

---

# **TRANSFER OF PROPERTY FOR THE BENEFIT OF THE UNBORN CHILD UNDER THE TRANSFER OF PROPERTY ACT, 1882**

---

Divyanshi Rawat, Bennett University  
Dinesh Kumar Singh, Bennett University

## **ABSTRACT**

The Transfer of Property Act, of 1882, specifies certain rules for property transfers to unborn persons and regulates inter vivos transfers, or transfers of property between living people. In order to guarantee that the unborn beneficiary has an absolute interest at birth, Section 13 of the Act permits such transfers through a structured procedure in which a prior life interest is formed for a living person. By following the rule against perpetuity, this procedure guarantees that the transfer vests in a fair amount of time. Additionally, as stated in Section 6, the Act restricts the categories of property that can be transferred and prohibits the transfer of public office, pensions, speculative succession, and similar interests. The Act forbids transfers based on speculative events or interests that go against public policy through these provisions. The requirements and restrictions on property transfers to unborn persons are clarified by case law, such as *Tagore v. Tagore* and *Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer*. These cases highlight the need for a prior interest and the invalidity of any subsequent life interest once the unborn's absolute interest has been vested. The property returns to the transferor if the previous interest holder passes away before the unborn beneficiary is born. The transfer is nullified if the live birth condition is not met, but the unborn's interest is still preserved.

The research examines the legal details and procedures that control such transfers, offering insights into their limitations and real-world uses. This systematic strategy guarantees that the unborn acquires rights without going against the ideas of perpetual ownership or speculative succession, highlighting the harmony between property rights and legal constraints.

## Introduction

One of the main pillars of Indian property law is the Transfer of Property Act, of 1882, which establishes the rules for transferring property rights between people. The Act also permits the transfer of property to unborn humans under specifically defined conditions, even though its primary purpose is to promote property transactions between live individuals. The legal system guarantees that unborn children can have full property rights without violating the concepts of perpetuity, public policy, or speculative succession. Transfer of property under the Transfer of Property Act, of 1882<sup>1</sup> can be done between living persons either in the present or in the future at any time<sup>2</sup>. Such future transactions can be accompanied by certain conditions that are not prohibited by law, shall not be an act of impossibility, shall not be an act of fraud, etc that need to be fulfilled for that transaction to take place, or such transaction would happen at an event whose occurrence may be certain or uncertain. For ex: A promises B to transfer his property as soon as B attains the age of 22. Here, B will get the property of A after the age of 22 years, and the possibility of such an event happening in the future is certain. The interest would not be defeated even by the death of the transferer or transferee before attaining the possession of the property promised to be transferred. The transactions where the occurrence of an event is certain is the vested interest<sup>3</sup>.

### What type of property can be transferred and by whom<sup>4</sup>?

However, the property can be transferred by a competent person, which means a person who is legally competent to contract, i.e., a person of the age of majority, is of sound mind, and is not prohibited by law. Such a person can transfer the property as per §7 of TPA, 1882<sup>5</sup>. However, not all properties can be transferred under TPA. It restricts certain types of properties from being transferred.<sup>6</sup> Which property can be transferred, and what restrictions are imposed on some property from being transferred are as follows:

1. Specs Succession: The chances of a person obtaining a right in the future as mentioned-

---

<sup>1</sup> THE TRANSFER OF PROPERTY ACT, 1882, No. of 4 of 1882, Acts of Parliament, 1882.

<sup>2</sup> Section 5 in The Transfer Of Property Act, 1882

<sup>3</sup> Vested and Contingent Interest under Transfer of Property Act

<sup>4</sup> Anirudh Singh Chouhan, Transfer of Property Act, 1882: Laws of Transfer Movable/Immovable Property, MAGIC BRICKS (July. 31, 2023) **Transfer of Property Act** - Laws of Transfer of Immovable Property

<sup>5</sup> Section 7. Transfer of Property Act, Persons competent to transfer.

