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**LEGALITY OF THE TRANSFER OF PROPERTY FOR THE BENEFIT OF
AN UNBORN PERSON: AN ANALYSIS**- Kriti Jha & Riya Majumder¹**ABSTRACT**

This research article examines, from the perspectives of Muslim and Hindu personal laws, the transfer of property for the benefit of an unborn child. Laws developed for this field of transfer of property are intriguing because they make proposals regarding a person who is not yet born. According to the law, an unborn person is someone who is not yet alive at the time of transfer but who may become so at a later period. In terms of property transfers for these people, Indian law has a variety of applications. The transfer of property done for the benefit of an unborn person is covered by S.13 of the Transfer of Property Act, of 1882, which covers a wide spectrum of property transfers in India. The researcher will make an effort to clarify the Transfer of Property Act, of 1882, provisions affecting unborn persons, such as S.13 and other relevant sections, as well as its scope and applicability in India, in this study. Last but not least, the researcher would also go through certain ambiguous points in these provisions for an unborn person.

KEYWORD: Unborn person, Transfer of property act, 1882, India, Transfer for the benefit of the unborn person, property.

INTRODUCTION

According to Section 13 of the Transfer of Property Act of 1882, if an interest in the property is created at the time of the transfer for the benefit of an unborn child, another interest must be

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created in connection with the same transfer and the interest created for the benefit of the unborn child cannot go into effect unless it fully covers the transferor's remaining interest in the property to be transferred. Therefore, in order to transfer property for the benefit of an unborn person on the transfer day, the property must be transferred through trust in favor of someone who is alive on the transfer date and who is not an inborn person. It could be more straightforward to say that the immovable property must vest in a live person between the date of the transfer and the child's conception because real estate cannot be transferred directly in favor of an unborn person.²

It could be argued that a prior interest must always take precedence over the interest of an unborn child. Furthermore, it is impossible to give an unborn child a life estate since, in order for an interest to be created in their favor, it must fully enclose the transferor's remaining interest in the property in order for it to take effect. The interest in favor of the unborn child shall make up the entire residual interest in the estate. Section 13's main premise is that no one who transfers property to another person shall prevent the free transfer of such property to more than one person. Section 13 in no way limits the subsequent interest that is produced in favor of several individuals who are still alive at the time the transfer is implemented. The restriction is defined as the gift of interest to an unborn person, whether the gift is time-limited or not.

Therefore, if the beneficiaries of the transfer are still alive, it can be argued that an unlimited number of succeeding life interests can be created in their favor. However, it's imperative to remember that if the interest is to be established in favor of those who have not yet given birth, entire attention must be given to unborn people.

RESEARCH QUESTIONS

1. How is an unborn person given the title of a legal personality?
2. What are the legal rights and status of an unborn person under Hindu law and Islamic laws in India?

LITERATURE REVIEW

² Transfer To Unborn person, <https://blog.ipleaders.in/transfer-to-unborn-person/>

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[1] It has come a long way from denying fundamental property rights to certain groups in society, including women, to recognizing intellectual property rights. The transfer of property for unborn people is one of these areas. This is an intriguing feature of property law because it assumes transfer for the advantage of an unborn person. There are a lot of murky regions in this topic that needs to be investigated. According to Section 13 of the Transfer of Property Act of 1882, when a property is transferred, an interest in it may be created for the benefit of a person who was not yet alive at the time of the transfer. However, subject to an earlier interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it encompasses the entirety of the transferor's remaining interest in the property.³ [2] This research paper's goal is to examine how international law, which is governed by treaty conventions and other countries like the USA and India, treats the legal personality of an unborn child. At both the national and international levels, there has been discussion around the legal rights of an unborn fetus. The issue that needs to be addressed is whether or not the fetus may be given the status of a human being from the beginning and given the status of a person. Through this study paper, we aim to further explore how a fetus' interests conflict with the rights and interests of the woman as protected by international treaties and the constitutions of the USA and India.⁴ [3] According to Section 122 of the Transfer of Property Act, a "gift" is the voluntary and uncompensated transfer of specific existing moveable or immovable property from one person, known as the donor, to another, known as the donee, and accepted by or on behalf of the donee. Islamic law generally does not distinguish between real and personal property; nevertheless, it does insist on the separation of the corpus of the property and the usufruct of the property. When a "gift" of property seeks to impose a condition that is incompatible with such absolute dominion, the condition is rejected as repugnant. However, interests limited in point of time can be created in the usufruct of the property, and the dominion over the corpus takes effect subject to any such limited interests. Under English law, limited interests in respect of the property are distinct from events of estates. According to Islamic law, they only have usufructuary rights (and not rights of ownership of any kind). Islamic law's various schools all share the same core understanding of property and ownership. Under any of the schools, a restricted interest replaces

³ VA, S. N. (2019). LEGAL FRAMEWORK RELATING TO TRANSFER FOR THE BENEFIT OF UNBORN PERSON. *National Journal of Real Estate Law*, 2(2).

