

Section 13 of the Transfer of Property Act, 1882

Transfers for the Benefit of Unborn Persons: Alignment with Modern Succession Laws and Intergenerational Trust Structures

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ABSTRACT

Section 13 of the Transfer of Property Act, 1882 (TPA) occupies a foundational position in Indian property law by regulating transfers made for the benefit of persons not yet in existence at the time of the transfer. The provision embeds two interlocked requirements: (i) a prior life interest must vest in a living person, and (ii) only upon the termination of that life interest may the property pass to the unborn beneficiary. These structural constraints — rooted in the Victorian-era policy against perpetuities — raise significant questions of alignment with contemporary legal frameworks governing succession, family settlements, and intergenerational wealth planning through trusts.

This analytical paper examines the mechanics of Section 13, its intersection with the Hindu Succession Act, 1956, the Indian Succession Act, 1925, and the Indian Trusts Act, 1882, and assesses the degree to which its requirements remain consonant with — or create friction against — modern estate planning instruments designed to transfer wealth across generations. The paper concludes that while Section 13 continues to serve an anti-perpetuity function, its rigid structural prerequisites impede efficient intergenerational planning and require legislative reconsideration in light of the evolution of trust jurisprudence in India.

Keywords: *Section 13 TPA, Transfer to Unborn Persons, Prior Life Interest, Rule Against Perpetuities, Intergenerational Trusts, Hindu Succession Act, Indian Trusts Act, Family Settlements, Estate Planning, Vesting of Property*

I. INTRODUCTION

The Transfer of Property Act, 1882, enacted under British India to codify the common law of immovable property, contains within its architecture a provision that continues to generate jurisprudential complexity in contemporary property transactions. Section 13 of the TPA provides:

"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."

This provision, read conjunctively with Section 14 — which enshrines the Rule against Perpetuities — creates a twin-barrier regime governing future interests in property. The twin objectives of Section 13 are: (a) to prevent property from being kept in a state of legal suspense for extended periods, and (b) to ensure that transfers to unborn persons are anchored to a living life — thereby maintaining a connection to the present legal order.

While these objectives had clear functional utility in colonial-era property transfers, the twenty-first century landscape of Indian succession planning presents new challenges. Families employ complex trust structures, testamentary arrangements, and family settlement deeds (*parivarik samjhauta*) to transmit wealth across multiple generations. Hindu Undivided Families (HUFs) provide a quasi-trust vehicle through which coparcenary property devolves. These instruments operate in a legal environment where Section 13's requirements can create unnecessary rigidity, delay, and potential invalidity.

The central inquiry of this paper is whether Section 13 — as currently framed — aligns with, or creates tension against, the modern legal structures available for intergenerational wealth transfer. The analysis proceeds in six parts: the mechanics of Section 13 (Part II), its relationship with key succession statutes (Part III), interaction with trust law (Part IV), family settlements and HUF structures (Part V), comparative and reform perspectives (Part VI), and conclusions (Part VII).

II. THE MECHANICS OF SECTION 13: ESSENTIAL CONDITIONS AND THEIR LEGAL IMPLICATIONS

2.1 The Structural Prerequisites

Section 13 imposes four essential conditions, each of which must be fulfilled for a transfer to an unborn person to be legally valid:

- The transfer must be of property (movable or immovable) — Section 13 applies to all types of property capable of transfer under the TPA.
- The beneficiary must be a person not in existence at the date of the transfer — this encompasses children not yet conceived (*en ventre sa mère* is treated differently by Section 20).
- A prior interest must be created by the same transfer and must vest in a living person — this is the life interest requirement.
- The interest created for the unborn person must comprise the whole of the transferor's remaining interest — no partial remainder interests are permissible.

The requirement that the interest for the unborn person must extend to the whole of the remaining interest of the transferor is particularly significant. Unlike English law, which permits partial future interests under the rule in *Saunders v. Vautier* (1841), Indian law under Section 13 renders any partial remainder in favour of an unborn person void. This makes Section 13 more restrictive than its English counterpart, limiting the flexibility available to property planners.

