

# **Ganter v Whalland**

[2001] NSWSC 1101

File Number: 4747/98

Hearing date: 5 November 2001

Judgment date: 12 December 2001

## **IN THE SUPREME COURT OF NEW SOUTH WALES EQUITY DIVISION**

**CAMPBELL J**

**12 December 2001**

### **Judgment**

1 **HIS HONOUR:** Between early 1988 and the end of 1996 Ms Ganter and Mr Whalland lived together in a *de facto* relationship. In September 1993 Ms Ganter was diagnosed as suffering from chronic myeloid leukaemia. She was advised that she should have a course of treatment which included chemotherapy. She was also advised that if she had extensive chemotherapy it would probably make her sterile, but that it was possible to have eggs removed from her ovaries, fertilised and frozen as embryos so that she could use them when she recovered.

2 She and Mr Whalland were referred to the IVF clinic at Royal North Shore Hospital. In January 1994 ova were collected from her, and fertilised with semen obtained from Mr Whalland. Six embryos resulting from this procedure were frozen.

3 The embryos have come to be stored on terms of an agreement dated 13 August 1996 made between Ms Ganter, Mr Whalland, and a company called North Shore A R T Pty Ltd (“NSART”).

4 In about November 1996 Ms Ganter and Mr Whalland separated. Their relationship has not resumed since then. Ms Ganter gives evidence that she does not intend ever to marry or to recommence any domestic relationship with Mr Whalland.

5 Ms Ganter wants to have the embryos transferred into her uterus in an attempt to become pregnant.

6 The agreement between Ms Ganter, Mr Whalland and NSART requires any decision on the future management of the embryos to be a joint decision of Ms Ganter and Mr Whalland. Mr Whalland has, so far, refused to permit the embryos to be used in the way Ms Ganter wants. He has told Ms Ganter, in effect, that a reason for taking this attitude is that he does not want to have any financial responsibility for any child which might result.

7 Ms Ganter has commenced proceedings against Mr Whalland under the *Property (Relationships) Act 1984* (NSW). In those proceedings she seeks a division of the net proceeds of sale of a house of which she and Mr Whalland were registered proprietors, and also the following:

*“...33 An Order that the Defendant do all such things and execute all such documents as are necessary to direct NSART to distribute all embryos which are the subject of agreements made between the Plaintiff and the Defendant and NSART to the Plaintiff for her use in attempts to achieve pregnancy.*

*34 An Order that the Defendant do all such things and execute all such documents as are necessary to donate the embryos to the Plaintiff for her use in attempts to achieve pregnancy.*

*35 A Declaration that in the event that the Plaintiff becomes pregnant as a result of any embryo transfer procedure undertaken as a consequence of the Defendant’s compliance with Orders 33 and 34, the Defendant will be irrebuttably presumed at law not to be the father of any child born as a result of the pregnancy.”*

8 Counsel for Ms Ganter informs me that one of the bases on which these orders will be sought, is that the rights under the agreement between Ms Ganter and Mr Whalland and NSART are property capable of being the subject of an order under the *Property (Relationships) Act 1984*.

9 On 20 March 2000 Master McLaughlin ordered that there be a separate decision of the following questions:

*“Whether on the true construction of sections 3 and 14 of the Status of Children Act 1996 (NSW):*

*(a) there is an irrebuttable presumption of law that a man, from whom sperm is obtained, but who is not the husband (within the meaning of sub-section 14(6) of the Status of Children Act 1996) of a woman, at the time when that woman*

*undergoes a fertilisation procedure to transfer into her body an ovum which was fertilised outside her body and becomes pregnant, is not the father of any child born as a result of the pregnancy; and whether*

*(b) there is an irrebuttable presumption of law that if an ovum which has been fertilised outside the applicant's body using sperm obtained from the Respondent, is transferred, with the Respondent's consent, into the body of the Applicant at a time when the Respondent is not the husband of the Applicant (within the meaning of sub-section 14(6) of the status of Children Act 1996), and the Applicant becomes pregnant, the Respondent is not the father of any child born as a result of the pregnancy.*