⁴ Nehra, S. S., & Rajput, A. S. (2019). The Legal Personality of an Unborn Child: A Comparative Analysis of USA & India. *Amity International Journal of Juridical Sciences*, 5.

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the usufruct. Hiba comes in a variety of forms. Among them are Ariya, Sadkah, Hiba bil Iwaz, Hiba ba Shart ul Iwaz, Hiba bil mushaa, and Hiba bil Iwaz. Since there is no universal civil code in India, the laws that apply will determine how gifts of property are handled. We have the Civil Procedure Code, the Transfer of Property Act, the Indian Succession Act, the Registration Act, the Indian Majority Act, and the Guardianship Act. There are individual laws in different localities. Hiba, which law will take precedence in the event of a conflict of laws? The essay is broken up into five sections: Part I discusses the ability to give and receive gifts; Part II discusses the various types of gifts; Part III discusses the transfer of possession; Part IV discusses the need for writing and registration, and Part V discusses contingent and conditional gifts. The study contrasts the Hiba under Islamic law with the transfer of property under Indian law and comes to the conclusion that Islamic law is more advanced, more easily implemented, and has fewer procedural requirements. While the law on the transfer of property entails numerous steps and presents challenges when giving gifts.⁵

ESSENTIAL ELEMENTS OF SEC. 13

The following discussion covers section 13's key components. These are what they are:

1. No Transfer Direct

An unborn human cannot be directly transferred. The only way to create such a transfer is through the use of trusts. A fundamental tenet of property law is that every piece of property will have an owner. As a result, if the property is transferred to an unborn person, it will result in a situation where the property will be left without an owner from the time of the property transfer until the unborn person is born.

2. Prior Passion

The estate must be held by a different person between the time of the transfer and the date the unborn person is born if the circumstances are such that no trust is created. Simply put, an

⁵ Ahmad, Tabrez, Comparative study of Gift under Islamic Law and Transfer of Property Law: Indian perspective (September 11, 2009). Available at SSRN: <https://ssrn.com/abstract=1471926> or <http://dx.doi.org/10.2139/ssrn.1471926>

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interest that is developed in support of a live person must always come before an interest that is created in support of an unborn person.

3. Absolute Interest

The property must be given to the unborn child in its entirety. There should be no future transfers from the unborn person to anyone else after the initial transfer to that individual. An interest that lasts only for a person's lifetime cannot be bestowed upon an unborn child. An estate may only be granted to an unborn person under English law for the duration of that person's lifetime. The "rule of double possibilities" is a limitation that applies to this idea of English law. The *Whitby Mitchell* case led to the acceptance of this rule. According to the rule, it is forbidden to transfer a life interest in an unborn person because doing so would result in two possible outcomes. The unborn person to whom the life estate was to be transferred giving birth will be the first option, and the emergence of their offspring will be the second. As a result, only the entire interest in the property, not only the life estate, may be passed to an unborn child, and not just the life estate.

WHEN AN UNBORN PERSON ACQUIRES A VESTED INTEREST

Section 20 of the Transfer of Property Act of 1882 makes reference to the idea of when an unborn person develops a vested interest. Even though an unborn person may not be able to use the possession of the property as soon as he is born, he may nonetheless develop a stake in it from the moment of his birth. When a transfer of immovable property creates an interest for the benefit of an unborn person, that person obtains a vested interest at birth, even if they may not be eligible to use it right away. However, if the conditions of the agreement include a stipulation to the contrary, the specified restriction may be waived.⁶ The clause states that once a child is born, an interest created for the child's benefit vests in the child. Even if he might not be eligible to enjoy it right away at birth, this interest nonetheless has a vested interest.

LEGAL STATUS OF AN UNBORN PERSON

⁶ Absolute interest under the transfer of property act, 1882, Aishwarya Sandeep, <https://aishwaryasandeep.com/2022/06/14/absolute-interest-under-transfer-of-property-act-1882/>

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An individual is regarded as a natural person from the moment of his birth until the moment of his death, as was previously stated. Such a natural person has a legal personality because he or she is capable of having rights and obligations. A natural person does not often have a legal personality before birth or after death. Therefore, a natural person must be living in order to have rights and obligations. But when it comes to the case of an unborn kid, the law has a problem. The fields of medicine and theology prove that a developing human being is a living thing. A child in its mother's womb is regarded as already being born in legal fiction. He will become a citizen when he is born alive. Normally, the law only pays attention to the living, natural persons, but it creates an exemption for a child ventre sa mere (a child in its mother's womb). A child in the womb has the potential to acquire some rights and pass down property, but this all hinges on whether the infant survives birth. During partition, an unborn child is regarded as a person. Such an unborn kid may also be entitled to compensation for the harm it experienced while still inside its mother.

