IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 283/95

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

NORTH BLENHEIM MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Ralph D'Angelo for the Applicant, Certas Direct

Gregory Brimblecombe for the Respondent, North Blenheim Mutual

ISSUE:

1. Was David Ainsworth a "spouse" as defined in subsection 224(1) of the *Insurance Act* when he was involved in a motor vehicle accident on December 24, 2003; more specifically was he the "parent of a child" on that date?

RESULT:

1. Mr. Ainsworth was not the "parent of a child" on that date, and is therefore not a "spouse" within the meaning of subsection 224(1) of the *Insurance Act*.

2. Given the above finding, Mr. Ainsworth is required to claim accident benefits from North Blenheim Mutual by operation of subsection 268(5) of the Act.

HEARING:

The arbitration took place on January 5, 2006, in the City of Hamilton, before me, Shari L. Novick, arbitrator.

THE FACTS:

The parties filed an Agreed Statement of Facts, which I have attached to this award. The relevant facts can be summarised as follows: On the date of the accident, Mr. Ainsworth had been cohabiting in a relationship of some permanence with Jacqueline Crane for approximately one year. Ms. Crane was pregnant at that time, and the child that they had conceived together was due to be born in July 2004.

Mr. Ainsworth was driving a vehicle owned by Ms. Crane, and insured by Certas Direct Insurance Company ("Certas") at the time of the accident. Ms. Crane was the named insured under that policy. Mr. Ainsworth also owned a vehicle, and was the named insured on a policy insuring that vehicle, issued by North Blenheim Mutual Insurance Company ("North Blenheim"). He was injured in the accident, and applied to Certas on January 23, 2004 for accident benefits. Upon noting that he was insured by North Blenheim under his own policy, Certas put North Blenheim on notice with respect to the priority of payment for accident benefits on January 27, 2004.

The parties agree that by virtue of the priority scheme outlined in section 268 of the *Insurance Act*, if Mr. Ainsworth and Ms. Crane were "spouses" of each other at the relevant time, Certas would be the priority insurer responsible to pay accident benefits to Mr. Ainsworth; if they are not "spouses" the parties agree that North Blenheim would be responsible to pay benefits.

RELEVANT PROVISIONS:

The definition of "spouse" in issue is as follows:

> "spouse" means either of two persons who,
>
> (a) are married to each other,
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or
>
> (c) are not married to each other and have co-habited continuously for a period of not less than three years, or have co-habited in a relationship of same permanence if they are the natural or adoptive parents of a child.

Mr. Ainsworth and Ms. Crane were neither married nor living together for three years as of the date of the accident, and would therefore only each meet the definition of "spouse" if they were "parents of a child" as set out in subsection (c).

The parties agree that Ms. Crane was pregnant at the time of the accident with the couple's first child, and that the child was subsequently born in July 2004. The question to be answered is therefore whether the subsequent live birth of the child has the legal effect of conferring spousal status on Mr. Ainsworth for the purpose of accident benefits coverage.

PARTIES'ARGUMENTS:

Certas argued that Mr. Ainsworth did not meet the definition of "spouse" on the date of the accident, and consequently North Blenheim is in higher priority to pay accident benefits to him. Counsel relied principally on the case of *Vasey v. Economical Mutual Insurance Company* (1986) 54 O.R. (2d) 692 (Dist. Ct.) in which a woman who was cohabiting with a man and was

pregnant with his child at that time, applied for death benefits under the *Insurance Act* (under what was then Schedule C) when he died in an accident. The question to be determined in that case was whether Ms. Vasey met the definition of a "spouse", and the relevant definition was similar to that in issue in this case. The child who was subsequently born also applied for death benefits.

The plaintiffs' arguments in *Vasey* were based on an application of the legal fiction that an unborn child who is subsequently born alive can assert property rights as if he or she had been alive at the relevant time. This is referred to in the case law as the 'en ventre sa mere' principle. The trial judge rejected Ms. Vasey's argument and denied her claim, reasoning that the 'en ventre sa mere' principle can only be applied to benefit an unborn child, and cannot be entended to benefit some other party. An appeal of that decision was dismissed by the Divisional Court [(1987) 60 O.R. (2d) 64,] and counsel for Certas submitted that this decision is directly on point and binding on me.

Counsel for Certas asserted that if the 'en ventre sa mere' legal fiction can not be extended to benefit a person claiming rights as a "spouse", it follows that an insurer involved in a priority dispute with another insurer should similarly be precluded from doing so.

Counsel for North Blenheim relied on a different line of cases in support of his argument that Mr. Ainsworth did meet the definition of a "spouse". He cited the decision in *Willard v. Zurich Insurance Co.* (2004) 73 O.R. (3d) 309 (Sup. Ct. of Justice), in which the judge applied the 'en ventre sa mere' principle to find that a son born subsequent to a father's death in a car accident was a "dependant" and therefore entitled to a death benefit under the SABS. He pointed out that the son was found to be entitled to the benefit despite the requirement in the provision that the claimant be a person who "*is principally dependent for financial support or care on the other person*", suggesting that those who became dependent after the fact would not qualify. Counsel noted the judge's comment that as social welfare legislation, the SABS should be construed liberally. He contended that the broader implications of this question should be considered, and should be viewed from an insured's perspective. He argued that when the court's reasoning in

Willard is applied in this case, it leads to to a finding that Mr. Ainsworth was a "spouse" on the date of the accident.

