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Rights of an Unborn Child

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ABSTRACT

Property Law in India has undergone tremendous change in the past few decades. From denying basic property rights to certain sections of the society such as women, to recognizing intellectual property rights, it has come a long way. One such domain is the transfer of property for unborn persons. The word unborn person has not been defined either in the transfer of property Act or under the Hindu succession Act. However, as per the Literal meaning, the word Unborn Person means “the person who has no existence at the time of the transfer of the property but may have its existence someday in future. The term unborn person also includes the Unborn Child. Such an interesting aspect of property law as it postulates transfer for the benefit of such a person who is not yet in existence. This subject has many grey areas, which need to be explored. The present research study is mainly doctrinal and analytical. Keeping this in view, the Researcher shall utilize the conventional method of using libraries consisting of primary Sources and secondary sources like Case-laws, legislations and books, journals etc. Respectively. Doctrinal methods for the purpose of research because have been adopted as It is not possible to study the subject by experimental method. From the collected material and information, the researcher proposes to conduct an in-Depth analysis of the topic of study. The researcher through this paper has made an attempt to explain the provisions of S. 13 along with the leading cases on the subject. The paper also outlines the relationship between S. 13 & other related provisions of the Transfer of Property Act, 1882.

Keyword: Property law, transfer for the benefit of an unborn person, Section-13, Transfer of Property Act, 1882, Unborn Person, Unborn Child.

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INTRODUCTION

Section 5 of the Transfer of Property Act, 1882 interprets the phrase “transfer of property”. The section gives that “transfer of property” implies an act by which a living person symbolizes property, in present or in future, to one or more other living persons, or to himself, and one or more than one living persons; and “to transfer property” is to conduct such act. Section 13 of the Transfer of Property Act, 1882 contributes that when for the transfer of property, an interest therein is established for the advantage of an unborn person at the date of the transfer, a previous interest is to be built in respect of the same transfer and the interest created for the benefit of such person shall not take impact, unless it broadens to the whole of the remaining interest of the person transferring the property in the property to be transferred.



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STATUS OF UNBORN CHILD

A child who is not yet born becomes a person as soon as he takes birth. There are plenty of reasons behind the birth of a child. In the words of property law, the child in the womb i.e. an unborn child can be permitted with some definite rights and can also inherit the estate as soon as he takes birth and comes into existence.

Even if the unborn child cannot be treated as a person, the privileges related to the property can get vested in him by transmitting over those rights to the trustees of that unborn child for the time being.¹

As per the property law, the unborn child are able to do definite rights and inherit the property however solely just in case he or she is born alive. Although the unborn child can not be considered as a person also his/her rights can be bestowed in the hands of his/her trustees.²



¹ <https://www.legalbites.com//Transfer of Property to an Unborn Child | June 25, 2020 | Akriti Gupta>

² <https://www.helpline1aw.com//Transfer of property to an unborn child>

TRANSFER OF PROPERTY TO AN UNBORN CHILD

Section 13 deals with the Transfer of property Act to an unborn child

“Where, on a transfer of property, an interest therein is established for the advantage of a person not in existence at the date of transfer, subject to a prior interest established by the same transfer, the interest created for the privilege of such person shall not take impact, unless it expands to the whole of the remaining interest of the transfer in the property.”

Section [\[15\]](#) 13 gives impact to the general rule that a transfer can be resulted in only between living persons. There cannot be a direct transfer to a person who is not in existence or is unborn. This is the purpose why section 13 uses the manner transfer ‘for the benefit of’ and not transfer ‘to’ unborn person. A child in the mother’s womb is deemed to be competent transferee.

Accordingly, the property can be transmitted to a child in the mother’s womb because the child survives at that time but not to an unborn person who does not even prevail in the mother’s womb. Every [\[16\]](#) transfer of property implicates the transfer of interest. As [\[17\]](#) soon as the property is transmitted, the transferor is divested of that interest and the interest is bestowed in the transferee. For vesting of interest, hence, it is essential that the transferee must be in existence.

Otherwise [\[18\]](#) the interest will stay in abeyance till the transferee comes into existence. This [\[19\]](#) is against the very notion of an interest. **Section 13** provides that the property cannot transfer directly to an unborn person however it will be transferred for the advantage of an unborn person. For transfer of property for the benefit of unborn person two circumstances are required to be fulfilled:

- 1) Prior life interest must be established in favor of a person in existence at the duration of transfer, and
- 2) Absolute interest must be transferred in endorsement of an unborn person

ESSENTIALS OF A VALID TRANSFER OF PROPERTY TO An UNBORN CHILD

1. No Direct Transfer

A transfer cannot be instantly made to an unborn person. Such a transfer can only be taken into existence by the mechanism of trusts. It is a cardinal doctrine of property law that every property will have a holder. Therefore, if a transfer of property is sent to an unborn person, it will preside to a strategy wherein the property will reside without an owner from the period of transfer of property till the date the unborn person comes into existence.