10 Those questions were listed for argument before me on Monday 5 November 2001.

11 Mr Whalland did not appear at the hearing. I was informed that Mr Whalland continues to instruct solicitors in the proceedings under the *Property (Relationships) Act 1984*. I was also informed that those solicitors had contacted Ms Ganter's solicitors recently and stated that Mr Whalland did not intend to appear on 5 November, and did not consent to, or oppose, the orders sought on that day. There is no material before me to suggest that he has ceased to oppose the orders which Ms Ganter claims under the *Property (Relationships) Act 1984*.

### **Relevant Legislative Provisions**

12 The *Status of Children Act 1996* contains the following provisions which are central to the present questions.

*"3(1): In this Act: ...*

#### ***Fertilisation procedure means:***

- (a) the artificial insemination of a woman, or*
- (b) the procedure of transferring to a woman's body an ovum (whether or not produced by her) fertilised outside her body, or*
- (c) the procedure of transferring to a woman's body a ovum (whether or not produced by her) or both the ovum and sperm to enable fertilisation of the ovum to occur in her body, or*
- (d) any other procedure for the assisted conception of children that is prescribed by the regulations.*

#### ***14 Presumptions of parentage arising out of use of fertilisation procedures***

*(1) When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:*

- (a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure,*

*but only if he consented to the procedure, and*

*(b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.”*

*(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.*

*(3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy.*

*(4) Any presumption arising under subsections (1)–(3) is irrebuttable.*

*(5) In any proceedings in which the operation of subsection (1) is relevant, a husband's consent to the carrying out of the fertilisation procedure is presumed.*

*(6) In this section:*

*(a) a reference to a married woman includes a reference to a woman who is living with a man as his wife on a bona fide domestic basis although not married to him, and*

*(b) a reference (however expressed) to the husband or wife of a person:*

*(i) is, in a case where the person is living with another person of the opposite sex as his or her spouse on a bona fide domestic basis although not married to the other person, a reference to that other person, and*

*(ii) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.*

13 No regulations have been made to give content to paragraph (d) of the definition of “fertilisation procedure”.

14 Section 14(6) gives an extended meaning to “*married woman*”, “*husband*” and “*wife*”, so that they include people who are in *de facto* relationships. In this judgment, whenever I refer to “*marriage*” or any of its grammatical cognates, “*husband*” or “*wife*” I will be using those words in the extended sense which section 14(6) provides.

15 Part 3 Division 1 of the Act (which runs from section 9 to section 18 inclusive) contains a variety of presumptions concerning when a relationship of parent and child exists, and rules concerning the way in which those presumptions are to be used. The reader will have observed that the presumptions arising under section 14(1), (2) and (3) are irrebuttable. The only other irrebuttable presumption arising under Part 3 Division 1 is the presumption created by section 12(1):

***“12 Presumption of parentage arising from findings of courts***

*(1) A person is presumed to be a child's parent if:*

*(a) while the person is alive, a prescribed court has:*

*(i) found expressly that the person is the child's parent, or  
(ii) made a finding that it could not have made unless the person was the child's parent, and  
(b) the finding has not been altered, set aside or reversed."*

16 The rules which the Statute establishes for using its presumptions are as follows:

***"15 Rebuttal of parentage presumptions***

*(1) A presumption arising under this Division or a parentage presumption arising under any other Act or rule of law, that is rebuttable, is rebuttable by proof on the balance of probabilities.*

*(2) Every presumption arising under this Division (except for a presumption arising under section 12 (1) or 14 (1)-(3)) is a rebuttable presumption.*

***16 Conflicting rebuttable parentage presumptions***

*If two or more rebuttable presumptions referred to in section 15 conflict with each other and are not rebutted in any proceedings, the presumption that appears to the court to be more or most likely to be correct prevails.*

