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Property Law and Unborn: The Legal Fiction and The Property Rights

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ABSTRACT

Unborn, in the simplest terms, means who is not yet born. Many variations, yet some similar definitions for the same are present in some form or other all around. The controversy surrounding rights of an unborn might be a result of the fact that an unborn is protected by the law. The rights of an unborn child are one of the most intriguing interfaces between science, morality and law. An unborn child, for many purposes under the legal system, is regarded as already born, according to the maxim nasciturus pro jam nato habetur. A child in the mother's womb is considered a person or as already born, under the property law to the extent that such a child is born alive subsequently. An emphatic determination of the same hasn't been done. The rights or status of a yet-to-existent person should be decided irrefutably as it influences or have a direct implication over the rights of other existing individuals, especially the proprietary rights. This legal fiction finds its presence in the Indian jurisprudence with the incorporation of certain provisions which guarantees property rights to the unborn in the legal enactments.

I. INTRODUCTION

The philosophical and the legal debate surrounding the legal rights of an unborn is deep-rooted in the definition for 'personhood'. Most philosophers argue that the point in time when human life begins is quite distinct from and less relevant than when a human "person" comes into existence.[2] This means that when we are talking about human foetus and a 5-year-old child, most would accept the 5-year-old as a person without a question while the personhood of human foetus; this approach maintains that all human life automatically has a greater intrinsic value and right to protection than that of any other species.[3] According to Salmond, a person is someone who is a bearer of legal rights and duties. Legal personality starts at birth, which makes birth a precondition for recognition of rights. But at the same

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[2] M. Tooley, *Abortion and Infanticide* (1983), J. Harris, *The Value of Life* (1985), J. Glover, *Causing Death and Saving Lives* (1977), as cited in Fortin, Legal Protection for the Unborn Child, 51, The Modern Law Review, 54, 55-56 (1988), Available at: https://doi.org/10.1111/j.1468-2230.1988.tb01743.x
[3] Fortin, *Legal Protection for the Unborn Child*, 51, The Modern Law Review,54, 55-56, Available at: https://doi.org/10.1111/j.1468-2230.1988.tb01743.x

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time, for certain purposes of the legal theory an unborn is a person. By virtue of the legal fiction, an unborn can be considered to be in existence, but the legal status of a person starts only at birth. Thus, law treats an unborn as a legal person. English law recognises unborn to be in existence if it is for its benefit; in property law, for the purposes of gift, or wills and considered in the rule against perpetuities. Ancient Hindu law considers unborn in existence for the purposes of partition, and allows inheritance upon the birth of the child similar as any other person would. Unborn, in the simplest terms, is a person who is not yet born or who will come into existence at a future time or who is in the womb of the mother.

II. TRACING THE ORIGIN OF LEGAL FICTION AND ITS DEVELOPMENT

Children, being one of the most valuable resource has been given legal protection since a very long time. Law considers limited recognition to an unborn to be in existence, be it in the recognition of basic inherent human rights, proprietary rights, protection and recognition under the criminal law, the contract law etc. Under property law, an unborn is considered to be in existence for certain purposes and this is an accepted provision. The recognition of the rights of an unborn child, can be traced back to the ancient Roman jurisprudence. Roman jurists recognised the concept of *persona,* the natural personality, as the primary subject of law[4]. The Roman Law utilised the prospect of an unborn to be considered a person by applying the fiction[5] that an unborn be considered born, whenever it's in its interest to do so. This principle under the Roman Law gives rise to the legal maxim, *nasciturus pro jam nato habetur quotiens de commodis eius agitur,* which finds its origin in the Justininan Pandects[6].

This legal fiction which came into being in the Roman Law, finds its presence under the Common Law. Blackstone, in his commentary states that,

> *"An infant in [sic] ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours"*[7]

Blackstone's comments on the status of an unborn can be described as a culmination or

4William J Curran, *An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Foetus and the Rights of Women*, 61, The Milbank Memorial Fund Quarterly. Health and Society, 58, 58-60 (1983) https://www.jstor.org/stable/3349816

[5] Fiction presumption not necessarily based on a fact

[6] William, supra note 3, at 59

[7] W. Blackstone, Commentaries * 130, as cited in, J William Maledon, *Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46, Notre Dame Law Review, 349, 351-354 (1971), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2972&context=ndlr

encapsulation of prior judgments of the English courts on property rights of an unborn child. This can be traced back the earliest to 1740 in a decision by Lord Chancellor Hardwicke in *Wallis* v. *Hodson*[8]. Here the court while holding that civil law is applicable to such issues, stated that[9],

> *"Nothing is more clear, that that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit."*

The Court relied on the Roman as well as the civil law to hold that a posthumous child was entitled to the father's estate. Further, in *Doe* v. *Clarke*[10], a 1795 decision, the court while stating that an infant in the womb who by the course and order of the nature is living, comes clearly within the description of children living in the will of a testator held that the word 'children' in a will to include a child in the womb.[11] The English courts recognised this right under the property rule as a rule of construction for the benefit of the child. This application of the rule of beneficent indulgence can be seen under the Indian law too.

