Introduction

The rules with respect to the transfer of property for the benefit of unborn person and rule against perpetuity are mainly governed and operated under section 13 and section 14 of [The Transfer of Property Act, 1882](https://www.lawjar.com/the-transfer-of-property-act-1882/) has given a headache to the lawyers of every age across the country. This is often described as one of the most complicated legal rules ever.

Here **unborn child**refers to the person who is non-existence as of now but will come into existence in future. A child in a mother’s womb is not a person in existence. Although it has been treated under both the Hindu and Muslim law.

Status of unborn child

Unborn child refers to an individual who is not born yet or is not in existence and there is nothing in the law to prevent the unborn child owning property before he is born.

[Transfer of property Act](https://www.lawjar.com/the-transfer-of-property-act-1882/) – Unborn child

Section 13 of the [transfer of property act](https://www.lawjar.com/the-transfer-of-property-act-1882/) states that “**Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence 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 whole of the remaining interest of the transfer in the property.**”

The transfer of property takes places between two persons living which means that there cannot be a transfer to a person who is not born yet or not in existence. This is the reason why section 13 of TOPA uses the term ‘for the benefit of’ and not transfer ‘to’ unborn person.

A child in a mother’s womb is considered to be a person competent of the transfer. Therefore a property can be transferred to a child in her mother’s womb because the child exists but not to an unborn person who does not even exists in the womb of her mother.

With every transfer of property, there is a transfer of interest which states that as soon as the property gets transferred in the name of transferee the interest is vested in the transferee. Therefore it is necessary that the transferee should be in existence when the transfer is made. This is against the very concept of an interest.

For a transfer of property for the benefit of the unborn person two conditions are necessary to be fulfilled:

1. Absolute interest should be transferred in the favour of the unborn person, and
2. Prior life interest must be created in favour of a person in existence at the date of transfer.

Pre-requisite for a valid transfer of property to an unborn person

Section 13 is enacted for the valid transfer of property to an unborn person. The procedure for the same are as follows:

1. Any person who intends or wishes to transfer the property for the benefit of an unborn person should first make a life estate in favour of a living person and after this, an absolute estate in favour of the unborn person.
2. Till the time, in whose favour the life estate created is alive, would hold the possession of the property, and enjoyment of the property.
3. If the person who was unborn during the time of creation of life estate, is born, the title of the property gets immediately transferred to the person born but he’ll get the possession only on the death of the life estate holder.

Rule against perpetuity

The term perpetuity means an indefinite or uncertain period. Perpetuity occurs because of the people who want to retain the property in their own family from generation to generation. So this will create a loss to the society because the society would be deprived of any of the benefit arising out of that property that is why the frequent circulation of a property is required and that is the policy of the law to prevent the creation of such perpetuity.

Perpetuity may arise in two ways:

1. By taking away the power of alienation from the transferor.
2. By creating a remote interest in the future property.

A condition restraining the transferee’s power of alienation is void as per S.1O of the Act. and a disposition to create a future remote interest is prohibited under S.14 of the Act.

Object

The main objective of this policy is the proper and free regulation of property both for trade and commerce as well as for the advancement of property which is useful for society. The object is to see that the property isn’t tied-up and the issue of ceaselessness can be anticipated.

Conditions necessary for section 14

1. Transfer of property should be there
2. Transfer of property be such that it should create interest in favour of the unborn person.
3. Interest created must take effect after the lifetime of one or more persons living at the date of such a transfer and during the minority of the unborn person.
4. The unborn person should be in existence during the expiration of interest of living person.
5. The vesting of the interest in favour of the ultimate beneficiary may be postponed only up to the life or lives of living persons plus the minority of the ultimate beneficiary but not beyond that.

Perpetuity period – Extent

Position in India – Life or any number of lives in being + period of gestation + minority period of the unborn beneficiary.

English Law – Life or lives in being +period of gestation +minority period.

Indian and English law – Difference

1. The minority period in both the countries is different. The minority period in India is 18 whereas the minority period under the English law is 21 years.
2. The English law states that the property need not be absolutely given to the unborn person whereas under the Indian law the property should be absolutely transferred to the unborn.
3. Under English law, the period of gestation is a gross period whereas under the Indian Law the period of gestation should be an actual period.
4. Under the Indian law, the unborn person must come into existence before the death of the last life estate holder but under the English law, the unborn person must come into existence within 21 years of the death of the last life estate holder.

Exceptions

1. **Transfer for public benefit**– A property transferred is not void if it is made for the benefit of people in general. E.g. religion, health, care or anything helpful to the society.
2. **Covenants of Redemption**– This rule does not offend the covenants of redemption in a mortgage.
3. **Personal agreements**– Agreements that do not create any interest in the property are not affected by this rule. This rule applies only to transfers where there is a transfer of interest.
4. **Pre-emption**– Pre-emption refers to the buying of goods and shares before it is offered to any other person. In this, there is an option of purchasing a land and there’s no question of any kind of interest in the property, so this rule does not apply.
5. **Perpetual Lease**– The contracts of perpetual renewal of leases is not applicable here.
6. The rule is also **not applicable to mortgages**as there is no creation of a future interest.

Rule under Hindu law and Muslim law

The transfer of property act has made possible the transfer of property for the benefit of an unborn person. Before the [transfer of property act](https://www.lawjar.com/the-transfer-of-property-act-1882/), the rule under the Hindu and Muslim law was that the gift given to a person who is not born or not in existence was void. The position under the Muslim law keeps being the same. However, for Hindus, the rule was modified by various of enactments to bring it conformity with the section of transfer of property act. There have been parallel provisions made under the [Indian succession act, 1925](https://www.lawjar.com/the-indian-succession-act-1925/), which allows bequest for the person who is not born or unborn. Section 113 of Indian Succession Act 1925(IS Act), applies to legacies created for the person unborn and contain a provision almost identical to section 13 of the [transfer of property act](https://www.lawjar.com/the-transfer-of-property-act-1882/).

Conclusion

Transfer of property to an unborn child has always raised questions. So to overcome the questions the section 13 of transfer of property act was given as an answer of the questions which states that the transfer of property for benefit of an unborn child or the person who is not born. A child in mother’s womb is regarded by a legal fiction as already born, in accordance with the maxim [nasciturus pro iam nato habetur](https://en.wikipedia.org/wiki/Nasciturus_pro_iam_nato_habetur%2C_quotiens_de_commodis_eius_agitur). For the unborn person, there must be a transfer of absolute interest.