***17 Conflicts involving irrebuttable parentage presumptions***

*(1) If two or more irrebuttable presumptions arising under this Division conflict with each other, the presumption that appears to the court to be more or most likely to be correct prevails.*

*(2) If an irrebuttable presumption arising under this Division conflicts with a rebuttable presumption arising under this Division that is not rebutted in any proceedings, the irrebuttable presumption prevails over the rebuttable presumption.*

***18 Parentage presumptions cannot be relied on by prosecutors***

*Despite any other provision of this Act, a prosecutor cannot rely in any criminal proceedings on a presumption arising under this Act to prove the parentage of a child."*

**"Fertilisation Procedure"**

17 The definition in section 3 of "*fertilisation procedure*" is an exhaustive definition. In accordance with it, obtaining semen, even for the explicit purpose of using it to fertilise an ovum outside a woman's body and later transfer the fertilised ovum into the woman's body, is not itself a "*fertilisation procedure*" within the meaning of section 3. Nor is fertilising an ovum outside a woman's body, with the intention of later transferring it to the woman's body, itself a "*fertilisation procedure*" within the meaning of section 3. In each of the three variants of "*fertilisation procedure*", it is the process of transferring to a woman's body the biological material which causes her to become pregnant which counts as

the “*fertilisation procedure*”.

### **Nub of the Questions**

18 The answer to the questions involved in this judgment depends upon whether the presumption in section 14(2) requires the man from whom the sperm is obtained to be, in relation to the woman about whom section 14(2) speaks, “*not her husband*” at the time the sperm is obtained, or at the time the fertilisation procedure occurs.

### **Help By Analogy From S.14(1)?**

19 One argument advanced by counsel for Ms Ganter is that section 14(1) requires the court to decide whether a man is the husband of the woman who is the subject of section 14(1) as at the time of the fertilisation procedure occurring. In like fashion, it is submitted, section 14(2) should be construed so that the court decides whether a particular man is the husband of the woman the subject of section 14(2) at the time of the fertilisation procedure.

20 I accept that section 14(1) should be construed so that whether, in relation to the woman with which that subsection is concerned, a man is “*her husband*” is determined as at the time she becomes pregnant. This is because:

(1) The introductory words “*when a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant*” as a matter of ordinary English, are speaking as at the time when the woman has already undergone the fertilisation procedure, and at the time she *becomes* (present tense) pregnant.

(2) The woman the subject of section 14(1) is a “*married woman*”. Because of reason (1), she has this status of being a married woman at the time she becomes pregnant. Being married, she necessarily has a husband. It is both a natural and an appropriate use of language for the identity of her husband to be ascertained as at the same time that the court ascertains whether a particular woman is a “*married woman*”, to whom section 14(1) is capable of applying.

21 However, I do not think that the fact that section 14(1) is construed in the way I have just outlined is a persuasive reason why “*husband*” in section 14(2) should be ascertained as at the time the fertilisation procedure takes place. There are too many differences between section 14(1) and 14(2) for this sort of reasoning by analogy to be persuasive. The differences include:

(1) Section 14(1) applies only to a married woman, while section 14(2) applies to a woman whether married or unmarried.

(2) Section 14(1) provides presumptions about when a person *is* the father, or the mother of a child when that child has been born using fertilisation procedures. By

contrast section 14(2) provides a presumption about when a man is *not* the father of a child born using fertilisation procedures.

(3) Underlying this difference between a presumption of parenthood, and a presumption of non-parenthood, are different purposes which the sub sections seek to achieve. Section 14(1), applying as it does only when the woman undergoing the fertilisation procedure is married, aims to assimilate the parentage relationships of a child produced using the fertilisation procedure to those which would apply if a child had been produced, in that marriage, by the traditional means of conception. In so operating, section 14(1) is a source of both the rights a parent has in relation to his or her child, and the responsibilities which a parent has towards his or her child. By contrast section 14(2) operates so that a man who has provided the sperm which enables fertilisation procedures to occur has no rights in relation to the child so conceived, nor responsibilities for the child so conceived.

