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UNBORN BENEFICIARIES AND PERPETUITY RULE: A COMPARATIVE ANALYSIS OF SECTION 13 AND SECTION 14 IN THE TRANSFER OF THE PROPERTY ACT, 1882

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I. ABSTRACT

The Transfer of Property Act, 1882, plays a crucial role in governing property transfers in India. Sections 13 and 14 of this Act address the intricate aspects of unborn beneficiaries and the rule against perpetuity, respectively. This research paper comprehensively analyzes the interplay between these two sections and their implications in property transactions. The paper begins with an introduction to the Transfer of Property Act, highlighting the significance of Sections 13 and 14. It then delves into Section 13, exploring the provisions governing the transfer of property to unborn children. The legal requirements, conditions, and implications for property succession and inheritance rights are examined, with relevant case law examples. Subsequently, Section 14, which deals with the rule against perpetuity, is analyzed. The concept of perpetuity, its purpose in property transfers, and the provisions of Section 14 are explained. The impact of this rule on property rights and exceptions to it are discussed in detail.

The research paper then focuses on the interplay between Sections 13 and 14, investigating how the transfer to unborn beneficiaries interacts with the rule against perpetuity. Case studies and legal precedents are presented to illustrate this interplay and its significance in property transactions. Furthermore, the paper explores international perspectives and comparative analysis to gain insights from other jurisdictions. Critical evaluation, controversies, and potential reforms related to Sections 13 and 14 are also discussed.

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II. KEYWORDS:

Transfer of Property Act, Property transfers, Unborn beneficiaries, Section 13, Section 14, Rule against perpetuity.

III. INTRODUCTION

The Transfer of Property Act, enacted in 1882 during the colonial era, was introduced to consolidate and codify the diverse laws related to property transfers prevalent in different regions of India. It aimed to establish a unified legal framework for property transactions across the country. Since its inception, the Act has served as a vital statute governing property rights and transfers, providing clarity and legal certainty. It forms the cornerstone of property law in India, providing a comprehensive framework for property transfers. Within this Act, Sections 13 and 14 hold particular significance, addressing the complex issues of unborn beneficiaries and the rule against perpetuity. This research paper aims to provide a comprehensive analysis of Sections 13 and 14, exploring their interplay and implications in property transactions.

Sections 13 and 14 of the Transfer of Property Act play pivotal roles in addressing specific aspects of property transfers. Section 13 deals with the transfer of property to unborn children, while Section 14 embodies the rule against perpetuity. These sections encompass intricate legal provisions and principles that significantly impact property succession, inheritance rights, and the validity of certain property transactions.

A. Purpose and objective of the research paper

The purpose of this research paper is to undertake a comprehensive analysis of Sections 13 and 14 in the Transfer of Property Act, delving into their provisions, interpretation, and practical implications. By exploring their interplay, this study aims to shed light on how the transfer to unborn beneficiaries relates to the rule against perpetuity and its effect on property transfers. Additionally, the research paper seeks to evaluate the effectiveness of these sections, identify potential challenges, and propose recommendations for potential improvements or reforms.

By undertaking this analysis, the research paper aims to contribute to the existing discourse on the topic, facilitate a better understanding of the legal framework surrounding unborn beneficiaries and the perpetuity rule, and provide insights for legal practitioners, scholars, and policymakers involved in property transactions.

IV. OVERVIEW OF SECTION 13: TRANSFER OF PROPERTY TO UNBORN CHILD

Section 13 of the Transfer of Property Act upholds the fundamental principle that property transfers are typically restricted to living individuals. However, in cases where the transfer is intended to benefit an unborn individual, this section provides the necessary framework. The phrase "unborn" includes those who have not yet been conceived as well as those who have been conceived but have not yet given birth, such as a kid in the womb. Even if it is unknown when such individuals will be born, a transfer can still be made in their favor.[3]

A. Mechanism of Transfer

According to Section 13 of the Act, an accurate method must be followed when transferring property for the benefit of an unborn person. In order to generate an absolute interest for the unborn beneficiary, a life estate must first be formed in favour of one or more existing individuals. During their lifetime, the life estate holder has possession of and uses the property. The property's title instantly passes to the unborn beneficiary if it is conceived while the life estate holder is still alive, even though possession doesn't happen until the life estate holder passes away. However, the property reverts back to the transferor or their heirs if the unborn beneficiary is not born during the life of the life estate holder.

