

# A BRIEF WRITE-UP ON TRANSFER OF PROPERTY FOR THE BENEFIT OF UNBORN PERSON AND RULE AGAINST PERPETUITY

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## INTRODUCTION

The rule as regards the transfer of property for the benefit of unborn person and the rule against perpetuity (collectively, the "**Rules**"), which are mainly governed by sections 13 and 14, respectively, of the Transfer of Property Act, 1882 ("**TOPA**"), have, since decades, troubled lawyers of all ages across the country. These Rules are often described as one of the most complicated legal rules ever.

Where property is desired to be transferred/ bequeathed by any person, to more generations than one, it is imperative that these Rules are conformed to.



## ORIGIN

- The origin of rule against perpetuity stems from the days of feudal England as far back as in 1682 from the case of Duke of Norfolk's, wherein, Henry (*the 22<sup>nd</sup> Earl of Arundel*), tried to create a shifting executory limitation in a way that one of his titles would pass to his eldest son (*who was mentally deficient*) and thereafter to his second son, and another title would pass to his second son and thereafter, to his fourth son. The estate plan also included provisions for shifting the titles many generations later, if certain conditions were to occur. It was held by the House of Lords that such a shifting condition could not exist indefinitely and that the tying up of property too long beyond the lives of people living at the time was wrong. The concept of trying to control the use and disposition of property beyond the grave was often referred to as control by the "*dead hand*". The rule against perpetuity, in England, was later codified in the form of the Perpetuities and Accumulations Act, 1964.

## ILLUSTRATIONS

- With a view to understand the Rules, let us first consider the following five illustrations:
    - i. **A** transfers his property to **B** (*his unborn child*).
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- ii. **A** transfers his property to **B** (*his child*) for life, thereafter to **C** (*his unborn grandchild*) for life and finally, to **D** (*his unborn great grandchild*) absolutely.
  - iii. **A** transfers his property to **B** (*his child*) for life and thereafter to **C** (*his unborn grandchild*) absolutely which property is to vest in **C** when he attains the age of twenty one years.
  - iv. **A** transfers his property to **B** (*his child*) for life, thereafter to **C** (*his unborn grandchild*) absolutely which property is to vest in **C** upon birth. However, C is unborn till the time of death of B.
  - v. **A** transfers his property to **B** (*his child*) for life, thereafter to **C** (*his unborn grandchild*) absolutely which property is to vest in **C** upon birth. C is born before the death of B.
- From the aforesaid five (5) illustrations, only the transfer sought to be made in favour of the unborn person in illustration "v" will take effect. The transfers sought to be made in favour of the unborn person in the remaining illustrations will fail and not take effect. In order to understand the rationale behind the failure of such proposed transfer in favour of an unborn person, it is necessary to understand the relevant provisions with respect to the Rules.

## **RULE FOR TRANSFER OF PROPERTY FOR THE BENEFIT OF UNBORN PERSON**

- Section 13 of TOPA provides 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 the 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 transferor in the property."*



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## RULE AGAINST PERPETUITY

- Section 14 of TOPA provides that:

*"No transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."*

## ANALYSIS OF PROVISIONS

- Section 13 and 14 of the TOPA go hand in hand, in as much as, section 13 and 14 are to be read together in order to understand the provisions governing the Rules.
- The TOPA does not permit transfer of property directly ***in favour of*** an unborn person. Thus, in order to transfer a property for the benefit of a person unborn ***on the date of the transfer***, it is imperative that the property must first be transferred in favour of some other person ***living on the date of transfer***. In other words, the property must vest in some person between the date of the transfer and the coming into existence of the unborn person since property cannot be transferred directly in favour of an unborn person. In other words, the interest of the unborn person must, in every case, be preceded by a prior interest.