22 It is, therefore, necessary to construe section 14(2) in its own terms, without help from section 14(1).

### **Help From Substituting The Definition?**

23 Section 14(2) is unclear in its syntax. In particular, it is unclear whether the phrase “*using any sperm obtained from a man who is not her husband*” is an adjectival phrase which describes “*fertilisation procedure*” or an adverbial phrase which qualifies “*becomes pregnant*”.

24 Some support can be obtained for the view that “*using any sperm obtained from a man who is not her husband*” is an adjectival phrase which describes “*fertilisation procedure*” by substituting, in the wording of section 14(2) the definition of “*fertilisation procedure*” for the expression “*fertilisation procedure*”.

25 It will be recalled that the definition of “*fertilisation procedure*” contains (in the situation where paragraph (d) of the definition has no content) three different procedures each of which counts as a “*fertilisation procedure*”.

26 If one substitutes, in section 14(2) for “*fertilisation procedure*” the full text of the three relevant parts of the definition, section 14(2) can be rewritten as:

“if a woman becomes pregnant by means of  
(a) the artificial insemination of [the] woman using any sperm obtained from a man who is not her husband, or  
(b) the procedure of transferring to [the] woman’s body an ovum (whether or not produced by her) fertilised outside her body using any sperm obtained from a man who is not her husband, or

(c) the procedure of transferring to [the] woman's body an ovum (whether or not produced by her) or both the ovum and sperm to enable fertilisation of the ovum to occur in her body, using any sperm obtained from a man who is not her husband that man is presumed not to be the father of any child born as a result of the pregnancy.”

27 When spelled out in this way, it can be seen that the time as at which the man from whom the sperm is obtained is “*not her husband*” is

(a) the time of the artificial insemination of a woman, if paragraph (a) of the definition of “*fertilisation procedure*” is used,

(b) the time of the fertilisation of the ovum, if paragraph (b) of the definition of “*fertilisation procedure*” is used, and

(c) the time of the fertilisation of the ovum occurring in the woman's body, if paragraph (c) of the definition of “*fertilisation procedure*” is used.

28 However, I think that this substitution exercise is likely to lead to error. A substitution exercise of this type is sometimes useful, indeed sometimes highly persuasive, in solving problems of statutory construction. However, the particular problem of statutory construction which I must solve is one which arises from the unclear syntax of section 14(2). The substitution exercise distorts and disguises, rather than elucidates, the syntax of the subsection which Parliament actually passed.

### **Help From A Purposive Construction?**

29 It is well established that a court should, in resolving any ambiguity in the statute, adopt the construction which will advance the legislature's purpose (section 33 *Interpretation Act 1987* (NSW); Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed. 2001, para [2.7] – [2.12], [2.15] and cases there cited).

30 Reading the *Status of Children Act 1996* as a whole, it is possible to discern some legislative purposes which bear upon the use of fertilisation procedures. Section 14 seeks to facilitate the use of fertilisation procedures in a variety of ways. Section 14(1) seeks to ensure that children born as a result of fertilisation procedures have, in the circumstances which section 14(1) addresses, rights which are not inferior to those of children born without the use of fertilisation procedures. Section 14(1) also seeks to ensure that the husbands and wives with which it is concerned have rights and responsibilities for the children born as a consequence of fertilisation procedures which are not inferior to those of parents of children who are born without the use of fertilisation procedures. By thus analogising the rights and responsibilities of a married couple who have a child using fertilisation procedures to those of other parents and children, one difficulty which there otherwise might be in the use of fertilisation procedures is



removed. Section 14(2) assists in a different way in facilitating the use of fertilisation procedures. It enables a woman to have a child using sperm obtained from a man who is not her husband, secure in the knowledge that that man will not be able to interfere in the life of her child. It also removes a disincentive for men to make sperm available for use in fertilisation procedures, by letting them do so secure in the knowledge that they will have neither rights nor responsibilities to any child which results.