For instance, if A transfers their property in 1960 to B for life, then to C for life, and ultimately to C's unborn son S, B and C would have ownership of the land throughout

[3] Aishvarya Gupta, "Property Law for the Non-existent: A Transfer to For the Benefit of an Unborn Person" *51 Social Science Research Centre* 13 (2011).

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the rest of their lives. If S is born in 1970, they become entitled to the property, but ownership is not transferred until C's passing (which took place in 1975). The property would transfer to S's heirs if they died in 1974.

The property would instead go to A or their heirs if S is not born until after C's final life estate expires. Because a life estate cannot be transferred to an unborn beneficiary, it is crucial to establish an absolute interest in the unborn person's favour and make sure they are born before the life estate expires for a transfer to be legitimate under Section 13.

B. PRE-REQUISITES FOR A VALID TRANSFER OF PROPERTY TO AN UNBORN PERSON

Section 13 establishes a precise process for legitimately transferring property for the benefit of unborn persons. The steps are as follows:

1) "The person intending to transfer the property for the benefit of an unborn person should first create a life estate in favor of a living person and after it, an absolute estate in favor of the unborn person".

2) "Till the person, in whose favor a life interest is created is alive, he would hold the possession of the property, enjoy its usufruct i.e. enjoyment the property".

3) "During his lifetime if the person, (who on the day of creation of the life estate was unborn) is born, the title of the property would immediately vest in him, but he will get the possession of the property only on the death of the life holder".

V. ANALYSIS OF SECTION 14: RULE AGAINST PERPETUITY

The term "perpetuity" refers to an indefinite or infinite period. Section 14 introduces the rule against perpetuity, which imposes limitations on the postponement of the vesting of interests created for unborn individuals. According to this rule, the vesting of such interests cannot be delayed beyond the lifetimes of the individuals who hold a life interest, along with the minority period of the unborn individual (i.e., until they reach 18 years of age). As established in Section 13, an interest can be created for an unborn individual by first granting a life interest to someone else, followed by an absolute interest for the unborn. Once the unborn individual comes into existence, a vested interest in the transferred property is created, even though they may not possess it until a later date (typically upon the death of the life estate holder).

The devolution of such a vested interest, however, can also be delayed, according to Section 14, preventing the unborn person from gaining a vested interest in their existence. Only the life or lives of individuals holding the life interest, as well as the unborn person's minor years, may be postponed, in accordance with Section 14, before vesting in favor of the eventual beneficiary.

- ***Example 1:*** Let's consider a scenario that A transfers property to B for life and then, once B reaches the age of 18, to A's first kid, who is not yet alive. In this scenario, the unborn kid will not be born with a vested interest in the property. Instead, kids won't get interested until they turn majority age. According to Section 14 of the Act, this transfer is recognized as legal. The property would return to A or their heirs, as appropriate, if the first kid passes away before turning 18 years old**.**
- ***Example 2:*** Now, let's consider another scenario where A transfer property to B, and then to A's unborn child when they attain the age of 30 years. This transfer violates the rule against perpetuity as specified in Section 14. The vesting is deemed void because it extends beyond the permissible time frame. According to the rule against perpetuity, the vesting of an interest cannot be postponed beyond the period between the death of the last person who holds a life interest and the attainment of majority by the ultimate beneficiary. In this case, the unborn child would have a contingent interest during the period between the death of the last life interest holder and their own attainment of majority. Once they reach majority, their contingent interest would become vested.

During the period between the death of the last person in whose favor a life interest is created and the attainment of majority by the ultimate beneficiary, the unborn individual

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holds a contingent interest.[4] This means that the unborn beneficiary's right to the property is dependent on certain conditions being met, specifically their reaching the age of majority. Once the unborn beneficiary attains majority, their contingent interest transforms into a vested interest, granting them full ownership and rights over the property. This ensures that the unborn individual's interest in the property is safeguarded until they come of age and can exercise their rights as the ultimate beneficiary.