The common law recognised proprietary rights as a rule of construction; beneficent indulgence for the benefit of the child, not exactly recognising it a legal fiction. And it was not until in *Thellusson* v. *Woodford*[12], that the court rejected this contention and held that for the purposes of inheriting, "the child *en ventre* is to be considered begotten and born"[13] and that the fiction under the Roman law has been adopted by the common law "to enable them to take legacies and devises".[14]

A legal fiction is generally an assumption of fact made by a court in order to settle a legal issue. Fuller, while discussing the purposes of legal fiction, observes that one of the purposes is to conform a particular legal issue with an established rule of law[15]. Basically, legal fiction acts as a judicial device and the fiction of treating a child *en ventre sa mere* as already born for the benefit of the child settles legal issues. The recognition of any legal fiction forms the basis for resolving any legal issues. According to Winfield[16], in law of property, the fiction

[8] Wallis v. Hodson, 2 Atkyns, 115
[9] *Ibid*
[10] Doe v, Clark, 2H BI 399, 126 Eng. Rep. 617
[11] *Unborn Children Recognised by Courts,* The New York Times, (March 2, 2021, 10:12 am), https://www.nytimes.com/1982/03/22/opinion/l-unborn-children-recognized-by-courts-698203.html
[12] Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798)
[13] R Ian Kerr, *Pre-Natal Fictions and Post-Partum Actions*, 20, Dalhousie Law Review, 237, 240-247 (1997), https://static1.squarespace.com/static/56b8dbd62eeb817f29aa3265/t/5768945de6f2e199f3429134/1466471518590/Kerr_Pre-Natal-Fictions....pdf
[14] supra note 8
[15] L. Fuller, *Legal Fictions*, Stanford University Press, 51 (1967), https://static1.squarespace.com/static/56b8dbd62eeb817f29aa3265/t/5768945de6f2e199f3429134/1466471518590/Kerr_Pre-Natal-Fictions....pdf
[16] P. H. Winfield, *The Unborn Child*, 8, The Cambridge Law Journal, 76, 77 (1942),

that a child *en ventre sa mere* is a person in being for the purposes of:

(a) acquisition of property by the child itself, or

(b) being a life chosen to form part of the period in the rule against perpetuities.

The potential existence of a child is considered thus placing it in the motive and reason of inheritance.[17] Lord Westbury in *Blasson* v. *Blasson*[18] held that the application of this fictitious legal interpretation is limited to where there is a necessity for the benefit of the child. If the testator has expressly or impliedly wished to include his posthumous children among the beneficiaries, then there is no fiction as to his intention, but the law can give effect to that intention only by the fiction that the child *en ventre sa mere* is actually born, provided it is in fact subsequently born alive.[19] Therefore, as per property law, for the legal fiction to apply, the child must consequently be born alive. This can be interpreted from the fact that the maxim says 'whenever it is in its interest to do so'.

Following the precedents set by the English courts, these common law rules have been adopted by the other common law countries in determining the proprietary rights of child *en ventre sa mere*.

From the precedents set out by English courts, an unborn child, from the moment of its conception enjoys proprietary rights. An interest is created in the property on behalf of the unborn and the law also recognises the child in the womb as the recipient of gift of property as well as in inheritance of property just as any other individual is entitled to.

III. THE INDIAN PERSPECTIVE

The proprietary rights of a child in the womb are recognised and codified in India. The several legal enactments and the following judicial interpretations of such provisions has resulted in a much lucid determination of proprietary rights of a child in the womb. The Transfer of Property Act 1882[20], deals with matters related to transfer of movable and immovable property. Section 5 of the TP Act explains transfer as the act of conveyance of a property by a living person to other living persons which can include himself, in the present or in the future. A reading of this section shows that TP Act deals with transfer *inter vivos*, i.e., between two living persons. While the fiction of considering child *en ventre sa* mere living is recognised, from the interpretation of provisions of law in various case laws, TOPA

https://www.jstor.org/stable/4503365?seq=2#metadata_info_tab_contents

[17] Leach V.-C. in Trower v. Butts, (1823) 1 S. & St

[18] Blasson v. Blasson (1864) 2 de g. j. & s. 665

[19] Supra note 12, p. 77

[20] Hereinafter referred as TOPA

does not recognise direct transfer in favour of a child in the womb. It provides for transfer in the interests of a person not in existence at the time of transfer. Section 13 of TOPA is as follows[21],