31 However, these purposes of the legislation are at too great a level of generality to provide assistance in resolving the present problem. The present problem is whether, when a man provides sperm for use in the fertilisation procedure at the time when he is the husband of a woman, but the fertilisation procedure itself takes place at a time when he is not the husband of the woman, the man is to be presumed not to be the father of any child which results. In answering that question, I cannot discern any particular legislative purpose, other than that which is provided by the actual words of section 14(2) itself.

### **Help From Extrinsic Aids?**

32 I have considered the second reading speech upon the introduction into Parliament of the Bill which became the *Status of Children Act 1996* (Hansard, Legislative Council, 29 May 1996, page 1639 ff). It provides no help in solving the present problem. No other possible extrinsic aids to construction have been drawn to my attention.

### **The Literal Approach**

33 Recognising that section 14(2) contains a syntactic ambiguity and unassisted by any other aids to construction, I must resolve the ambiguity as best I can on the basis of the actual language of section 14(2). So doing, it seems to me to be a more natural reading of the words of section 14(2) to treat "*using any sperm obtained from a man who is not her husband*" as an adverbial phrase qualifying "*becomes pregnant*". If that construction is adopted, there is some internal symmetry in section 14(2), in that "*by means of a fertilisation procedure*" is one adverbial phrase which qualifies "*becomes pregnant*", and "*using any sperm obtained from a man who is not her husband*" is another such adverbial phrase.

34 When that construction is adopted, the use of the present tense "*is*" in "*using any sperm obtained from a man who is not her husband*" would require the status of being "*not her husband*" to be ascertained at the time when the woman in question becomes pregnant.

### **The Sanity Check**

35 A legitimate check for a court to use, in deciding whether an interpretation of a statute arrived at by grammatical analysis is indeed the correct interpretation, is to consider whether that interpretation produces practical results which are sensible,

rather than:

“... ‘absurd’, ‘extraordinary’, ‘capricious’, ‘irrational’ or ‘obscure’” (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commission of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 321 *per Mason and Wilson JJ.*”

36 Jordan CJ expressed the same notion by saying “a court is entitled to pay the legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense”: (*Hall v Jones* (1942) 42 SR (NSW) 203 at 208). From the strength of the language which these judges employed to describe the sort of consequences which will cause a possible construction to be rejected, it is apparent that an anomaly arising from what, on all other tests of construction, is the correct construction of legislation, must be a very serious one, before the court is justified in using that anomaly as a reason for rejecting what otherwise seems the correct construction. Were courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature.

37 One possible anomaly which arises from the construction that I prefer is that it will result, in certain circumstances, in a child having no father at all. If a woman has ova removed from her and fertilised with sperm obtained from a man who is her husband at the time the sperm is obtained, and the resulting embryos are implanted in the woman after that man has ceased to be her husband (whether through death, or divorce, or when the marriage is a marriage within the extended meaning arising from section 14(6) by the relationship simply ending), and if at the time the embryo is implanted section 14(1)(a) cannot operate, either because the woman is not at that time married or because her husband has not consented to the procedure, and if none of the rebuttable presumptions of paternity apply, the resulting child will have no father.

38 However, even if section 14(2) is construed so that whether the sperm donor is the husband of the woman in question is determined at the time the sperm is obtained from the man, there will still be children without fathers. It does not seem to me that the fact that the construction that I prefer will result in there being a larger number of children without fathers, than would be the case if the contrary construction of section 14(2) were adopted, is an anomaly of sufficient seriousness to justify rejection of the literal construction.