<sup>6</sup> R. K. Sinha Transfer Of Property Act 1882 16 Ed

- (a) The chance of an heir succeeding to the estate.
  - (b) The chance of a relative obtaining a legacy on the death of a kinsman.
  - (c) Any other possibility of like nature.
2. Right to re-enter: The right to re-enter cannot be transferred to someone else except the owner.
- For ex- A transfers his property to B on lease under certain conditions that B was prohibited from doing on that piece of land. On violation, A can re-enter but A cannot transfer this right to C.
3. Easement: Cannot be transferred except dominant heritage.
- For example: the right to way, light, or other benefits that come from land.
4. Restricted interest: the property may be transferred with or without any restrictions. When the transferer transfers the property with restrictions the transferee cannot act contrary to them.
5. Right to future maintenance: Only for personal benefit to whom it is granted and thus cannot be transferred to anyone else.
6. Mere right to sue: only the aggrieved party can sue and such right cannot be transferred.
7. Public office: The public offices and the salaries of public servants cannot be transferred. This prohibition is based on public policy.
8. Pensions: Stipends paid to navy, military, and army officers, civil pensions to government employees, and personal allowances cannot be transferred to any other person.
9. Nature of Interests: No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an in so far unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be a transferee.
10. Statutory prohibitions: Leaseholds are transferable, but a tenant having an untransferable right of occupancy, farmer of the estate, or lessee of the estate cannot be transferred.<sup>7</sup>

---

<sup>7</sup> 922\_TRANSFER OF PROPERTY Section 5\_6\_7.docx

In the case of *Official Assignee of Madras v. Sampath Naidu*<sup>8</sup>, it was held that a mortgage executed by a legal heir is void even if he has acquired the property. Therefore, it can be concluded that the transfer of specs succession is void.

In the case of *Shoilojanund Ojha v. Peary Charan Dey*<sup>9</sup> The court stated that the right to receive voluntary and uncertain offerings in worship is restricted for personal enjoyment and thus it cannot be transferred.

### **Definition of unborn child and transfer of property to unborn under the TPA,1882**

Individuals are the units in which the legal rights are vested.<sup>10</sup> The unborn person is the one who is not in existence and may be born in the future but for now, their current legal existence is unknown.<sup>11</sup> A child in the womb is not a person in existence but it is considered and treated as living while the transfer is to be done to an unborn under the Transfer of Property Act, 1882. On transfer of property, an interest is created for the benefit of a person in existence at the date of transfer subject to the prior interest created by the same interest. This means that during the transfer to an unborn person the child is not in existence so the property cannot be in their direct possession. In order to keep the property in the possession of a person so that the child acquires that after its birth as per the transfer made before its existence, the interest is created for some other person during his life existence. In the case of *Paton v. United Kingdom*<sup>12</sup>, Sir George Baker stated that a fetus does not have any legal rights until it is born and has a separate existence from its mother. This is because, in English law, a person cannot be assigned legal rights or duties before its birth.

The transfer of property under the Transfer of Property Act, of 1882 shall be *inter vivos*<sup>13</sup>, i.e., the property can be transferred by and transferred to a living person. The transaction between the transferer and transferee can occur when both are living beings and competent to form a contract, i.e. of sound mind, attained age of majority, and not prohibited by law. But an exception to this is §13 of the Transfer of Property Act, of 1882 which allows transfer of property under TPA to an unborn person. This implies that the principle of transfer of property which is supposed to be *inter vivos* that facilitates the transfer of property between living individuals has an exception to it utilizing §13 of the TPA, 1882 that recognises the existence

---

<sup>8</sup> 1933 SCC OnLine Mad 141

<sup>9</sup> 1902 SCC OnLine Cal 114

<sup>10</sup> G.W. Paton

<sup>11</sup> Transfer for Benefit of Unborn Person under Transfer of Property Act

<sup>12</sup> (1981) 3 E.H.R.R. 408, Application No. 8416/78.

<sup>13</sup> Essentials of Transfer under Transfer of Property Act 1882 - Law Times Journal

of an unborn before its birth. Also, such a transfer creates a vested interest in the unborn child. The unborn will receive the property once it is born with the conditions implied by the transferer. This interest is not affected by the death of the transferer or the prior interest, but it leads to failure of interest in the death of the unborn in the mother’s womb. *FM Devaru Ganapati Bhat v. Prabhakar Ganapati Bhat*<sup>14</sup>, this case upheld the principle that a transfer of property to an unborn child is permissible under Section 13 of the TPA, provided the necessary conditions are met.

**Role of a prior life interest in the transfer of property to unborn**

Property is transferred to the unborn by a mechanism as the property cannot be directly in possession of the person not in existence. Therefore, it is first transferred in favor of other living beings as immovable property vests between two living persons, and it cannot be directly transferred to the unborn. However, the prior interest is only required when the property is being transferred to the unborn and until the unborn acquires the possession of the transferred property for the benefit of the unborn. Further, no prior interest is required after the unborn receives the possession which means the final interest shall end up with the unborn child only.

The transferrer can create ‘n’ number of prior interests until the property is given in possession of the unborn. But once the property is given to the unborn, they cannot act as a prior interest for the other person.

For example: if A wants to transfer the property to an unborn child he may

A-----life interest  
           -----life interest  
           -----life interest  
           -----unborn child (absolute interest), it is a valid transfer.