The Respondent also cited the arbitration decision in *Virk v. Liberty Insurance Co. of Canada* [2004] O.F.S.C.D. No. 119, affirmed on appeal (on the main issue) at [2005] O.F.S.C.D. No. 99. In that case a mother's application for death benefits under the SABS for the death of her child was granted, despite the fact that he had not been born at the time of the accident. The child was subsequently delivered by emergency ceasarean section the day after the accident and died 15 days later. Counsel contended that this case is further support for the notion that the SABS provisions are to be interpreted broadly and that very clear language specifically overriding the presumption of entitlement created by the "en ventre sa mere" principle is required.

The Applicant stressed in his reply submissions that the *Virk* case turned on the question of whether a child who was not alive at the time of an accident was a "dependant" or not, while the issue in the instant case is whether spousal status should be conferred on Mr. Ainsworth. He argued that whereas there may be public policy reasons to extend the 'en ventre sa mere' principle in the former context, those reasons were not germane to the discussion of whether someone meets the definition of a "spouse" or not.

FINDINGS/ ANALYSIS:

The dispute turns on the interpretation of the phrase "parents of a child" appearing in the definition of "spouse" in subsection 224(1) of the *Insurance Act*. More specifically, the question to be answered is whether an applicant who would otherwise not meet the definition of "spouse" but who has been involved in conceiving a child born subsequent to an accident, should be considered to be a parent of that child on the day of the accident.

Having reviewed the cases cited by counsel, I find that they are of limited assistance in deciding this issue.

I acknowledge and agree with the view that the SABS is social welfare legislation that should be interpreted liberally in order to achieve its legislative purpose. However, it is important to carefully define the issue raised and appreciate the specific context in which it is raised. As

opposed to the cases cited by counsel for North Blenheim which raise issues of entitlement to benefits, the only thing that turns on whether or not Mr. Ainsworth meets the definition of "spouse" is which insurer is responsible to pay him accident benefits. There is no question that he is entitled to collect benefits; the simple question is whether Certas should continue to respond to his claim, or whether that obligation should shift to North Blenheim.

While this is clearly an important question to the parties involved, it does not invoke a purposive analysis of the rights under discussion, as was the case in *Virk* (*supra*). In that case, Appeals Delegate Makepeace upheld the arbitrator's decision that the legal fiction of 'en ventre sa mere' should not be ousted by the wording of the regulation; in doing so, she acknowledged the strength of the insurer's argument that accepting the Applicant's argument would result in an extension of the 'en ventre sa mere' principle beyond the unborn child onto his mother, but found that this promoted the legislative objective of recognising the value of a child's life. No such considerations apply in the instant case.

Similarly, there are no issues of public policy raised by this case. While my findings may conceivably impact a future applicant in similar circumstances who does not have insurance coverage and whose spousal status will therefore determine whether or not they are entitled to receive benefits, there are no overriding social or policy concerns at stake.

Consequently, the focus of the analysis narrows and comes down to this - given that Mr. Ainsworth would not otherwise qualify as a "spouse", should the principle of 'en ventre sa mere' be extended to cloak him with this status on the date of the accident? In my view, it should not. As stated above, the 'en ventre sa mere' principle has the effect of enabling an unborn child, subsequently born alive, to assert a benefit it would have been entitled to at the time, had it been born. However, if the matter in issue is neither the rights of the child, nor any legislative objectives relating to these rights, the legal fiction created by that principle cannot be extended to benefit another party. The *Vasey* case stands for this proposition, and to the extent that the *Virk* decisions turn on the legislative objective of recognising the value of a child's life by providing for a death benefit, they are not inconsistent with that.

Accordingly, the plain meaning of the words of the provision must be examined. Was Mr. Ainsworth the "parent of a child" on the date in question? I find that he was not. The case law is clear that a fetus is not a person until it is born (*Dehler vs. Ottawa Civic Hospital et al.* (1980) 25 O.R. (2nd) 748 (C.A.); *Tremblay v. Daigle* [1989] 2 S.C.R. 530; *Winnipeg Child and Family Services v G.* (D.F) [1997] (3rd) S.C.R. 925) and since the 'en ventre sa mere' principle does not apply in these circumstances, its subsequent live birth does not retrospectively cloak Mr. Ainsworth with parenthood.

The result of this finding is that David Ainsworth does not meet the definition of "spouse" found in subsection 224(1) of the *Insurance Act*, and that North Blenheim is therefore in higher priority than Certas to pay his accident benefits. I will leave it to the parties to arrange for the reimbursement of payments already made by Certas in this regard.

COSTS:

The parties have agreed that costs are to be borne by the unsuccessful party. I may be spoken to in the event that the parties are unable to come to an agreement on the quantum of costs payable to Certas from North Blenheim.

DATED THIS _____ day of March, 2006 in the City of Toronto, Province of Ontario.

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Shari L. Novick
Arbitrator