39 One can envisage a variant on the facts of the present case, where the construction of section 14(2) opposite to the one which seems to me to be preferable, could produce anomalous results. Consider the situation of a young woman, engaged to be married, but not living with her fiancé in circumstances which would deem him to be her husband pursuant to section 14(6). She is diagnosed as suffering from an illness, the treatment of which is likely to render her sterile. She and her fiancé set about having ova removed, fertilised with the

fiancé's semen, and stored. Her treatment is successful; she and her fiancé marry, and use the stored embryos to produce a family. On the construction of section 14(2) which requires a man from whom sperm is obtained to be the husband of the relevant woman as at the time the sperm is obtained, this man would be irrebuttably presumed not to be the father of the children his wife had produced.

40 It is true that section 14(1) would produce a contrary irrebuttable presumption, if the man had consented to the fertilisation procedure, and that section 17(1) would leave the way open for a court to resolve the conflict between the two contradicting irrebuttable presumptions by deciding that the man was the father of the children. However, it is undesirable that it should be necessary for parties to go to court to decide something as basic as whether a person is, or is not, the father of their child. There are many situations (from administration of deceased estates, to the ordinary practicalities of bringing up and educating a child) where one needs to know who is the father of the child, without having to go to court to find out.

41 The hypothetical scenario I have just been considering is, as I have said, one which arises on the opposite construction of section 14(2) to the one that seems to me to be preferable. The practical difficulties which arise on that scenario are ones which provide some slight measure of comfort in adhering to the construction which strikes me as the preferable one.

42 There is another way in which the construction of section 14(2) opposite to the one which seems to me to be preferable, could produce anomalous results. Consider the situation of a woman who has ova removed, and fertilised using sperm obtained from a man who is, at the time of obtaining the sperm, her husband. If the construction contrary to the one which seems to me to be correct applies, the irrebuttable presumption arising from section 14(2) does not apply to any child born as a result of implantation of the embryos so obtained. If the woman in question were later to marry, and were to have the embryos implanted with the consent of her new husband, section 14(1) would operate, so that the new husband would be irrebuttably presumed to be the father of the resulting child. If, however, the embryos were later to be implanted in her without the consent of her then husband, the presumption under section 14(1) would not operate. There would be a rebuttable presumption arising under section 9 that, because the child was born during a time the woman was married, the then husband was presumed to be the father of the child. However, the then husband could, no doubt, readily rebut that presumption. The way would then be open for a court to find that it was the sperm donor who was the father of the child. Further, this could happen even if the implantation occurred years after the embryo was created, and even if the implantation occurred notwithstanding the steadfast opposition of the sperm donor. It seems to me harsh that a woman could impose the financial responsibilities of parenthood on her ex-husband in these circumstances. By contrast, on the construction which seems to me to be the preferable one, in the scenario I am now

considering, the ex-husband would irrebuttably be presumed not to be the father of the child. If the woman were to have the child, it would be on the basis that she was not able to require any financial support for the child, from her ex-husband. In this very difficult area of the law, that strikes me as a fairer outcome. Thus, this scenario also provides a slight measure of comfort in adhering to the construction of section 14(2) which I have adopted.

### Answers to Questions

43 It is not possible to give an unqualified “yes” or “no” answer to the questions I am asked. The questions are posed in ordinary English. The Act uses the expression “*irrebuttable presumption*” in a fashion which does not sit well with ordinary English. This is because section 17 contemplates the possibility that a fact in relation to which there is an “*irrebuttable presumption*” might sometimes be held by a court not to be the case. The answers to the questions I am asked must recognise this possibility.

44 Further, as section 18 makes clear, there is a significant area of the law in which the Act’s “*irrebuttable presumptions*” do not apply. This must also be recognised in any answer to the questions.

