) That there should be consistent screen time between the homes, with parental controls.
 - j) That school breaks except Christmas breaks should be shared.
 - k) That S.S. should have all decision-making authority until M.O. has completed therapeutic intervention, and demonstrates he has ceased behaviours that harm the children.
 - l) That M.O. stop using phone and FaceTime calls to parent the children during S.S.'s parenting time.
3. Use of the 211 Report

- [63] A report made under s. 211 of the FLA can act as the court's eyes and ears and provide information that cannot be obtained by affidavit or viva voce evidence: *Arulsothynathan v. Ganeshalingam*, 2021 BCSC 946 at para. 58. These eyes and ears are intended to provide information that will guide the court in determining what is in the best interests of the children.
- [64] A court may implement recommendations made in a s. 211 report on an interim basis ahead of trial. The courts have identified certain considerations to assess whether doing so is appropriate, including those stated by Master MacNaughton, as she then was, in *M.D.L. v. P.T.M.*, 2012 BCSC 75 at para. 11, which include four specific considerations:
- a) the time until trial;
 - b) whether there are concerns about the s. 211 report and whether those concerns are serious;
 - c) whether the s. 211 report proposes a change to the status quo and the significance of that change; and
 - d) whether there are other concerns about the reasonableness of the recommendations and the children's best interests.
- a) Time to Trial
- [65] The trial is not currently anticipated to be heard until June 2026, which is 14 months away. Given the time until trial, the seriousness of the concerns raised about the potential for alienation of the children from S.S. require attention at an early stage. It would not be in the best interests of the children to put this matter over to trial, even though cross-examination on the 211 Report may be of assistance. This is, in the entire context, simply too long a period of time during which the children and their relationships with their parents may face harm.
- b) Concerns with the 211 Report
- [66] M.O. raises a range of concerns respecting the 211 Report. M.O. states in his application response that a response report would be sought to critique the 211 Report, but that this has not taken place. At the hearing, I confirmed that counsel for M.O. was not applying to adjourn the application on this basis and was willing and prepared to address the application.
- [67] At the hearing, I was advised that M.O. intended to rely on a responsive "report" authored by his legal counsel. I concluded that a document drafted by counsel, although titled as a "response report", could not be tendered as expert opinion, but I would consider the document a statement of M.O.'s arguments about what weight if any to afford the 211 Report. I have done so here.

- [68] In objecting to reliance on the 211 Report and its recommendations, M.O. argues he was subjected to bias and prejudice in the assessment, and that Dr. Bolgar exhibited favoritism toward S.S. M.O. has asked me to conclude the 211 Report is biased on its face, and accordingly its recommendations should not be given effect. M.O. further argues there are a range of methodological errors evident in the report. I address these concerns in turn.
- i. Bias: Drug Testing, Counselling, and IME
- [69] M.O. asserts that Dr. Bolgar was biased for demanding that M.O. re-do drug testing. He says she insisted on further testing despite three negative tests for drugs or alcohol. The application response states, "this is a profound degree of bias and dislike by Dr. Bolgar, and she made no attempt to conceal it." M.O. also asserts that Dr. Bolgar was biased for insisting he undergo addiction counselling and an IME.
- [70] Upon review of the 211 Report, I do not find there is bias inherent in Dr. Bolgar's request that M.O. complete drug testing through a particular process or standard. Dr. Bolgar requested the testing and M.O. agreed. The need for a further test was to meet the standard of a forensic assessment which includes a photograph and identification.
- [71] Additionally, S.S. notes that Dr. Bolgar did not insist on addiction counselling but made a recommendation of monitoring through an IME and to attend counselling for emotional regulation and distress tolerance. She did so with knowledge of negative drug tests.
- [72] I accept that Dr. Bolgar was not aiming to overburden M.O. with testing requirements but attempting to meet a testing standard accepted in her professional context. It does not appear to me that M.O. was being persecuted for his history of alcohol addiction; rather, Dr. Bolgar was attempting to respond to her observations with practical steps, including counselling, to support M.O. in his success as a parent.
- [73] These circumstances do not reveal bias or dislike in Dr. Bolgar's treatment of M.O., including in the recommended drug and alcohol testing. I cannot conclude the requests and standards applied by Dr. Bolgar appear to reflect any bias or animus.
- ii. Bias: Claimant's Use of Alcohol
- [74] M.O. asserts that Dr. Bolgar ignored S.S.'s abuse of alcohol, and that this reveals bias.
- [75] In my review, the 211 Report does assess S.S.'s alcohol use and her attitude towards drinking, which includes a level of awareness about alcohol consumption. S.S.'s affidavit evidence states she drinks alcohol in front of the children because in her view it is important for them to understand that it is possible to consume some alcohol in a safe and healthy way.

[76] S.S. argued there was no evidence of her misuse or overuse of alcohol, based on the information generated in the 211 Report process, and there was accordingly nothing to report upon. I agree. Other than M.O.'s assertions, which are not direct observations, there is no evidence that S.S. misuses alcohol. It is clear from Dr. Bolgar's assessment she did not accept M.O.'s allegation that S.S. uses alcohol in a manner that is problematic or that affects the best interests of the children.

[77] I cannot conclude the 211 Report is biased for failing to consider S.S.'s use of alcohol.

iii. Bias: Claimant's Physical Violence

[78] M.O. asserts Dr. Bolgar ignored S.S.'s physical violence and the December 19, 2024 incident. In my review of the 211 Report, I found the allegations respecting events on December 19, 2024 were explored and investigated by Dr. Bolgar, and I cannot conclude that Dr. Bolgar ignored this important event.