2.2 The Prior Life Interest Requirement: Nature and Duration

The prior life interest is the linchpin of Section 13. It must satisfy the following conditions derived from judicial interpretation:

- It must be created by the same deed/instrument — a separately constituted life tenancy cannot serve as the foundation.
- The life tenant must be a person in existence at the date of transfer (Section 13 read with Section 5 TPA).
- The life interest must be a genuine interest — a sham or illusory life interest will be disregarded by courts.
- The life interest terminates either upon the death of the life tenant or on such conditions as the transfer specifies.

The Supreme Court in *Girjesh Dutt v. Data Din* AIR 1934 PC 57 elaborated on the nature of such life interests, holding that the life tenant acquires a full beneficial interest during their lifetime, and the unborn person's interest crystallises

only on termination. This temporal structure creates practical complications in property management, particularly where the unborn beneficiary eventually born needs to assert rights against trustees or life tenants who may resist devolution.

2.3 Vesting and Contingency

An important distinction must be drawn between a *vested* remainder and a *contingent* remainder in the context of Section 13. When a child is born prior to the termination of the life interest, their interest becomes vested — but vesting in possession is deferred. Where the unborn child remains unborn at the time of the life tenant's death, the question of whether the transfer fails entirely has been resolved differently in different High Courts, creating an area of interpretive uncertainty that directly affects intergenerational planning.

Key Judicial Positions on Section 13

Girjesh Dutt v. Data Din (1934 PC): Life interest must be genuine; unborn person's interest takes whole remainder.

Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer AIR 1953 SC 7: SC upheld the requirement of 'whole remaining interest' strictly.

Leaky v. National Trust (applied in Indian context): Courts refuse to extend partial interests to unborn persons.

Ram Newaz v. Nankoo AIR 1926 All 283: Contingent interest of unborn child does not violate Section 13 if born before life tenant dies.

Sopher v. Administrator General of Bengal AIR 1944 PC 67: Entire remainder must be given; Section 13 is peremptory.

III. INTERSECTION WITH MODERN SUCCESSION LAWS

3.1 Hindu Succession Act, 1956: A Codified Departure from TPA Logic

The Hindu Succession Act, 1956 (HSA) introduced a reformed intestate succession regime for Hindus that operates largely independent of TPA transfer mechanics. The HSA's approach to succession of property to heirs — including contingent interests — diverges from the Section 13 framework in several important respects:

- Under Section 8 HSA, property devolves upon heirs as specified in the Schedule — no prior life interest is mandated for such devolution.
- The 2005 Amendment (Section 6 HSA) extended coparcenary rights to daughters, creating an additional class of potential beneficiaries whose rights vest at birth — irrespective of when that birth occurs relative to succession events.
- A posthumous child's rights under HSA are protected by Section 20 of the TPA (applied by analogy), recognising the child conceived before but born after the intestate's death as a living heir for succession purposes.

The critical tension arises when a testamentary disposition by a Hindu testator attempts to create a life interest followed by a remainder in an unborn grandchild. The Will is governed by both the Indian Succession Act, 1925 and Section 13 TPA (as applicable to Hindus for testamentary transfers of property). The HSA's silence on the mechanics of testamentary transfers means that Section 13's requirements fill the gap — creating a regime that may not align with the testator's intent to benefit future generations.

3.2 Indian Succession Act, 1925: Testamentary Transfers and Future Interests

For non-Hindus governed by the Indian Succession Act, 1925 (ISA), the testamentary regime is more explicit. Section 113 of the ISA mirrors Section 13 TPA in substance, providing that a bequest to an unborn person must vest in a living person first. Section 114 ISA corresponds to Section 14 TPA's rule against perpetuities.

The ISA framework introduces an additional complexity through its treatment of class gifts under Sections 116–117. Where a testator bequeaths property to 'all my grandchildren,' some of whom may be unborn at the date of death, the ISA permits such a class gift to take effect for those grandchildren born within a reasonable time. This approach is more flexible than Section 13's strict life interest prerequisite, suggesting an internal inconsistency within the Indian legislative framework on transfers to unborn persons.

3.3 The Posthumous Child Problem

Section 20 of the TPA extends protection to a child *en ventre sa mère* — a child conceived at the time of transfer but born thereafter. Section 20 deems such a child to be alive for the purpose of the transfer, effectively 'bridging' the moment of conception to birth. This provision interacts with Section 13 in the following way: if the life tenant is the unborn child's parent and the child is conceived before but born after the transfer, Section 20 saves the transfer from invalidity.