But,

A-----life interest  
           -----life interest  
           -----transfer to unborn and considering them as a life interest  
           -----absolute interest to another person, this is not a valid transfer.

---

<sup>14</sup> AIR 2004 SC 2665

In the case of *Tagore v Tagore*<sup>15</sup>, the Privy Council held that a child in the womb is a person in existence for making gifts to the unborn.

in the case of *Abdul Fata Mahomed v. Rasamaya*<sup>16</sup>, the Privy Council held that a gift to an unborn person is forbidden by Mohammedan law except in the case of Waqf.

Section 13 does not apply to transfers made by Muslims.<sup>17</sup> However, under Muslim law too a gift in favor of a person not in existence is held void.<sup>18</sup>

Thus, if someone transfers the property to the unborn it cannot be done directly. Prior life interest has to be created, and the absolute interest must be in favor of the unborn.<sup>19</sup> This shows that there are no laws that forbid the unborn from owning property. The unborn can hold the property and enjoy the rights of that property once it is alive. Therefore, for the transfer to be valid it is essential that the transfer should not be done directly to the unborn. A prior interest should be created. And most importantly, the interest of the unborn should be absolute and it should not act as a prior interest.

### **Procedure of transfer**

The procedure to transfer the property to the unborn is simple and clear as stated above.

1. The person intending to transfer the property shall create prior interest and then the absolute interest of the unborn according to §14 of TPA, 1882<sup>20</sup>.

This is called the rule against perpetuity which says no transfer shall create interest that will take effect the lifetime of the unborn. Perpetuity means continuous and never-ending transactions.

In the case of “*Ram Baran Prasad v. Ram Mohit Hazra*<sup>21</sup>”, the supreme court perpetuity: A perpetuity, is a “future limitation, whether executory or by way of the remainder, and of either real or personal property which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests”.<sup>22</sup>

---

<sup>15</sup> 1872 SCC OnLine PC 36

<sup>16</sup> 1894 SCC OnLine PC 24

<sup>17</sup> Asaf A. A. Fazee, *Outlines of Mohammedan Law*, IV edition

<sup>18</sup> Abdul Cadur v Turner, (1884) 9 Bom.

<sup>19</sup> §13 Transfer of Property Act, 1882

<sup>20</sup> V.P. Sarathi *Law of Transfer of Property*, VI edition

<sup>21</sup> 1966 SCC OnLine SC 20

<sup>22</sup> William David Lewis, *A Practical Treatise on The Law of Perpetuities*, (p. 164)

*K. Naina Mohamed v. A.M. Vasudevan Chettiar*<sup>23</sup>, it was held that the “rule against perpetuity concerns rights of the property only and did not affect the making of contracts”

2. Until the prior interest is alive, they would hold possession of the property.
3. The unborn may receive possession of the property when the prior interest is no longer alive or after the unborn attains the age of majority.

According to §15 TPA, 1882 if an interest is created on the transfer of property for the benefit of a class or classes of persons with respect to some of whom such interest fails by rule as mentioned under sections 13, and 14 of this act, such interest fails as regards to those people.

In the case of *Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer*<sup>24</sup>, the father made a will that allowed his younger son, his heirs, and his successors to enjoy and possess the properties in question as "absolute owners" without any authority to alienate them. The father intended to create a series of life interests one after the other, with the ultimate reversion being given to the parent estate when there was the complete failure of heirs. Accordingly, under the will, only a life estate was created in favor of the beneficiary and successive life estates in favor of successive heirs of the beneficiary. Further upon the complete extinction of the line of heirs of such son properties affected by the will, they were to revert to the estate of the testator. It was held that the will was only valid for those who were alive at the time of the testator's death; it was invalid for everyone else. Additionally, the interest fails any interest generated in the same transaction due to any of the rules in sections 13 and 14, and it is intended to occur after the previous interest fails, as stated in §16.

In the case of *Girjesh Dutt v Datadin*<sup>25</sup> A gave B possession of the property which she later gave to her sons with absolute interest. On the day the gift was executed, B was childless. The deed also stated that if B had only daughters, the property would pass to them for the duration of their lives. The property was to go entirely to X at B's death if B had no children. In violation of Section 13's requirement, the deed on paper granted B's unborn daughters a life estate. However, X claimed the land under the gift deed after B passed away without having any children. The court determined that any transfer included in the same deed and meant to take effect or upon the failure of such a preceding transfer is also void when a transfer in favor of

---

<sup>23</sup> (2010) 7 SCC 603

<sup>24</sup> (1952) 2 SCC 383

<sup>25</sup> AIR 1934 Oudh 35.

an individual or his benefit is void under §13. The contents of the deed, not the actual events, must be taken into consideration when assessing whether the transfer violates §13. In this case, the transfer in favor of X was void as well because the transfer specified in the contract was void. Hence, X's claim was defeated.