[79] Dr. Bolgar concluded, on her review of the information and interviews she conducted, she did not have any concern about family violence on the part of S.S. This conclusion appears to me to be rationally connected to the information she unearthed from the parties as well as collateral sources, and based on a professional assessment of the interviews of the children.

[80] In fact, the evaluation of the alleged December 19th incident brought to light some of the concerns raised by Dr. Bolgar about M.O.'s conduct. Dr. Bolgar records she considered M.O.'s allegations about S.S.'s alleged corporal punishment, and the events M.O. characterized as child abuse and which he reported to MCFD. Dr. Bolgar came to a different conclusion than M.O. about the allegation, and this resulted in some observations about the dynamics between the parents and the children. Dr. Bolgar's observations were based on information from M.O., from S.S., and from her interviews with the children.

[81] Dr. Bolgar is in a particularly helpful position to be able to attempt to understand the information being conveyed by the children, having observed them in a number of contexts, and seen how their statements are conveyed. On this matter, I am prepared to give Dr. Bolgar's analysis weight as it provides context from both the parties, the children, and other third-party witnesses.

[82] I am concerned that M.O.'s approach to this serious matter and his critique of the 211 Report has been to advance serious allegations lacking a sound factual foundation. For example, in his application response, M.O. states: "Dr. Bolgar's s. 211 report ignored the fact that the Children have been physically abused by S.S. for months, as observed by third parties." Counsel advanced this submission at the hearing. I advised counsel this was a critically important issue for me to understand and address, as it is central to my being able to reach a decision that advances the best interests of the children. I urged counsel to provide me with all available information on this point. Counsel was unable to point me to any evidence of S.S. having physically abused the children over a period of months, or that such was

observed by third parties.

- [83] Instead, counsel referred me to medical records of the children's family doctor, documenting a visit by the children with M.O. which contains notes about bruises from S.S. On their own, however, these records do not demonstrate that S.S. abused the children, nor do they demonstrate a pattern of abuse over the course of months, nor do they illustrate that this conduct was observed by third parties. While the record of a physician noting that the children had reported the bruises being from their mother must be taken very seriously, it must also be considered alongside all of the other evidence before me. That evidence includes the 211 Report which investigated this very situation and interviewed a range of individuals regarding the claims, including the children and other parties who directly observed the family. The 211 Report specifically documents that the children appeared to have been coached by M.O. to make harmful claims about S.S.'s conduct.
- [84] M.O. advanced very serious allegations against S.S. The fact that counsel was unable to support the statement claiming ongoing, months-long abuse by S.S., observed by third parties, suggests that M.O.'s claims are strategically overstated. This affects the credibility of M.O.'s objections to the report, and is unhelpful to the court.

iv. Other Methodological Errors Including Use or Misuse of Information

- [85] M.O. makes a number of assertions respecting the failure of Dr. Bolgar to consider issues such as S.S. taking the children to school late, being involved in a car accident, not conducting sufficient collateral interviews, relying on other collateral interviews, and asking questions or conducting observations improperly.
- [86] In response, S.S. argues that each of the concerns respecting use of information in the 211 Report are simply M.O.'s disagreement with the results, masked in methodological objections.
- [87] In my review of the 211 Report including its methodology, I do not observe that its findings are undermined by procedural deficiencies. A s. 211 report is not required to be perfect, and there is no standard protocol that must be met for such a report. I consider the comments of Justice G.P. Weatherill who provided the following helpful reminder of the realities of s. 211 reports in *L.C.T. v. R.K.*, 2015 BCSC 2378:
- [418] The professionals who are tasked with the responsibility of preparing these reports are experienced and qualified. Time and money does not permit these reports to be, and they are not intended to be, exhaustive and detailed. In a perfect system where time and cost was no object perhaps more interviews, studies, tests and assessments could be done. When dealing with questions, such as here, of whether one parent should be granted supervised or unsupervised access to children, one parent will inevitably be unhappy with the recommendations of the author of a s. 211 report.

[419] The standard of preparing these reports is not perfection. There is no protocol or checklist that must be exactly followed in every case, regardless of the circumstances or the individuals involved such that failing to do so will result in the report being rendered "insufficient and inadequate." The authors of the s. 211 reports must be free to use their education, experience and expertise to conduct the assessments with an eye to the objective of assisting the courts in determining what is in the children's best interests.

[88] I have considered each argument alleging that Dr. Bolgar's approach was inappropriate, but I cannot conclude that any of these undermine the usefulness of the report for the present purpose of determining whether the best interests of the children are engaged in the current parenting arrangements and whether these should be altered. I am unable to conclude the choices made by Dr. Bolgar in conducting the background work supporting the report were inadequate, incorrect, or biased. In this case, I am of the view that the report is methodologically satisfactory.

v. Bias: Characterizations and Conclusions Drawn

[89] M.O. asserts that Dr. Bolgar was biased because of how she characterized M.O., and that she drew problematic conclusions from the testing she employed. My impression of the report was that Dr. Bolgar took a careful and balanced approach to the exercise, and the conclusions were supported by the interviews and assessments she conducted, along with the documentary evidence reviewed. S.S. argued that Dr. Bolgar was in fact conservative in her broad conclusions and expressed that test results are not determinative; nor did she apply labels to the parties. I agree, it was appropriate for Dr. Bolgar to take a cautious approach to her conclusions, and to ensure her assessment was approached with an even hand, without labeling or stereotype.