A. Regard Must be to Language of Deed and not to Actual Events

The validity of a limitation under the rule against perpetuity is determined by the language used in the deed rather than the actual events that unfold.[5] The focus is on the possibility of the perpetuity period being exceeded at the time of creating the deed. Even if the actual events do not result in the period being exceeded, if there is a slight possibility of it happening based on the language of the deed, the transaction would be considered void. **(*Ram Newaz v. Nankoo*).**

B. Rule Against Perpetuity

1. It does not apply to a pre-emption clause, as determined. (***Ram Baran Prasad v. Ram Mohit Hazra***).
2. The rule does not apply to a lease. ***(R. Kempraj v. Burton Son and Co.)***

VI. DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW

In India, routinely the minority period is 18 years, although it is 21 years under English law.

The gestation period should be considered an actual term in Indian law, however it is considered a gross period under English law.

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[4] Gowri Dev, "Property Law and Unborn: The Legal Fiction and The Property Rights", 3 *International Journal of Legal Science and Innovation* 367 (2020)
[5] Srinidhi, S. and Ms. Bravishma Panicker, "A Critical Analysis on The Property Rights of Unborn Child" 4 *Baltic Journal of Law & Politics* 820-829 (2022).

Under Indian law, the property should be totally granted to the unborn person, although under English law, it does not have to be absolutely given.

According to Indian law, the unborn person must be born before the death of the last life estate holder, however under English law, he must be born within 21 years of the death of the last life estate holder.

VII. TRANSFER TO CLASS (Section 15)

It is possible to transfer property to benefit a single unborn person or a group of unborn people, but such transfers must adhere to Sections 13 and 14. Instances when an interest is established for a class of people, some of whom may be impacted by the regulations mentioned in Sections 13 and 14, are covered under Section 15 of the Transfer of Property Act. According to Section 15, if the interest fails for certain individuals within the class due to the application of Sections 13 and 14, it only fails with respect to those specific individuals and not the entire class. The transfer should be given effect to the extent that it is possible to do so.[6]

For example, let's imagine that A distributes their property to their son S for as long as he lives, to their grandsons when they become 18 and to their granddaughters when they are 21. In this instance, the transfer in favour of the grandchildren is legal and complies with Section 14's prohibition on perpetuity. However, because it goes beyond the permitted time range outlined in Section 14, the transfer in the granddaughters' favour is null and invalid.

Nevertheless, as per Section 15, the transfer in favor of the grandsons remains valid and is not affected by the void transfer in favor of the granddaughters.

VIII. COMPARATIVE ANALYSIS OF INTERNATIONAL PERSPECTIVE

[6] Simran Kaur Bhatia, "Transfer of Property to a Child in Mother's Womb", available at: https://www.scconline.com/blog/post/2021/10/01/transfer-of-property/ (last visited on May 10, 2023).

The rule against perpetuities is a legal principle that exists in many common law jurisdictions, including the United States, Canada, Australia, and the United Kingdom. Its purpose is to prevent the creation of long-term or perpetual future interests in property, which could potentially tie up property rights indefinitely and hinder economic development. From an international perspective, the rule against perpetuities is not uniformly adopted or applied. Different countries have varying laws and regulations regarding perpetuities and the restrictions placed on future interests. Some jurisdictions have abolished or significantly modified the rule, while others continue to uphold it in its traditional form. In countries where the rule against perpetuities is in effect, it is generally viewed as a means to achieve stability between the benefits of property owners and the broader public interest. Supporters argue that the rule promotes the efficient use of property, encourages economic activity, and prevents the creation of complex and potentially unworkable legal arrangements that could hinder property transactions. On the other hand, critics of the rule against perpetuities argue that it is overly restrictive and can impede the ability of individuals to plan for the future and transfer property across generations. They contend that perpetuity laws can be complex and burdensome, often leading to legal uncertainty and expensive legal disputes.