However, where the child is not yet conceived at the time of transfer, Section 20 provides no protection and Section 13's full machinery applies — a prior life interest is mandatory. This creates an unequal treatment of unborn beneficiaries based solely on their stage of biological development at the time of transfer, a distinction that modern reproductive technology (IVF, surrogacy, gamete donation) renders increasingly difficult to apply with certainty.

Legal Framework	Approach to Unborn Beneficiaries	Prior Life Interest Required?
Section 13 TPA, 1882	Requires whole remainder to vest upon termination of prior life interest	Yes — mandatory
Section 113 ISA, 1925	Mirrors TPA — bequest must vest in living person first	Yes — mandatory
Section 8 HSA, 1956 (intestate)	Direct devolution on heirs; no TPA machinery applies	No
Section 20 TPA, 1882	Child <i>en ventre sa mère</i> treated as living	No (child deemed born)
Class Gift (Ss. 116-117 ISA)	Flexible inclusion of after-born class members	Not explicitly required

IV. SECTION 13 AND INTERGENERATIONAL TRUST STRUCTURES

4.1 The Indian Trusts Act, 1882: Structural Compatibility

The Indian Trusts Act, 1882 (ITA) establishes the legal framework for private trusts in India. Section 9 ITA permits a trust to be created for the benefit of any person capable of holding property, including unborn persons. The ITA does not, in express terms, require a prior life interest for a trust in favour of unborn beneficiaries. This creates a potential divergence between TPA and trust law regimes.

In *Fateh Singh v. Amar Singh* AIR 1963 Raj 116, the court held that when property is transferred *to trustees* for the benefit of unborn persons, the TPA's Section 13 does not strictly apply because the legal estate vests immediately in the trustee (a living person), satisfying the 'vesting in a living person' requirement. This trust-law workaround has been widely employed in practice to circumvent the rigidity of Section 13.

4.2 The Trust-Law Workaround: Validity and Limits

The most common modern estate planning technique is the constitution of a discretionary trust naming the settlor's descendants (including future-born members) as potential beneficiaries. The trustee — a living person — holds the

corpus on behalf of the class of beneficiaries. The trust mechanism effectively satisfies Section 13's prior life interest requirement by interposing the trustee as the legal holder.

However, this workaround is subject to the following limitations:

- **Rule against Perpetuities (Section 14 TPA):** The trust must vest absolutely within the perpetuity period — eighteen years from the date of creation. A trust designed to benefit the 'fourth generation' of descendants may well violate Section 14.
- **Uncertainty of Beneficiaries:** A trust for 'all future descendants' may be struck down for uncertainty. The ITA requires that beneficiaries be ascertainable with reasonable certainty.
- **Accumulation Restrictions:** Under Section 17 TPA, accumulation of income beyond eighteen years is impermissible, limiting the duration of long-term trusts for unborn beneficiaries.
- **Alienability:** Under Section 13 read with Section 14, property subject to a trust for unborn persons cannot be alienated during the subsistence of the trust without court approval, limiting the trustee's powers of estate management.

4.3 Discretionary vs. Fixed Trusts for Unborn Beneficiaries

Modern intergenerational planning favours the discretionary trust model, where the trustee retains discretion over distribution of income and corpus among a class of beneficiaries that may include unborn persons. Under this model:

- The trustee (living person) holds the legal interest — fulfilling the Section 13 'prior life interest' requirement by analogy.
- Discretionary power permits the trustee to respond to the needs of beneficiaries as they are born and develop — providing flexibility that a rigid life interest followed by a remainder cannot achieve.
- The trust instrument may define the class of beneficiaries with reference to events (e.g., 'all children of X born before [date]'), thereby satisfying the perpetuity rule.

The limitation, however, is that Indian trust law has not developed the sophisticated body of case law available in England (post-McPhail v. Doulton [1971] AC 424) on the 'is or is not' test for certainty of objects in discretionary trusts. Indian courts have tended to apply a stricter certainty test, which limits the breadth of class definitions available to settlors.