[90] I am unable to find that the conclusions reached in the report reflect bias.

vi. Conclusion Regarding Alleged Deficiencies

[91] Based on the information before me, I cannot find the report to be biased or methodologically unacceptable. This conclusion does not limit M.O.'s right to cross-examine Dr. Bolgar at trial, if necessary.

c) Change to the Status Quo

[92] It also figures into my analysis that the overall change to the current parenting arrangement (apart from the 30-day suspension) is modest. On an ongoing basis, the proposed schedule changes the status quo by two overnights per month. This change is not drastic, and I consider it appropriate in the circumstances. This is also not a case in which M.O. seeks 50/50 parenting time. The proposed interim schedule is not precisely what M.O. seeks, but it is not radically different. The best interests of the children cannot be overridden by a commitment to the status quo.

d) Concerns Respecting the Recommendations

[93] M.O. raises concerns about Dr. Bolgar's recommendations being punitive. I cannot agree that the recommendations are punitive or disproportionate. Each recommendation is linked to information and observations relating to the children's best interests. The 211 Report did not substantiate M.O.'s view that additional parenting time by M.O. would be in the children's best interests. This does not mean that the report and its recommendations are punitive toward M.O.; to the contrary, the 211 Report recommends steps that would put M.O. in a stronger position as a parent to fulfill that role to a greater capacity.

[94] There is no question that both parents having a significant role in the lives of the children is a priority. This priority must be advanced with the best interests of the children at the forefront, and in this case that requires attention to the concerns raised in the 211 Report about the risk of harm.

4. Conclusions on Use of 211 Report in Making Interim Orders

[95] In application of the considerations set out in *M.D.L. v. P.T.M.*, examined above, it is my view that it is appropriate and consistent with the best interests of the children to implement certain recommendations in the 211 Report on an interim basis. I am not of the view that the nature of the concerns raised are such that the 211 Report should not be relied on to implement interim recommendations.

[96] On a *prima facie* basis, I cannot find the 211 Report, viewed by an informed person, realistically and practically, was infused by conscious or unconscious bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20. Instead, I found the report to be of assistance because it presented a realistic portrayal of a family undergoing a very difficult situation and managing it with varying degrees of success. The family is divided by the parties' separation, but joined permanently by their children. There is clear friction in that reality. Each party has different degrees of capability in managing their reactions to difficult situations and with communicating appropriately about them. I found the 211 Report not to be biased but illuminating in that regard, depicting the difficulties each party has with this ongoing process of family life after divorce. What I am compelled to take from the 211 Report is not that one party is being treated unfairly or in a biased way, but that one party is having a greater struggle managing how to behave appropriately in relation to the children, and this is risking harm to the children and their relationships with their parents.

[97] While the report is contested, and M.O. suggests that a critique report may be obtained, this does not lessen the validity of the 211 Report: *Arulsothynathan* at para. 57. The fact that M.O. disagrees with the report and asserts his wish to cross-examine on it, does not mean I am compelled not to consider it.

[98] In *Arulsothynathan* at para. 57, Justice Forth stated that the cross-examination of the author of a s. 211 report is the preferred method for testing conclusions in that report. Ultimately, the trial judge can be anticipated to hear that cross-examination. They may then decide if M.O.'s concerns about the 211 Report have merit and how much weight to place on that

report in the decisions to be rendered at trial. That judge may reach different conclusions than I do given the information before them at that time. While it may be preferable to employ procedural opportunities such as cross-examination on the 211 Report to obtain a full picture including objections to the report, it is also permissible, depending on the circumstances, to rely on a s. 211 report in the face of objections. Here, where there are aspects of the report that are not seriously contested, in particular the documented interactions between parents and children, and where the report raises significant concerns about a child's safety, I conclude it is appropriate to rely on the 211 Report: K.S. v. H.S., 2023 BCSC 888 at para. 49.

[99] I do not accept that the flaws argued by M.O. undermine the validity or usefulness of the report for its interim use. I am prepared to give the 211 Report weight on this application for interim orders, and find its recommendations should be given due consideration.

5. Interim Order

[100] I rely on the 211 Report for Dr. Bolgar's observations of the interactions between the parents and children, information generated from the children, her views of the parents' parenting strengths and weaknesses, and the recommendations connected to those observations. I share the concerns expressed in the 211 Report about how M.O.'s conduct risks harm to the children's best interests. I have accepted certain recommendations of Dr. Bolgar and ordered their implementation where they flow from the parents' and children's interactions, and where I agree on their soundness given the information recorded in the 211 Report. Fundamentally, I accept Dr. Bolgar's concern, based on her observations of the interactions between the parents and the children, there is a significant risk of alienation of the children from their mother as a result of the conduct of their father.

[101] I have determined the following recommendations will be implemented. These were ordered as of March 17, 2025.

[102] On an interim basis, S.S. will have all the s. 41 of the FLA parental responsibilities for the children, pending the trial. I make this order pursuant to the recommendation of the 211 Report. The s. 41 responsibilities have primarily been undertaken by S.S. since the separation, and she is anticipated to continue to provide a safe and stable living situation. In the circumstances it is preferable and in the best interests of the children for her to maintain sole s. 41 responsibilities on an interim basis.

[103] I have ordered that for 30 days, M.O.'s parenting time is suspended. I accept this recommendation from the 211 Report as being necessary to permit the children to re-establish a positive connection with S.S. The suspension is a meaningful departure from the status quo, but in place for a short period of time. In my view, it is justified in circumstances identified as giving risk to imminent harm. I also view this period as an opportunity for M.O. to commence the counselling as recommended, and which I accept is in the children's best interests.