VIEWS OF SUPREME COURT ON TRANSFER OF PROPERTY TO UNBORN PERSON

The Transfer of Property Act, 1882's provisions on the transfer of property done for the benefit of unborn people have been interpreted by the Supreme Court of India in a number of judgments throughout the years. The Apex Court made significant points in the well-known case of Girjesh Dutt v. Datadin⁷. According to the case's facts, "A" gifted her belongings to "B," her nephew's daughter. The gift from A was made for B's lifetime, then went to B's daughter without the ability to alienate her, and if B had no male or female heirs, it went to A's nephew.

B passed away without bearing any offspring. Because the gift was a limited interest and also subject to the prior interest in favor of B, the court determined after taking the case's facts into account that Section 13 did not apply to the gift in favor of unborn daughters. The case of Raja Bajrang Bahadur Singh v. Thakurdin Bhakhtrey Kuer⁸ also pertains to this idea. Although no interest can be created in favor of an unborn person, the Apex Court noted that in the present case, where a gift is made to a class or series of people, some of whom are real but some of

⁷ Girjesh Dutt v. Datadin AIR 1934

⁸ Raja Bajrang Bahadur Singh v. Thakurdin Bhakhtrey Kuer, 1976 SC 794 (8)

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whom are not, it does not entirely fail, It is valid for those who were alive at the time of the testator's death but void for everyone else.

Additionally, Section 13 allows for the transfer to an unborn child through the establishment of a trust. The requirement is that the unborn child must be born before the holder of the life interest passes away. In this case, existence does not imply birth; rather, it indicates that the child should be conceived and remain in the mother's womb. It was decided in Trustees of Sahebzadi Oalia Kulsum Trust v. CED⁹ that establishing a trust does not equate to establishing a life interest for the purpose of transferring to an unborn child.

In the case of F.M. Devaru Ganapathi Bhat v. Prabhakar Ganapathi Bhat¹⁰ The land was handed to the appellant by the transferor, subject to the stipulation that any male offspring born to her brother would also hold a share of the property. It was decided that Section 13 will not have any bearing on the current circumstances and that there is no prohibition on the transfer of interest in favour of an unborn person. The Act's Section 20 allows for the creation of an interest for the benefit of a foetus whose interest will become absolute at birth. The Court further decided that there is no clause prohibiting the creation of an absolute interest in behalf of a person who is not yet born. The creation of this kind of right was deemed to be acceptable.

TRANSFER OF PROPERTY FOR THE BENEFIT OF AN UNBORN PERSON UNDER MUSLIM LAW

With the exception of Wills, which take effect immediately after the testator's death, we typically find that property is transferred to another person while the testator is still alive. The next logical query that comes to me is: Can one transfer property to an unborn person? Since a property can only be transferred between two living parties, the law improvises the query to Can a person transfer property for the benefit of an unborn person? The Act provides a positive response to this query. The relevant section of the Act, S. 13, is as follows:

⁹ Trustees of Sahebzadi Oalia Kulsum Trust v. CED (1998) 6 SCC 267

¹⁰ F.M. Devaru Ganapathi Bhat v. Prabhakar Ganapathi Bhat (2004) 2 SCC 504

"Where, on a transfer of property, an interest therein is created for the benefit of a person not existing at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the entire remainder of the transferor's interest in the property."

Under the Act, who is considered an unborn person? A person who is not yet born but who may be is considered to be unborn. In fact, it would not be accurate to say that a child in the womb is a person in existence. The English and Hindu legal systems, however, approach this scenario differently. The Supreme Court ruled that under S. 20 of the Act, the transfer of an interest in favor of an unborn person is not prohibited in the case of *F.M. Devaru Ganapati Bhat vs. Prabhakar Ganapathi Bhat*¹¹. This establishes without a doubt that a person who is unborn applies to both those who have not yet conceived and those who are conceived but have not yet given birth. Regardless of whether the kid would really be born, any transfer of property for the benefit of such an unborn person is legal under the law.

According to the Act, the following steps must be taken in order to transfer property for the benefit of an unborn person:

1. Prior to creating an absolute interest in favor of the unborn person, the transferor must first create a life interest in favor of a live person. This implies that extra family members would be considered beneficiaries in addition to the specified beneficiary.
2. The property and any usufruct (if any) would be owned by the individual in whose favor the life interest was created until that person's death.
3. If there was a preference for the living person at the time of life's creation.