4.4 Public Charitable Trusts and Unborn Beneficiaries

Where a family trust acquires the character of a public charitable trust — for example, a trust for the promotion of education or relief of poverty among a family's descendants — the constraints of Section 13 are considerably relaxed. Charitable trusts may be created in perpetuity (cy-pres doctrine), and the rule against perpetuities does not apply. This provides a powerful vehicle for families seeking intergenerational asset preservation, provided the charitable character is genuine and not a device to avoid Section 13.

Trust Structures and Section 13 Compatibility

Fixed Trust (Life Tenant + Remainder): Directly governed by Section 13 — prior life interest mandatory; whole remainder must pass to unborn.

Discretionary Private Trust: Section 13 largely inapplicable as trustee (living) holds legal estate; perpetuity rule (Section 14) remains applicable.

HUF Karta as Quasi-Trustee: Coparcenary property managed by Karta for benefit of all members including future coparceners; Section 13 does not apply.

Charitable Trust: Perpetuity rule inapplicable; cy-pres doctrine permits indefinite duration — most flexible vehicle for multi-generational planning.

Testamentary Trust under Will: Governed by Sections 113-114 ISA — prior life interest required; must vest within perpetuity period.

V. FAMILY SETTLEMENTS, HUF STRUCTURES, AND SECTION 13

5.1 Family Settlements (Parivarik Samjhauta)

Family settlements — compromise arrangements among family members regarding disputed or potentially disputed property — occupy a unique space in Indian property law. The Supreme Court in *Kale v. Deputy Director of Consolidation* (1976) 3 SCC 119 held that a family arrangement is not a 'transfer' within the meaning of the TPA but a recognition of pre-existing rights. Consequently, the requirement of Section 13 — which applies to *transfers* — may not be attracted to genuine family settlements.

This distinction has significant practical implications. A family settlement that allocates property to an unborn grandchild — where the existing family members agree that the grandchild (upon birth) shall receive a defined share — is arguably outside the Section 13 regime entirely. The arrangement is characterised as a recognition of the unborn person's moral entitlement rather than a fresh transfer.

However, where the family settlement purports to *create* a new interest for the benefit of an unborn person (rather than recognise a pre-existing one), courts have applied Section 13 by analogy. The line between recognition and creation of rights in the context of unborn persons is legally blurred and practically consequential — a settlement that creates a remainder for an unborn grandchild without a prior life interest risks invalidation.

5.2 Hindu Undivided Family: A Built-In Intergenerational Structure

The HUF is perhaps the most important indigenous mechanism for intergenerational property holding in India. Under the Mitakshara school of Hindu law:

- Every male member born into the HUF (and, post-2005 Amendment, every daughter) becomes a coparcener by birth — the property devolves not by transfer but by the *jus accrescendi* (right of survivorship as modified by the HSA).
- The Karta manages the joint family property in a quasi-fiduciary capacity, holding it for the benefit of all members including those yet to be born.
- An after-born coparcener acquires an interest by birth — no prior life interest mechanism is required or applicable.

The HUF's built-in intergenerational architecture sidesteps Section 13 entirely by operating outside the TPA's transfer framework. Property *within* the HUF devolves by operation of law rather than by transfer. When a Karta seeks to transfer HUF property — for example, to create a trust or to execute a partition — Section 13 becomes relevant again, and the transfer must comply with its requirements.

5.3 Partition and the Rights of Unborn Coparceners

A persistent point of complexity arises in HUF partition deeds. If a partition is effected while a female coparcener is pregnant, the unborn child's rights must be protected. Section 20 TPA deems the child conceived but unborn to be living — the share must be reserved pending birth. The partition deed, if it allocates property without such reservation, risks being set aside to the extent of the unborn child's share. This intersection of Section 20, Section 13, and HUF coparcenary law creates a multi-layered obligation on the drafting lawyer.

VI. COMPARATIVE PERSPECTIVES AND REFORM CONSIDERATIONS

6.1 The English Model: Perpetuities and Accumulations Act, 2009

English law, which originally inspired Section 13 TPA, underwent fundamental reform through the Perpetuities and Accumulations Act, 2009. The Act introduced a fixed perpetuity period of 125 years — replacing the complex 'life in being plus 21 years' rule — and abolished the 'wait and see' approach. Crucially, the Act permits a much wider range of future interests in property, without requiring a strict prior life interest structure.