- [104] I have ordered that after 30 days, the parenting schedule is to be modified such that the children will spend every other weekend with M.O. I make this order to address what has been identified as a critical point in the parties' parenting schedule. On mid-week transitions, the children struggle with the change in households and parenting approaches. This causes rupture and conflict, and brings instability to the children's school week and their regular activities. This is a modest interim change to the parenting arrangement, and it remains the long-range goal for the children to have a meaningful, consistent and stable relationship with M.O. I accept the conclusion of the 211 Report that increased parenting time for M.O. is not in the children's best interests at this time.
- [105] I have ordered pursuant to s. 224 of the FLA that M.O. will commence and engage in regular counselling to address emotional regulation, distress tolerance and any other issues which will assist M.O. in his parenting, including managing his addictions, if applicable. As recommended by Dr. Bolgar, M.O. is ordered to attend counselling at the Vancouver Dialectical Behaviour Centre. A copy of Dr. Bolgar's report will be provided to M.O.'s counsellor. The costs of counselling will be borne by M.O. This order is intended to respond to M.O.'s needs identified in the 211 Report, so he has an opportunity to achieve awareness and develop tools that will provide him with a stronger foundation in parenting, and prevent ongoing behaviours that diminish the children's relationship with S.S. This is intended to put M.O. in a better position to maintain an ongoing, safe and secure relationship with the children.
- [106] I have further ordered pursuant to s. 224 of the FLA that M.O. is to attend an IME with Dr. Durnin-Goodman to assess M.O. in respect of his alcohol use disorder or any other addictions. A copy of Dr. Bolgar's report will be provided to Dr. Durnin-Goodman. The parties will share the costs of the IME. This order is to enable M.O. to have in place the tools and supports he needs to sustain his ongoing efforts to overcome alcoholism, a process for which he is to be commended for engaging in and committing to. This too is intended to put M.O. in the best place possible to parent his children in a positive and healthy manner including in relation to S.S.
- [107] I have ordered pursuant to ss. 40 and 224 of the FLA that M.O. is to direct the children not to call him from school, and if he does receive a call, he is to direct it to S.S. This order is made because the 211 Report observes that the children's tendency to call M.O. from school has caused considerable disruption and undermines S.S.'s parenting during her parenting time.
- [108] I have also directed that S.S. will provide a copy of the 211 Report to the children's school. This information-sharing will assist in ensuring that adults who are responsible for the children have the necessary information to ensure their best interests are being pursued.
- [109] I have also ordered that telephone and FaceTime communication orders made by Dick A.J. on July 23, 2024 (and amended by Masuhara J. on November 4, 2024) are amended, pending the trial, as follows: following the 30-day suspension period, on alternate Wednesday

nights, S.S. will facilitate a FaceTime call with M.O. at approximately 8:00 pm. If the parties agree, FaceTime calls may be scheduled on the other Wednesday nights. Given the concern expressed in the 211 Report about M.O.'s use of phone and FaceTime calls to interrogate the children, and intrude, control and judge S.S.'s parenting, M.O. is expressly ordered not to communicate in this manner in scheduled FaceTime calls.

[110] I have made this order respecting FaceTime calls because I am not willing to conclude that M.O. should not have any access to the children during the week, and because the removal of the Wednesday overnight parenting time is a meaningful change. While an on-line visit is not equivalent, if M.O. can conduct these calls appropriately, they will be beneficial to all involved.

[111] I have also ordered that S.S. will have costs of this application in any event of the cause, and I do so because S.S. achieved considerable success in obtaining the orders sought.

IV. Application to Strike the Counterclaim due to Statutory Time Limit

[112] The Limitations Application was brought by S.S. to strike aspects of M.O.'s amended counterclaim as being out of time. This application is fundamentally intertwined with the Separation Agreement Application, the merits of which I determined were not suitable to be addressed summarily. The outcome of the Limitations Application is determinative of whether the merits of the Separation Agreement Application can proceed because the former application answers the question of whether the substance of the latter application has been brought out of time.

A. Facts

1. Context of the Separation Agreement Dispute

[113] The evidence before me discloses the following salient and generally uncontroversial facts:

- a) The parties were married September 13, 2003.
- b) The parties separated in April 2017 and divorced in 2018.
- c) The parties signed a Separation Agreement dated May 11, 2017, signed May 15, 2017.
- d) In making the Separation Agreement, S.S. was represented by experienced family law counsel, and M.O. received independent legal advice.
- e) M.O. received independent legal advice from an individual who was not involved in the contracting process, who was not a family law or contract lawyer, and who was paid for by S.S.
- f) The Separation Agreement deals with assets of the marriage and the parties' intentions for property division.

- i. The agreement does not describe two properties identified by M.O. which he states were purchased in full by D.D. Ltd. S.S. says these are assets of D.D. Ltd., which were disclosed and the subject of the negotiated agreement.
- ii. The agreement does not describe two numbered companies. M.O. was a director of one of these companies. Both companies were vehicles for the purchase of assets that were disclosed and the subject of the agreement.
- g) M.O. experienced serious alcohol addiction from 2012-2022.
- h) M.O. attended numerous inpatient rehabilitation programs until 2022.
- i) M.O. has been unwaveringly sober since he commenced his last rehabilitation program on June 11, 2022, which finished August 8, 2022.

2. Procedural Background

[114] M.O.'s challenge to the Separation Agreement is raised in two places.