- Further, where an interest is created in favour of an unborn person on a transfer of property, such interest in favour of the unborn person shall take effect only if it extends to the whole of the remaining interest of the transferor in the property, thereby making it impossible to confer an estate for life on an unborn person. In other words, the interest in favour of the unborn person shall constitute the entire remaining interest. The underlying principle in section 13 is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more than one generation.
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- Section 13 does **not** prohibit successive interests (*limited by time or otherwise*) being created in favour of several persons **living** at the time of the transfer. What is prohibited under section 13 is the grant of interest, *limited by time or otherwise*, to an unborn person.
  - Further, Section 14 of TOPA provides that where an interest is created for the benefit of an unborn person (*in accordance with the provisions of section 13*), such interest shall not take effect if the interest is to vest in such unborn person **after** the life time of one or more persons living on the date of the transfer (*i.e. the person in whose favour the prior interest is created as required under section 13*) **and** the minority of such unborn person. In other words, the interest created for the benefit of an unborn person shall take effect only if the interest is to vest in such unborn person **before** he attains the age of eighteen years.
  - Section 14 further provides that the unborn person, in whose favour the interest is created, must have come into existence **on or before** the expiry of the life or lives of the person(s) in whose favour the prior interest is created as required under section 13.



## OTHER RELEVANT PROVISIONS

- **Sections 113 and 114 of Indian Succession Act, 1925 ("ISA"):** Sections 113 and 114 of the ISA are almost identical to sections 13 and 14, respectively, of TOPA. The main difference between the provisions under the ISA and the provisions under TOPA is that the former deals with bequests which take effect only on the death of the testator while the latter relate to transfer of property *inter vivos*. Section 13 of TOPA controls Section 113 of ISA and both of them are to be read together, as opined by the Apex Court in **Raj Bajrang Bahadur Singh vs. Thakurain Bakhtraj Kuer** (AIR 1953 Supreme Court 7). It was further observed by the Court that:

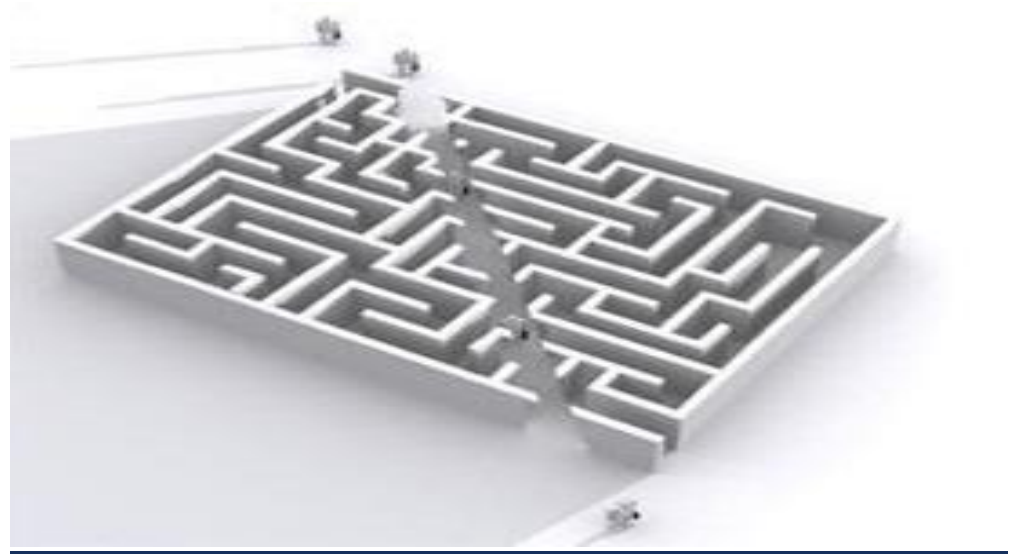
*"It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest."*

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## RULES SIMPLIFIED:

- The effect of these Rules is that a transfer/ gift can be made to an unborn person subject to the following conditions: (i) that the transfer/ gift shall be of the whole of the remaining interest of the transferor/ testator in the thing transferred/ bequeathed and not of a limited interest; and (ii) that the vesting is not postponed beyond the life in being and the minority of the unborn person.
- In simple terms, while section 13 of TOPA lays down the mechanism for transfer of property for the benefit of unborn person and "*what property*" is required to be ultimately transferred in favour of an unborn person in order to validate such transfer, section 14 of TOPA provides the "*maximum period as to when*" such property can be vested upon such unborn person.
- Section 14 of TOPA supplements section 13 of TOPA and thus, it is pertinent to note that when an interest in any property is intended to be transferred in favour of an unborn person, sections 13 and 14 of TOPA are required to be read together and the provisions contained thereunder are required to be duly complied with, in order to give effect to the intended transfer in favour of such unborn person.



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