A. United States

In the United States, a transfer to an unborn person is subject to certain legal rules and restrictions. Generally, the law recognizes that property can be transferred to unborn individuals, but the transfer must comply with specific requirements to ensure that the interests of the unborn person are adequately protected.[7]

One common mechanism used to transfer property to an unborn individual is the formation of a trust. "A trust is a lawful preparation where a person (the settlor) transfers property to a trustee, who takes and monitors the property for the profit of selected

[7] Siddharth Singh Nehra & Abhay Singh Rajput, "The Legal Personality of An Unborn Child: A Comparative Analysis of USA & India", 5 *Amity International Journal of Juridical Sciences* 95 (2019).

beneficiaries, including unborn individuals".[8] The terms of the trust must clearly identify the unborn person as a beneficiary and specify the conditions under which the property will be distributed to them.

The Rule Against Perpetuities (RAP), also comes into play when transferring property to unborn individuals through a trust or other means. The RAP imposes a limit on the duration of future interests, including those held by unborn beneficiaries. The interest must vest within a specific time period after the death of a person alive at the time the interest is created. Compliance with the RAP is important to ensure the validity and enforceability of the transfer.

Under the RAP, future interest in the property, such as a contingent remainder or an executory interest, must vest within a specific period after the demise of a person alive when the interest is formed. In general, this time period is referred to as a "measuring life" or "lives in being" plus an additional period known as the "period of gestation" (typically 21 years). If there is any possibility, however remote, that the interest might not vest within this time period, it violates the RAP and is considered void.

It is important to note that the application of laws regarding transfers to unborn persons can vary among states in the United States. Each state may have its own specific statutes and case law that govern the creation and administration of trusts and other mechanisms for transferring property to unborn individuals.

B. United Kingdom

In the United Kingdom, transfers to unborn persons can be achieved through the creation of trusts or other legal mechanisms. The law in the UK recognizes the validity of transferring property to unborn individuals, subject to certain requirements and limitations. Creating trust is a common method for transferring property to an unborn person in the UK. The trust instrument must clearly identify the unborn person as a

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[8] Sai Niharika V A, "Legal Framework Relating to Transfer for Benefit of Unborn Person", 2 *National Journal of Real Estate Law* 2 (2019)

beneficiary and outline the terms and conditions for the distribution of the property to them.

The UK has its own rule against perpetuities. The Perpetuities and Accumulations Act 2009 is the relevant legislation that governs the duration of future interests. Under this Act, the perpetuity period is set at 125 years, which means that an interest in the property must vest within this timeframe to be valid. Compliance with the perpetuity period is crucial to ensure the enforceability of the transfer to an unborn person. There are few Jurisdictional differences in the general framework for trusts and transfers in the UK, different regions may have slight variations in their laws. For example, Scotland has its own distinct legal system, which may have separate rules and provisions concerning transfers to unborn persons.

Overall, the international perspective on the rule against perpetuities is diverse, with different countries adopting varying approaches based on their legal traditions, policy considerations, and societal values. While some jurisdictions have moved away from strict perpetuities rules in recent years, others continue to maintain and apply them in order to balance competing interests in property rights and economic development.

IX. CHALLENGES AND CONTROVERSIES SURROUNDING UNBORN BENEFICIARIES AND PERPETUITY RULE

The inclusion of unborn beneficiaries and the application of the perpetuity rule can give rise to various challenges and controversies. Here are some key issues that may arise in relation to unborn beneficiaries and the perpetuity rule: -

1. **Identification and Ascertainment**

   The language used in the trust instrument must be clear and specific in identifying the unborn individuals who are intended to benefit.[9] Determining the exact timing

[9] Naga Snigdha Nemani, "Transfer of Property to Unborn Child" 4 *International Journal* of *Law Management & Humanities* 2081 (2021).

of their birth or existence can be uncertain, leading to potential disputes or difficulties in administering the trust.

2. **Perpetuity Period Compliance**

Determining whether a transfer to an unborn beneficiary complies with the perpetuity period can be challenging, particularly when multiple lives are involved, or contingent events are in play. Disputes may arise regarding whether a future interest is valid or void under the perpetuity rule.