[115] First, M.O. filed an amended counterclaim on October 23, 2023 (the "Amended Counterclaim"). In the Amended Counterclaim, he alleges the Separation Agreement should be set aside. The original counterclaim, filed on December 22, 2022, (the "Original Counterclaim") had sought to enforce the Separation Agreement. S.S. asserted in her amended response to the Amended Counterclaim that the pleading was time barred under the FLA.

[116] Second, on August 16, 2024, M.O. filed the Separation Agreement Application under s. 93(3) of the FLA. An application under s. 93 is the appropriate process to seek to set aside a separation agreement: *Halliday v. Halliday*, 2015 BCCA 82 at para. 59.

[117] In the application, M.O. argued the Separation Agreement should be set aside because of each of the factors identified in s. 93(3). In particular, he alleges:

- a) S.S. failed to disclose significant assets;
- b) S.S. took improper advantage of M.O. because of his vulnerability, ignorance, need and distress;
- c) M.O. lacked the required understanding of the consequences of the Separation Agreement due to lack of representation and defective legal advice;
- d) S.S.'s conduct has made the Separation Agreement voidable, as she had not complied with the contract;
- e) the contract was unconscionable;
- f) misrepresentations were made; and
- g) M.O. was under undue influence at the time of the Separation Agreement's creation.

- [118] M.O. raised the issue of the statutory time limit for an application to set aside a Separation Agreement. He argued that the time did not begin to run until August 2022 because of his struggle with addiction.
- [119] On August 23, 2024, S.S. responded to the s. 93(3) application on its merits. She argued the matter is not suitable for summary determination, and if it is addressed summarily, the order should not be granted. S.S. raised the issue of limitations and argued the running of time should not be suspended by s. 198(5) of the FLA respecting any of the grounds on which M.O. seeks to set aside the Separation Agreement.
- [120] On August 20, 2024, S.S. made the Limitations Application to strike the property claims in M.O.'s Amended Counterclaim for having been brought outside of the statutory limitation period.
- [121] S.S. submits that after the parties entered into the Separation Agreement on or about May 15, 2017, they both relied on its terms, and M.O. sought to confirm those terms in the Original Counterclaim. M.O. filed his Amended Counterclaim on October 23, 2023, being more than six years after the Separation Agreement was made.
- [122] On August 22, 2024, M.O. filed a response to the Limitations Application, arguing the running of time was suspended. In this response, M.O. referred to s. 198(5) of the FLA and characterized his rehabilitation from alcohol use disorder as a prescribed process. M.O. asserted he was in inpatient rehabilitation for periods of time from 2012 to 2022 and attested that, until he ultimately became sober in 2022, he experienced serious alcohol addiction. In argument, M.O.'s central submission was that his addiction to alcohol limited his ability to know the grounds supporting a challenge to the Separation Agreement.

B. Analysis: Limitations Application

- [123] Both the Separation Agreement Application and the Limitations Application relate to the Separation Agreement and its validity, and both may be determined by whether the challenge to the Separation Agreement is brought out of time. Over the course of the hearing, I effectively merged the two applications, and then bifurcated to address the limitations question first as it has the potential to dispose of both. If the challenge to the Separation Agreement is brought out of time, the Separation Agreement Application cannot proceed, and the pleading must be struck. If it is not out of time, the pleading can remain in place, and the substance of the Separation Agreement Application can be addressed at trial, as I have concluded would be suitable.
- [124] In summary, the following issues arose on the two applications and responses, all of which were argued before me:
- a) Question 1: Should the substance of the Separation Agreement Application, being whether the Separation Agreement should be set aside on the grounds listed in s. 93(3), be addressed summarily?

- b) Question 2: Should the limitation issue, raised in both the response to the Separation Agreement Application and in the Limitations Application, be addressed summarily?
 - c) Question 3: Does s. 198(3) of the FLA bar the Separation Agreement Application as being out of time?
 - d) Question 4: If so, should the property claims in the Amended Counterclaim, which advocate for setting aside the Separation Agreement, be struck as an abuse of process?
1. Question 1: Suitability of the Separation Agreement Application for Summary Determination

[125] Following the parties' arguments, I concluded the merits of the s. 93(3) Separation Agreement Application were not suitable for summary disposition, given the nature of the disputes and contradictions in the evidence, particularly given M.O.'s assertion that he wished to rely on expert evidence of a handwriting specialist which had not been served in time.

[126] I echo the Court of Appeal in Halliday, where they state:

[61] Given the numerous factual issues that will almost always be in play on such applications, it is most difficult to envision many circumstances in which a contested application to set aside or replace an agreement filed under R. 2-1 could be determined by way of a summary application.

[127] Accordingly, I found the merits of the Separation Agreement Application could not be determined summarily in this case. Whether they should be addressed at trial is subject to my conclusion on the Limitations Application.

2. Question 2: Suitability of the Limitations Application for Summary Determination

[128] The parties agreed that the question of whether portions of M.O.'s Amended Counterclaim should be struck as being time barred was suitable for summary disposition, being a question that can be determined based on the material before me on this application. While there are issues of credibility in the claims themselves--that is, whether the Separation Agreement should in fact be set aside--those disputed matters do not bear on the limitations question. The parties did not argue that any facts pertaining to the limitation issue could not be ascertained fairly on the record before me.

[129] This Court in Townshend v. Abbott, 2021 BCSC 1600 at para. 42 concluded that a claim to set aside a separation agreement may be summarily dismissed due to being time-barred. Here, as in Townshend, the issue of whether or not the running of time for M.O. to set aside the Separation Agreement was postponed can be fairly addressed on the evidence before the Court.