2. Prior Interest

If the conditions are such that there is no creation of trust, again in that case the property must in some other person between the date of transfer and the date when the unborn person comes into existence. In simple terms, we can say that the interest in favour of an unborn person must always be come before by a prior interest established in favour of a living person.

3. Absolute Interest

It expresses that the absolute interest in the property must be transferred at a go in the name of the unborn child and not the unfair interest. **There can be no transfer regarding fixed interest in the property.** This implies that the whole of the interest in the property has to be transferred at a single go.

WHEN AN UNBORN PERSON ACQUIRES VESTED

The requirements of section 20 of the Transfer of Property Act, 1882 note the theory that in what situations unborn person acquires vested interest. Unborn person may not be able to

admire the ownership of property as soon as he is born but he may, yet, acquire a vested interest in the property since his birth. Where, on a transfer of immovable property interest is built for the advantage of an unborn person, he acquires upon his birth, a vested interest, though he may not be permitted to the enjoyment thereof immediately on his birth. The presented provision however may be waived off if the words of the agreement mention an opposite clause.

The section enacts that an interest created for the advantage of an unborn person vests in that unborn person as soon as he is born. Such interest stays vested interest even though he may not be allowed to the enjoyment thereof soon on his birth.

For example, if “A” transfers a property to trustees for the advantage of A’s unborn son with a direction to expand the income of such estate for an interval of 10 years from the period of the birth of A’s son and thus hand over the funds to him. A’s unborn son acquires a vested interest upon his birth, although he is not authorized to take and relish the income of the property for a duration of ten years.

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CASE LAWS

Sopher’s case

In the case of **Sopher v Administrator General of Bengal**³ a testator instructed that his property was to be distributed after the death of his wife into as many portions as there shall be children of his, living at his death or who shall have pre-deceased leaving problem living at his death. The income of each share was to be paid to each child for life and thereafter to the grand-children until they achieved the age of 18, when alone the grand-children were to be completely allowed to the property.

³ (1944) 46 BOMLR 865

The inheritance to the grand-children was held to be annul by Privy Council as it was hit by **Section 113** of the Indian Succession Act which conforms to sec.13 of Transfer of property Act. Their Lordships of the Privy Council examined that: “If under an inheritance in the conditions cited in Sec.113, there was a chance of the interest given to the beneficiary being overthrown either by a contingency or by a clause of a defeasance, the beneficiary under the later inheritance did not receive the interest bequeathed in the same unfettered aspect as that in which the testator held it and that the bequest to him did not thus, encompass the whole of the staying interest of testator in the thing endowed.

Ardeshir’s Case

In **Ardeshir v. Duda Bhoy’s**⁴ case D was a settler who made a concession. According to the words of the settlement, D was to get during life, one-third each was to go to his sons A and R. After D’s demise, the trust property was to be distributed into two equal parts. The net income of each estate was to be given to A and R for life and after their demise to the son’s of each absolutely.

If A and R were each to pre-deceased D without masculine issue, the trust were to infer and the trust estate were to the settler absolutely. The settler then seized power to abolish or vary the concession in whole or in part of his own advantage. It was carried that R’s son who was not born either at the date of concession or his death did not seize any vested interest and the gift to him was ineffective. A’s son who was alive at these duration did not also take a vested interest.⁵

CONCLUSION

Section 13 of the Transfer Property Act, provides for a particular mechanism for transferring property validity for the advantage of unborn persons:

⁴ Transfer of property to unborn child- Shivani Gupta, Lawctopus, February 14, 2015, available at <https://www.lawctopus.com/academike/transfer-property-unborn/>

⁵ <https://www.lawoctopus.com//Transfer of Property to an Unborn / admin/7 years age/By Shivani Gupta, HNLU Raipur>

1. The person intending to transfer the property for the advantage of an unborn Person, should first establish a life estate in favour of a living person and after it, Absolute interest in favour of the unborn person.
2. Till the person, in whose favour a life interest is established is alive, he would hold ownership of the property and admire its usufruct i.e. enjoy the property.
3. During his lifetime, me if the person, (who on the day of the composition of the life Estate was unborn) is born, the ownership of the property will instantly vest in him, but he will get the ownership of the property only on the demise of the life Holder.

This Section still, cannot be read in isolation and its requirements are given full significance when read with S. 14, 15, 16 & 20 of the Transfer Property Act.



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