Prior to the Act's passage, Hindu and Muslim law shared the same position in comparison by forbidding making a donation in support of someone who had not yet been born or even existed. Such a gift was seen as worthless. The Hindu Law was altered to comply with the Act's stipulations, nonetheless, through later enactments. The Indian Succession Act of 1925's S. 113 contains the aforementioned changes. Muslim Law, on the other hand, did not alter its stance. According to Muslim law, a gift given to an unborn child is invalid. When an unborn child is

¹¹ *F.M. Devaru Ganapati Bhat vs. Prabhakar Ganapathi Bhat*, Appeal (civil) 4385 of 2001

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given a gift as part of a Waqf, this rule is an exemption. In the event that the child is still in the mother's womb, a different outcome is attained. In that situation, a gift given to a child while it is still in the mother's womb is valid as long as the child is born within six months of the date of the present. In situations like this, the youngster is handled separately.

RULE OF PERPETUITY UNDER MUSLIM LAW

The right to alienate one's property in whatever way that one chooses is reserved by the property owner. However, the law steps in when a legitimate claimant is mistreated. Let's use a fictitious scenario to provide further context. Consider a family that consists of a father and his three sons. As legal heirs, the three boys are entitled to their father's possessions following his passing. The father can, however, transfer the property for the benefit of the unborn person in the fourth or fifth generation to prevent one of his sons from inheriting if he so chooses. In order to resolve this, the law must make a decision. Can someone continue to transfer the property after his death? The law provides a negative response to this. The goal of the law is to uphold the rights of legitimate claimants. S. 14 of the Act was consequently passed. The clause reads as follows:

“No property can be transferred in such a way that it creates an interest that will become effective after the passing of one or more people who were alive at the time of the transfer and the minority of someone who will still be alive at the end of that time, and to whom, if he reaches full age, the interest created is to belong.”

As said by Jarman In its most basic meaning, a perpetuity is a disposition that makes property unassignable indefinitely. Some people make permanent transfers because they do not want to lose their ancestors' assets. It is argued that free property circulation is necessary since doing otherwise prevents society from reaping any benefits from the property.¹²

The occurrence of perpetuity occurs in two situations, namely "by removing the transferor's ability to alienate and by establishing a remote interest in the future property." S. 10 of the Act stipulates that it would be invalid to create a distant interest in future property that would limit

¹² Jarman on Wills, Raymond Jennings, John C. Harper, 8th edition.

the transferee's ability to alienate in order to promote this prohibition on perpetuity. S. 14 forbids the formation of any potential distant property interests.

The following prerequisites must be met in order for S. 14 of the Act to apply:

1. There is a property transfer.
2. An interest in favor of an unborn person should be created through such a transfer.
3. The interest therefore generated must continue to exist for at least one or more people who were alive on the transfer date.
4. The unborn child must exist at the time the interest of the living person expires.
5. Only up to the lifetimes of the living individuals in addition to the minor of the intended beneficiary might the vesting of such an interest in favor of the final beneficiary be delayed. Any further vesting would not be legal.

The norm relating to perpetuity is distinct in terms of Muslim Personal Law. Conflicts have arisen between the common law's compulsory "rule against perpetuity" and the obligatory perpetuities in family Waqfs as a result of the differences between Muslim law and common law. A family Waqf is a type of Waqf property that is set aside for charitable purposes with the settlor's family or descendants forever, among other types of Waqf property. The Waqf benefit will only be used for charitable causes after they pass away. Three of the Sunni Jurisprudence of Islam's four schools of thought—the Hanafi, Shafi'i, and Hanbali schools—believe that a family Waqf must be eternal in nature. Thus, it can be observed that Muslim Personal Law renders such transfers void, with the exception of Waqf, even if the Act enables the transfer of property for the benefit of an unborn person. Similar to the rule against perpetuity, the Act forbids the transfer of property in perpetuity, which is opposed to Muslim law, by maintaining that the transfer of property through a waqf must be in perpetuity by law.

CONCLUSION

It follows from the explanation above that property transfers can be made with regard to unborn people. Even if the transfer cannot be carried out directly, it can be done so through the intermediary of trusts. In other words, the interest in the unborn child will be the exclusive

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interest in that particular piece of real estate. Section 13 of the Transfer of Property Act is based on the fundamental concept that no one who transfers property to another person shall erect obstacles to the free transfer of that property to one or more generations. Therefore, it is crucial that the entire residual interest of the person transferring the property be transferred to the unborn person for a transfer in favor of an unborn person to be lawful. Additionally, the vested interest is transferred to the unborn person as soon as the property transfer is put into effect. Thus, only in accordance with the provisions mentioned above may the transfer of the real estate to unborn persons take place. The transfer will be deemed invalid if something happens.



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