[130] In Halliday, the Court concluded the following (though without deciding the limitation issue):

[66] in most cases it will be exceedingly difficult, given the numerous factors that the court is directed to consider to determine in advance of the hearing on the merits, when an applicant first discovered or reasonably ought to have discovered that he or she had grounds for making the application.

[131] Here, the parties agree the necessary facts are available in the affidavits before me to determine when M.O. knew or reasonably ought to have known the facts underlying the application.

[132] I therefore conclude that the issue of whether the pleading is time-barred or whether the limitation period is extended pursuant to s. 198(5) is suitable for summary resolution and it is just to resolve it in that manner.

3. Question 3: Application of the Statutory Limitation Period to the Separation Agreement Application

[133] I find that the Separation Agreement Application is brought out of time. To the extent there is a question of whether the property claims in the Amended Counterclaim were brought in time, I also conclude they were not.

[134] The relevant dates of the Separation Agreement and filings are as follows:

- a) The Separation Agreement was made on or about May 15, 2017;
- b) On December 22, 2022, M.O. filed the Original Counterclaim in which he sought to have the terms of the Separation Agreement confirmed;
- c) On October 23, 2023, M.O. filed the Amended Counterclaim in which he requested that the Separation Agreement be set aside; and
- d) On August 16, 2024, M.O. filed the Separation Agreement Application seeking to set aside the Separation Agreement.

[135] On its face, the Amended Counterclaim's request to set aside the Separation Agreement is made more than three years after the limitation period expired. The Separation Agreement Application was brought more than four years after the limitation period expired. Accordingly, the question before me is whether the two-year limitation period was suspended or extended for the reasons articulated by M.O.

a) Law Respecting Limitations Applicable to Separation Agreements

[136] I acknowledge that the parties argued the Limitations Application based on whether the Amended Counterclaim was filed in time, as opposed to whether the Separation Agreement Application was. Given the language of ss. 93(3) and 198(3) of the FLA, I have concluded that the proper assessment is whether the Separation Agreement Application was made in time.

[137] Under the FLA, a party may apply to set aside a separation agreement in the circumstances listed in s. 93(3), or if the court is satisfied that the agreement is significantly unfair based on the considerations in s. 93(5). Section 93 stipulates:

Setting aside agreements respecting property division

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[Emphasis added]

[138] The FLA provides a statutory limitation period for an application under s. 198(3), and identifies the circumstances that suspend the running of time for the limitation:

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
 - (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
 - (ii) an order is made declaring the marriage of the spouses to be a nullity, or
 - (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
- (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
- (4) The time limits set out in subsection (2) do not apply to a review under section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].
- (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in
 - (a) family dispute resolution with a family dispute resolution professional, or
 - (b) a prescribed process.

[Emphasis added]

[139] The prescribed processes identified in s. 198(5) are those set out in the Family Law Act Regulation, B.C. Reg. 347/2012, s. 25.1:

25.1 The early resolution requirements described in rule 10(a), (c), (d) and (e) of the Provincial Court Family Rules are prescribed processes for the purposes of section 198(5)(b) of the Act.

[140] In *Halan-Harris v. Blain*, 2023 BCSC 2128, Justice Forth notes that the early resolution processes described in the Provincial Court Family Rules are the only prescribed processes that apply to suspend the time limit in s. 198(3) of the FLA:

[62] I also find that s. 198(5)(b) does not apply to suspend the time limit. Counsel made no specific submissions on how the parties were engaged in a prescribed process beyond pointing out that they have been engaged in litigation. The only prescribed processes for the purposes of s. 198(5)(b) are set out in s. 25.1 of the Family Law Act Regulation, B.C. Reg.

347/2012. They are the early resolution requirements described in ss. 10(a), (c)-(e) of the Provincial Court Family Rules, B.C. Reg. 120/2020. There is no evidence the parties engaged in the prescribed early resolution processes. [emphasis added]

[141] Additionally, the Court of Appeal in Halliday concludes:

[38] Section 198(3) concerns applications where the parties have entered into an agreement respecting property or spousal support. In those situations, if a party seeks to set aside the agreement or replace the agreement with an order under Part 5, 6 or 7 of the FLA, the application must be brought within 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application. (underline emphasis in original; bold emphasis added)

[142] Section 198(3) says that an application must be brought within two years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application. I do not read the FLA as providing that a pleading announcing that a separation agreement is in issue satisfies the need to bring an application under s. 93(3), which is the proper procedure and what is contemplated in s. 198(3). Neither party provided support for this construction. This interpretation of ss. 93(3) and 198(3) would in my view be inconsistent with the spirit of the legislation, which aims to provide some certainty to the parties, and to protect properly negotiated separation agreements, on which parties are relying, from undue or untimely challenges and multiple proceedings.

[143] Accordingly, I find that the question before me is: was the application, filed on August 16, 2024, brought within two years of when M.O. knew or ought to have known the grounds for the application?

[144] I do not perceive any prejudice to the parties to my proceeding on this analysis, given that the arguments on the relevant bases for suspension of time would have been the same whether the time limit was for the pleading to be made or the application to be brought.

[145] I would in any event come to the same conclusion whether the correct measure was the date of the prescribed s. 93(3) Separation Agreement Application or the date of the Amended Counterclaim, as I conclude that the elements of the Amended Counterclaim seeking to challenge the Separation Agreement were also brought out of time.

b) The Respondent's Amended Counterclaim and the Separation Agreement Application

[146] The Amended Counterclaim (filed October 23, 2023) pleads that the property issues addressed in the Separation Agreement (signed May 15, 2017) should be set aside. The Separation Agreement Application (filed August 16, 2024) pursues this aim.