> *'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.'*

Transfer to an unborn should be preceded by an interest created to an individual who's alive at the time of transfer, i.e., a direct transfer to the unborn is invalid. Further, the interest created for the unborn must be absolute[22]. Any interest that is created must be absolute, there should not be a further transfer to another person. Once the child takes birth, the property rights are immediately transferred to the child and they become the sole owners of the property. Section 20 of the TOPA entitles vested interest on the unborn upon the transferred property. While the interest created under Section 13 is absolute, Section 20 talks about limited interest in the first instance and successive interest thereafter.

Similar to the provisions under TOPA, the Hindu Succession Act 1956[23], also recognises the proprietary rights of an unborn. Section 20 of the HSA provides that[24],

> *'A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.'*

Form the provisions, a child in the womb can inherit the property of an intestate if:

(i) The child was in the womb at the time of the death of the intestate, i.e., the child should be conceived at the time of death.

(ii) Such a child is born alive subsequently.

Upon the fulfilment of the above conditions, a child in the womb, under the HSA, 1956, will inherit in the same manner as a living person. The legal fiction that a child in the womb, during the death of the intestate, is already born is applied here. Such a child divests the right of anyone who has been temporary vested with the property rights during their absence as a

[21] Transfer of Property Act, 1882, § 13, No. 4
[22] Girjesh Dutt v. Datadin, AIR 1934 OUDH 35
[23] Hereinafter referred as HSA
[24] Hindu Succession Act, 1956, § 20, No. 30, Act of Parliament (India)

child in the womb, in the eyes of law, is already born. According to Mulla[25],

> "*It is by fiction or indulgence of the law that the rights of a child born in justo matrimonio are regarded by reference to the moment of conception and not by birth and the unborn child in the womb if born alive is treated as actually born for purpose of conferring on him benefits of inheritance.*"

The inclusion of this particular principle, recognises the rule of beneficent indulgence, which can be identified from the Latin maxim, *qui in utero est, pro jam nato habetur, quoties de ejus commodo quaritur*, which means he who is in the womb is treated as if already born, as often as it is questioned concerning his benefit.[26] The same principle has also been identified under family law, involving the inheritance to Hindu joint family property, by several judicial pronouncements. [27]

Indian courts have gone to the extent of recognising the legal fiction of child *en ventre sa mere* in cases of succession. Such a fiction protects the child's right over the property and to quote Salmond, there is nothing in law to prevent a man from owning property before he is born. A right to property on succession legally takes place under the law immediately after the death of the owner, as property cannot be without an owner and succession cannot be postponed. But where an owner of property dies while his wife is enceinte, a son that is born subsequently would take the property as the heir of his father although he was not in actual existence on the date when succession opened.

IV. CONCLUSION

It can be inferred that a 'person' in the eyes of law includes an unborn; or rather a person who is not in existence but who will be subsequently born alive. The extent of this recognition under law is still a topic of controversy; with what should be given more relevancy, the rights of person not yet in existence or a living, natural person. The solution to this involves philosophical, metaphysical and legal variations. Regardless, the law of property, which structures policies, rules and principles for regarding property, tangible and intangible, considers an unborn to be in existence for its benefit. It recognises the legal fiction of child *en ventre sa mere* as already born for providing the rights an unborn have upon a property for its benefit. The property law considers an unborn to be in existence for all matters related to its proprietary rights. The current position which limits the extent of proprietary rights

[25]Sir Dinshaw Fardunji Mulla, Mulla Hindu Law, 14th Edn.
[26] *qui in utero est, pro jam nato habetur, quoties de ejus commodo quaritur*, Law Times Journal, (February 25, 2021, 7:34 pm) http://lawtimesjournal.in/qui-in-utero-est-pro-jam-nato-habetur-quoties-de-ejus-commodo-quaeritur/#_ftn1
[27] Priyesh Vasudevan v. Shameena, 2005 (4) KLT 1003

consequent upon the subsequent birth of the child ensures that such a recognition does not affect the lawful rights of any other persons. Precedents under common law considers an unborn even capable of recovering damages in any action suits as they are considered beneficiaries to the father's estate by virtue of the legal fiction. The different legal enactments concerning property law, as well as the personal laws prevailing in India, grants legal status to an unborn to the extent of proprietary rights. Assessing the scenario, it is safe to presume that personhood of unborn in relation to the proprietary rights are well settled.

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