Such absolute interest of the unborn is vested interest. It creates a right that has to be fulfilled and it does not depend upon the fulfillment of any condition. It only postpones the right to enjoy the property but nothing can stop the interest from vesting in the person in favor of whom the transfer is made.

### **What happens when the prior interest dies before the child in the womb is born<sup>26</sup>?**

The Transfer of Property Act, of 1882 however, provides provisions for the transfer of property to an unborn child by a medium of creating a prior life interest. There may occur certain situations where the prior interest may by accident or natural causes die before the unborn has come into existence. Supposing, the transferrer has created only one prior interest, and then the property is to be acquired by the unborn with an absolute interest and the prior interest dies before the unborn could have got the absolute interest of the property or before the unborn is born, in such circumstances the property can not be directly transferred to the unborn and it cannot be left solely on the responsibility of the legal heirs of the prior interest. Therefore, the property is returned to the transferrer if the prior interest dies before the unborn child is born. As long as the transfer was made with the intention of benefiting the unborn child under the legal principle of "*en ventre sa mere*" (in the mother's womb), which treats a fetus as a living person for inheritance purposes, the unborn child will still be considered a potential beneficiary and will inherit the property upon birth. However, this transfer must comply with the relevant laws regarding transferring property to an unborn child as stated above, which typically requires the entire remaining interest to be transferred to the unborn child without any restrictions or conditions.

In the case of *P. Venkata Subanna v. D. Chinna Panayya*<sup>27</sup> It was clarified that when a transfer is made to an unborn child, the property will vest in them upon birth, even if the prior interest holder dies before that time.

This concludes that even if the prior interest dies before the birth of the unborn, the unborn will anyhow receive the property as it was initially transferred with the objective and intention of

---

<sup>26</sup> Dr Avtar Singh & Prof (Dr) Harpreet Kaur, *The Transfer of Property Act (2019)*

<sup>27</sup> AIR 1989 AP 34

the benefit to the unborn.

### **What happens if the unborn dies in the womb of the mother?<sup>28</sup>**

The transfer of property to an unborn child under the Transfer of Property Act is permissible because it is beneficiary for the unborn. However, if the unborn child dies in the womb of the mother and never takes a breath outside the womb, the unborn can opt for no benefits from the property being transferred to them. Hence, such a transfer would hold no value of benefits, therefore, the transfer is deemed void. The property cannot remain in a legal vacuum. The life interest created will keep the property in their possession and such transferred property must be passed on to someone else upon the termination of the life interest. If the unborn dies in the mother's womb, the property will typically return to the original transferor or their heirs. Hence, the transfer does not take place when the unborn dies in the womb.

For example: A wants to transfer his property to his unborn grandchild so he creates a life interest holder, B. Unfortunately, the unborn dies in the womb before being born alive. Thus, the transfer to the unborn fails. However, the life interest of B remains valid until their death. Upon B's death, the property reverts to A or A's heirs.

### **Conclusion**

By permitting transfers to unborn children under carefully crafted regulations, the Transfer of Property Act, of 1882, strikes a compromise between property rights and legal restrictions. According to Section 13, a prior life interest established for a living person is the sole way for an unborn beneficiary to get absolute interest. This system protects against speculative succession, the perpetuation of interests, and other transfers that go against public policy.

The Act clarifies the types of property that are transferable under its provisions, making sure that transfers adhere to legal restrictions including the ban on transferring pensions, speculative interests, and public posts. The concept of these transfers has been further clarified by case law, such as *Tagore v. Tagore* and *Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer*, which highlight the need for absolute interest vesting with the unborn and the invalidity of contingent life interests.

Due to the practical ramifications of this framework, the property reverts to the transferor if the prior interest holder passes away before the unborn child is born unless the unborn child is still alive to inherit under the principle of "en ventre sa mere." On the other hand, the transfer is

---

<sup>28</sup> The Transfer of Property Act by Mulla

completely unsuccessful if the unborn child passes away while still in the womb; the property either stays with the holder of the life interest or returns to the transferor or their heirs.

These clauses demonstrate the Act's intention to protect the rights of all parties involved, guarantee that property transactions follow the law, and avoid speculative or perpetually postponed interests. This approach preserves the balance between private ownership and public policy by highlighting the significance of foresight in real estate transactions. The Act is a pillar of Indian property law because of its complex approach, which permits just and legal property transfers while upholding the rights of future generations.