[147] In order to satisfy s. 198(3), the Separation Agreement Application made under s. 93(3)[1] would have to have been brought by May 15, 2019, unless the time limit in that provision were extended. In my view, M.O. would have to demonstrate the running of time was suspended until August 16, 2022, being two years prior to the filing of the Separation Agreement Application.

i. Arguments on Extension of the Limitation Period

[148] M.O.'s position is the limitation period did not start to run until several years following the making of the Separation Agreement, and his Settlement Agreement Application was made in time. He advances several arguments in this respect.

[149] S.S. submits that M.O. has not provided any tenable reason why the time limits should not apply to bar M.O.'s attempts to set aside the Separation Agreement.

[150] I discuss and assess here each category of argument raised by M.O. for extension of the s. 93(3) limitation period.

(1) Announcement of Knowledge in Pleading

[151] M.O. suggests the limitation period commenced on filing the counterclaim, because that was the moment when he clearly had knowledge of the relevant facts. He says that since only a year has passed since the filing of the Amended Counterclaim, he is well within the limitation period to bring the Separation Agreement Application.

[152] While the fact of the filing may be evidence of actual knowledge, it does not assist M.O. in respect of when his knowledge of the grounds of the application should be imputed. I cannot accept, in the context of all the information before me, that the date of filing the Amended Counterclaim could stand as the starting point for knowledge of the grounds of the application, and I do not accept this bare assertion which is made without any further supporting evidence. To accept this argument also risks circumventing limitation periods, undermining the legislature's intent.

(2) Prescribed Processes

[153] M.O. asserts that s. 198(5) applies to suspend the running of time during periods in which he was in rehabilitation, and says he was engaged in inpatient rehabilitation on and off from 2012 until August 8, 2022. M.O.'s evidence is that he has been continuously sober since the beginning of his last session starting June 11, 2022. He argues that disability rehabilitation is a prescribed process under the FLA. He also argues the parties' litigation at the BCSC is itself a prescribed process.

[154] I am persuaded the only prescribed processes that qualify for suspension of time limits under s. 198(5) are early resolution processes under the Family Law Act Regulation: Halan-Harris at para. 62. I cannot conclude that being engaged in litigation will satisfy 198(5): it is a process, but not a prescribed one. Similarly, being engaged in rehabilitation is a process, and an important one, but it has not been identified by the legislature as a prescribed

process for the purpose of extending a limitation period, and I have not been provided with any reasoned argument why I should interpret the provision to include rehabilitation, and if so, what parameters would apply to that category of process.

(3) Property Rights Not Vested

[155] M.O. further argues the limitation period has not begun to run because the property rights contemplated in the Separation Agreement have not vested in M.O. I cannot agree. M.O.'s property rights vested at the time of the separation and the Separation Agreement in 2017: *Bingham v. Bingham*, 2023 BCCA 69 at para. 47. Accordingly, this argument provides no assistance to M.O. in extending the limitation period.

(4) Inability to Know Grounds for Application Due to Addiction, Intoxication, and Rehabilitation Efforts

[156] M.O.'s most forceful argument for postponing the limitation period generally is that he was in the grips of addiction at relevant times, which meant he was unable for those periods to know (or be imputed to know) any of the grounds to set aside the Separation Agreement.

[157] I cannot accept this position for two reasons.

[158] First, I find that on this Limitations Application I must take M.O.'s evidence at its highest. Counsel for S.S. agreed this was appropriate. I take this task to require accepting the evidence on its face and giving it weight but not making leaps of logic or additional inferences from the evidence, even if those leaps are beneficial to M.O.'s position.

[159] Counsel for S.S. submitted the Court could take M.O.'s evidence at its highest by excluding from the time elapsed all the days M.O. spent in rehabilitation. This approach would mean the running of time is paused for 657 days after the signing of the Separation Agreement. On this calculation, M.O. would have filed the Amended Counterclaim nearly a year after the time limit expired, and the Separation Agreement Application another 10 months after that. This adoption of M.O.'s argument that time is suspended while in rehabilitation and treatment programs accordingly does not assist M.O. in overcoming the time limit.

[160] I note that even if I were to accept that M.O. did not have capacity to know or investigate the grounds of the application at any point until he eventually became unwaveringly sober on June 11, 2022, the time for making the application expired June 11, 2024 and the application was filed August 16, 2024.

[161] Second, I am unwilling to draw an inference that M.O. did not have (or could not have) the requisite knowledge to challenge the Separation Agreement at any time between the making of the Separation Agreement in 2017 and October 21, 2023 (two years before the Amended Counterclaim was filed) or August 16, 2022 (two years before the application was filed).