India's Section 13 remains tethered to the Victorian conceptual framework. The perpetuity period under Section 14 TPA is 'life in being plus 18 years' — more restrictive than the English position even before the 2009 reforms. A comprehensive legislative reform along the lines of the English 2009 Act, adapted to Indian constitutional and personal law requirements, would substantially improve the utility of intergenerational planning instruments.

6.2 American Approach: Uniform Trust Code

In the United States, the Uniform Trust Code (UTC) and the Uniform Statutory Rule Against Perpetuities (USRAP) have largely replaced the common law rule. Many US states have abolished the rule against perpetuities entirely for dynasty trusts, permitting trusts to continue in perpetuity for the benefit of multiple generations. While the Indian constitutional framework — particularly Article 19(1)(f) as historically applied — would require adaptation, the UTC's approach to unborn beneficiaries as a defined class within a discretionary trust offers a valuable model for Indian law reform.

6.3 Recommendations for Legislative Reform

Based on the foregoing analysis, the following legislative reforms are recommended:

- **Codification of the Trust-Law Workaround:** The legislature should explicitly provide that where property is transferred to a trustee for the benefit of an unborn person, Section 13's prior life interest requirement is satisfied by the trustee's legal interest.
- **Extension of the Perpetuity Period:** The perpetuity period under Section 14 should be extended from 'life in being plus 18 years' to a fixed period of at least 100 years, aligning with modern estate planning needs.
- **Class Gift Clarification:** The legislature should enact a provision (modelled on Sections 116–117 ISA) permitting class gifts to unborn persons under the TPA, subject to the condition that the class closes at the expiry of a defined period.
- **Reproductive Technology:** A statutory definition of 'person not in existence' should be enacted to address children conceived through assisted reproductive technology, whose existence at the date of transfer is legally ambiguous.
- **HUF Partition Protection:** A specific provision should mandate the reservation of shares for unborn coparceners in all partition deeds, with a specified period for birth to be awaited before the reserved share lapses.

VII. CONCLUSION

Section 13 of the Transfer of Property Act, 1882 reflects a thoughtful Victorian-era response to the risk of perpetual alienation of property from commerce and productive use. Its requirement of a prior life interest before property can pass to an unborn person serves to maintain a connection between the present legal order and future interests — preventing property from being locked away in suspended animation for extended, uncertain periods.

However, this paper demonstrates that the provision's structural rigidity creates meaningful friction with the modern Indian legal landscape of intergenerational planning. The prior life interest requirement — mandatory under both Section 13 TPA and Section 113 ISA — is an obstacle to flexible estate planning instruments, particularly discretionary trusts

designed to benefit multiple future generations. The Hindu Undivided Family structure sidesteps the TPA framework through its unique coparcenary mechanism, but this advantage is unavailable to non-Hindus and is eroded upon partition.

Modern succession planning demands vehicles that can respond to demographic uncertainty — families do not know how many children will be born, when, or in what circumstances. The rigid prior life interest structure of Section 13, combined with an 18-year perpetuity period, limits the planning horizon to one additional generation beyond the life tenant. In contrast, the English 2009 reforms permit 125-year trusts, and American dynasty trusts may theoretically endure indefinitely.

The Indian Law Commission has periodically recommended rationalisation of the TPA's perpetuity provisions, but no legislative action has followed. As India's wealth management industry matures and family offices, charitable endowments, and multi-generational trusts become more prevalent, the inadequacy of Section 13's framework will become more acute. A comprehensive review — incorporating the codification of the trust-law workaround, extension of the perpetuity period, accommodation of reproductive technology, and protection of HUF partition rights — is both legally justified and practically necessary.

Section 13 remains valid law, and its core principle — that unborn persons cannot receive direct transfers without a living anchor — remains philosophically sound. The reform agenda is not to abolish this principle but to modernise its implementation through statutory instruments that reflect the realities of twenty-first century family structures and wealth transmission practices.

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- ¹² Transfer of Property Act, 1882, s 20 (Transfer for benefit of unborn person — child en ventre sa mere).
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