45 The wording of question (a) is derived from alternative (b) of the definition of “*fertilisation procedure*”, and section 14(2), but elaborating on the wording of section 14(2) to remove the syntactic ambiguity in it by stating that the man is not her husband at the time the sperm is obtained. On the basis of the foregoing discussion in this judgment, the answer to that question is “*except in the circumstances where section 18 of the Status of Children Act 1996 applies, and subject to the possibility of the irrebuttable presumption being displaced pursuant to section 17 of the Status of Children Act 1996, yes.*”

46 In one sense, the answer to question (b) is “*no*” because the irrebuttable presumption of law that is provided by section 14 is not framed in terms of “*the applicant*”, and “*the respondent*”, but rather in language which can apply generally. To answer the question on that basis would be technically correct, but would not advance the purpose for which the question was posed.

47 It is easy to see where the factual situation posed by question (b) comes from. It is alternative (b) in the definition of “*fertilisation procedure*”, plus the factual elements of section 14(2) (elaborated to remove the syntactical ambiguity by stating that the man is not her husband at the time the sperm is obtained), plus the element of consent of the man, which occurs in section 14(1)(a). However, section 14(1)(a) can apply only if a woman is married at the time she has undergone the fertilisation procedure, and if the man who is her husband at the time she undergoes that fertilisation procedure consents to the procedure. Those elements

are not present in the situation to which question (b) is directed. Thus, section 14(1)(a) cannot come into play to provide a potential means of overcoming the “*irrebuttable presumption*” derived from section 14(2). There is still, however, the theoretical prospect of there being a conflict with the irrebuttable presumption derived from section 12(1).

48 The answer which I give to question (b) is

*“No; however as a matter of law, in those situations where section 18 of the Status of Children Act 1996 does not apply, and subject to the possible operation of section 17 of the Status of Children Act 1996, if an ovum which has been fertilised outside the body of a woman using sperm obtained from a man (“the Relevant Man”) who is her husband (within the meaning of sub section 14(6) of the Status of Children Act 1996) at the time the sperm is obtained, and that fertilised ovum is transferred, with the consent of the Relevant Man, into the body of the woman at a time when the Relevant Man is not the husband (in that same extended sense) of the woman, and the woman becomes pregnant, the Relevant Man is not the father of any child born as a result of the pregnancy.”*

### **Conclusion**

49 I answer the questions as follows:

Question:

*“Whether on the true construction of sections 3 and 14 of the Status of Children Act 1996 (NSW):*

*(a) there is an irrebuttable presumption of law that a man, from whom sperm is obtained, but who is not the husband (within the meaning of sub-section 14(6) of the Status of Children Act 1996) of a woman, at the time when that woman undergoes a fertilisation procedure to transfer into her body an ovum which was fertilised outside her body and becomes pregnant, is not the father of any child born as a result of the pregnancy; and whether”*

50 Answer:

*“Except in the circumstances where section 18 of the Status of Children Act 1996 applies, and subject to the possibility of the irrebuttable presumption being displaced pursuant to section 17 of the Status of Children Act 1996, yes.”*

51 Question:

*“Whether on the true construction of sections 3 and 14 of the Status of Children Act 1996 (NSW):*

*“(b) there is an irrebuttable presumption of law that if an ovum which has been fertilised outside the applicant’s body using sperm obtained from the Respondent, is transferred, with the Respondent’s consent, into the body of the Applicant at a time when the Respondent is not the husband of the Applicant (within the meaning*

*of sub-section 14(6) of the status of Children Act 1996), and the Applicant becomes pregnant, the Respondent is not the father of any child born as a result of the pregnancy.”*

52 Answer:

*“No; however as a matter of law, in those situations where section 18 of the Status of Children Act 1996 does not apply, and subject to the possible operation of section 17 of the Status of Children Act 1996, if an ovum which has been fertilised outside the body of a woman using sperm obtained from a man (“the Relevant Man”) who is her husband (within the meaning of sub section 14(6) of the Status of Children Act 1996) at the time the sperm is obtained, and that fertilised ovum is transferred, with the consent of the Relevant Man, into the body of the woman at a time when the Relevant Man is not the husband (in that same extended sense) of the woman, and the woman becomes pregnant, the Relevant Man is not the father of any child born as a result of the pregnancy.”*