- [162] To accept such an inference based on M.O.'s arguments would be to assume that M.O., who was periodically in a state of intoxication as a result of his addiction, and who attended a series of rehabilitative programs, did not have capacity to investigate, perceive, know or understand factual information about the Separation Agreement and its terms at any time during the period in which he was seeking rehabilitation.
- [163] I cannot accept such an inference because it would be a prejudicial stereotype, not founded in evidence or proper judicial notice, that would paint people with alcohol use disorders as being without capacity, and to apply that as a general presumption. This would establish a discriminatory presumption on the basis of disability, and I reject it.
- [164] Again, it is laudable that M.O. has sought care and support for his alcohol use; however, it does not follow that during the times in which he sought care and treatment he was without capacity. That is simply not in evidence before me. M.O. did not provide evidence of his subjective experience of being in treatment or being intoxicated which would reveal, over lengthy periods, an ongoing inability to obtain or comprehend the necessary facts to ground the claims he now makes respecting the Separation Agreement. Instead, I am asked to assume that incapacity, and I am unwilling to do so.
- [165] Even if I accept M.O.'s evidence that he was inebriated at the very time of making the Separation Agreement and accept that this means he did not have sufficient ability to understand the facts and the circumstances on that date, I do not have evidence before me that this state of impairment was a chronic state throughout the relevant time. It is possible for a party to prove they did not have the ability to know or comprehend critical information due to intoxication, and that may well be a valid reason for a party to not know the grounds of an application. However, I cannot find here that M.O. was in such a state of intoxication throughout a nearly five-year period that it deprived him of knowledge of the alleged circumstances supporting his claims about the Separation Agreement, or of the ability to obtain that knowledge. There is no evidence supporting an inference of incapacity, and I find the fact of being engaged in rehabilitative efforts, without more, is insufficient to draw that conclusion.
- (5) Failure to Disclose Significant Property
- [166] M.O. argues he did not or could not know of the s. 93(3)(a) grounds for the application until around the time of filing the Amended Counterclaim, because it was then he discovered several undisclosed properties. M.O. points to the fact that, while certain companies were disclosed and formed part of the Separation Agreement, property held by those companies was not.

- [167] I cannot accept the argument that M.O. was deprived of critical information about the assets in question until much later. I am persuaded on the evidence before me that information respecting the assets was sufficiently detailed in the context of the Separation Agreement and the parties' relationship such that M.O. would have had notice of any issues of concern related to the property decisions resolved by the Separation Agreement.
- [168] M.O. alleges that two business properties were not disclosed in the Separation Agreement. These properties were owned by D.D. Ltd., which was disclosed. The evidence shows that M.O. knew or ought to have known of those properties as he had visited them prior to the parties' separation.
- [169] M.O. alleges he did not know about two companies that should have been disclosed in the Separation Agreement. The evidence suggests these companies were created for the building and sale of a property, the value of which was specifically agreed to be split in the Separation Agreement. M.O. was a director of one of the companies. There was no persuasive evidence before me that M.O. did not or could not have known about these entities.
- [170] M.O. further argues he did not know about the worth of D.D. Ltd., a stake in which was negotiated in the Separation Agreement. This was an asset that M.O. was aware was to be divided, and I cannot conclude there is any evidence of why M.O. did not or could not have become aware of grounds at a time later than the Separation Agreement that could give rise to the Separation Agreement Application.

(6) Receipt of Inadequate Legal Advice

- [171] M.O. also argues he did not receive adequate legal advice and so did not understand the consequence of the Separation Agreement, giving rise to an application under s. 93(3)(c). The basis of this argument is that the individual who provided him with independent legal advice on the Separation Agreement was not experienced in family law or in this type of agreement, and was paid for by S.S.
- [172] The evidence is that M.O. obtained independent legal advice. To the extent there is any claim as to the insufficiency of that advice, those facts were discoverable at the time the Separation Agreement was made. I cannot conclude on the evidence before me that M.O. received inadequate legal advice, such that he did not understand the consequences of the Separation Agreement.

(7) Vulnerability, Need, Ignorance, Distress

[173] Lastly, M.O. argues the Separation Agreement was made in circumstances where S.S. took advantage of his vulnerability, ignorance, need or distress, as contemplated in s. 93(3)(d). Other than the fact of his addiction, which I have addressed, M.O. has not led evidence or explained why his alleged vulnerability only became discoverable at a later date. On this basis, I cannot conclude the limitation period relating to this ground began to run at a date later than the making of the Separation Agreement.

c) Decision

[174] The parties agreed the record before me is what is required to make this determination, and based on this evidence I can assess whether s. 198(3) bars M.O.'s attempts to undo the Separation Agreement.

[175] I conclude the Separation Agreement Application and the claims in the Amended Counterclaim specifically targeting the Separation Agreement are out of time. I am satisfied on the record before me that, taken at its highest, M.O. knew or ought to have known of the facts giving rise to the asserted grounds for the Separation Agreement Application by at least some time in 2019 (being more than 600 days following the making of the Separation Agreement); accordingly, the limitation period has long since expired.

4. Question 4: Amended Counterclaim as Abuse of Process

[176] On the Limitations Application, S.S. relies on R. 11-2(1)(d) of the Supreme Court Family Rules. This rule states that at any stage of a family law case, the court may order to be struck out any part of a pleading on the ground that it is an abuse of process.

[177] I conclude the Amended Counterclaim attempts to advance a pleading that may not be pursued because it is out of time. As the application to set aside the Separation Agreement (the prescribed process under the FLA) is time-barred, the pleadings in the Amended Counterclaim that seek to achieve the goals of the Separation Agreement Application must be struck, as to permit M.O. to pursue them would be an abuse of process.

[178] The Limitations Application asks that I strike out the portions of the Amended Counterclaim challenging the Separation Agreement. I find that the aspects of the Amended Counterclaim which allege grounds on which the Separation Agreement should be set aside should be struck for being an abuse of process and for not disclosing a reasonable cause of action, being time-barred.

V. Conclusion

[179] In summary, the parenting arrangements are ordered to be modified as described above, and as ordered on March 17, 2025.

[180] The Limitations Application is allowed, and the Separation Agreement Application is dismissed.

[181] The claims seeking to challenge the Separation Agreement within the Amended Counterclaim are struck.

[182] S.S. will have costs of the Limitations Application.

"E. Sigurdson J."

[1] Or if I am wrong, the Amended Counterclaim, with the running of time extended to October 23, 2021.

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