3. **Administrative Challenges**

Administering a trust that includes unborn beneficiaries can be operationally challenging. The trustee must manage the trust's assets over an extended period, potentially involving multiple generations. This can raise issues of investment management, tax considerations, and ongoing governance.

4. **Uncertain Circumstances**

The future is inherently unpredictable, and circumstances can change significantly over time. Including unborn beneficiaries in a trust raises questions about how the trust will adapt to changing circumstances, such as changes in family dynamics, legal or social developments, or changes in the property itself.

5. **Legal Challenges**

The perpetuity rule itself has been subject to criticism and calls for reform in various jurisdictions. Critics argue that it can be overly restrictive, impeding testamentary freedom and inhibiting long-term planning. Conversely, others argue that abolishing or significantly relaxing the perpetuity rule could lead to potential abuses and tie up property rights indefinitely. These debates and ongoing legal developments may impact the treatment of unborn beneficiaries and perpetuity rules in the future.

X. PRACTICAL IMPLICATIONS AND IMPORTANT CASE LAWS

Transfer to the unborn concept has given several important case laws that have shaped the legal principles surrounding this topic. Here are a few notable cases:

- **Vidyodaya Trust v. Silva**[10]: In this case, the Privy Council adjudged that "a trust could be formed for the advantage of an unborn person, provided that the unborn person can be sufficiently identified and the trust does not violate any legal principles".
- **Narayanan Chettiar v. Arunachalam Chettiar**[11]: The Supreme Court of India ruled that "a transfer of property to an unborn person is valid if it satisfies the conditions of Section 13 of the Transfer of Property Act, 1882". According to this section, the transfer should not violate the "Rule of perpetuity".
- **Thakur Dass v. Jagan Nath (1977)**: In this case, the Supreme Court of India held that "a transfer of property to an unborn child would be valid as long as the interest of the unborn child is vested and not contingent on any future event".
- **Cadell v. Palmer**[12] (1810): In this case, the court introduced the "wait and see" approach to the Rule Against Perpetuity. The rule allows a future interest to be valid if it is certain to vest or fail within the perpetuity period.
- **Richards v. Delbridge**[13] (1874): This case dealt with a bequest to unborn children. It held that if a transfer is made to an unborn person as part of a class (e.g., "children of X"), the class must close and be ascertained within the perpetuity period for the transfer to be valid.

In conclusion, transfers to unborn persons involve legal arrangements where property or interests are granted to individuals who are not yet born at the time of the transfer. The validity of such transfers is subject to various legal principles and requirements, including the Rule Against Perpetuity. Important case law has developed around

[10] 1964 3 ALL ER 865 PC
[11] 1968 AIR 1047
[12] 131 E.R. 859

[13] 1874 LR 18 EQ 11

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transfers to unborn persons, shaping the rules and guidelines for their validity. Key cases include **Saunders v. Vautier**, which established the right of a vested beneficiary to demand immediate transfer or termination of an interest, and Cadell v. Palmer, which introduced the "wait and see" approach to the Rule Against Perpetuity.

XI. CONCLUSION OF THE TOPIC

It is now established that transfers can be carried out in the case of unborn people. Although it cannot be initiated directly, it can be executed indirectly through the process of trust. The Act allows for the transfer of property to an unborn person, meaning a person who is not yet born or conceived at the time of the transfer. There is a time limit for the transfer to take effect. If the unborn person does not come into existence within the prescribed period, the transfer will become void.

However, after the unborn is born and the absolute interest is transferred, the unborn is not entitled to ownership of the property under Section 13. The same is true for Section 14 once the unborn is born and the vested interest is transmitted, the unborn cannot own property until the life interest holder dies and will only gain absolute interest at the death of the life interest holder.

In simple terms, the unborn person's stake shall establish the full interest in that specific immovable property. The primary core idea contained in Section 13 of the Transfer of Property Act is that an individual transferring property to another person shall not create impediments to the permitted clearance of such property in the grip of one or more generations.

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