And when **he left him** he was **old or sick, etc.** – **והניחו זקן או חולה כולי**

Overview

Our משנה states if when the שליח הגט left the husband, he was old and sick, nevertheless he may give the גט to the woman with the assumption that the husband is still alive (so she is exempt from יבום [if applicable]). תוספות reconciles our משנה with a seemingly contradictory גמרא.

תוספות asks:

תימה דבפרק המפקיד (בבא מציעא דף לט,ב) גבי ההיא סבתא[1] דאישתבאי איהי וחדא ברתא -

It is astounding for in פרק המפקיד regarding that grandmother, where she and one daughter were captured -

אמרינן דלמא שכיבא סבתא דלמא שכיבא ברתא[2] -

We say there **'perhaps the סבתא died, perhaps** her **daughter died';** we see that we do not presume that they are certainly alive, so why here do we assume that the husband is still alive even though he was a זקן או חולה when the שליח departed?!

תוספות answers:

ואומר רבינו יצחק דלענין יתמי החמירו[3] טפי למיחש -

And the ר"י says that regarding orphans we are more strict so we are **concerned** perhaps they died and the יתומים should inherit their assets –

תוספות proves that by יתומים there is a greater concern:

כדקאמר נמי התם לא שנא עבוד עיטרא[4] לא שנא לא עבוד חיישינן -

As the גמרא **also states there; 'there is no difference whether an עיטרא was written or whether** an עיטרא **was not written,** in all cases **we are concerned -**

ובחזקת הבתים (בבא בתרא דף כט,ב) מפלגינן בין עבוד עיטרא ללא עבוד דאמר עיטרא קלא אית לה -

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[1] The case there was that the grandmother had three daughters; the grandmother and one of her daughters were in captivity, and one of the remaining daughters died and left over a child (the grandson of the סבתא). The issue there is how to deal with the estate of the סבתא. Some of the doubts are whether the סבתא and the captured daughter may have died, so do we give the assets to her heirs; namely the remaining daughter (who was not captured) and the minor grandson, עיי"ש.

[2] See 'Thinking it over'.

[3] The בי"ד is considered the father of the יתומים, therefore they need to assure that the יתומים receive what is rightfully theirs, so even though usually we are not concerned שמא מת, but regarding the rights of יתומים we are חושש שמא מת.

[4] An 'עיטרא' is a document which states that the assets of an inheritance was divided amongst the specific heirs. The גמרא there rules that one may not assign a relative to be a trustee for the assets of a minor, because of the concern that the trustee will be there an extended period of time (שני חזקה) and claim that this is his own inheritance, and it does not belong to the קטן. This rule concludes the גמרא is effective even if an עיטרא was written and it stated that the קטן is an heir and owns (part of) this property, nevertheless we are concerned that he may be swindled.

However in פרק ח"ה we distinguish[5] whether an עיטרא was written or not, for the גמרא **states** there that **there is publicity[6] by an עיטרא –**

תוספות offers an alternate distinction between the two cases:

ועוד דבשבויות חיישינן טפי[7] למיתה:

And additionally we are more concerned for death by captives than we are concerned by זקן או חולה.

SUMMARY

Generally we are not concerned for שמא מת, except to protect the rights of יתומים, or when one is in captivity.

THINKING IT OVER

תוספות poses a contradiction from the גמרא in המפקיד which states דלמא שכיב סבתא דלמא שכיב ברתא.[8] Is תוספות question from both (סבתא וברתא) or only from one?[9]

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[5] The case there is where two brothers bought a slave in partnership; one partner used the slave for years 1, 3, and 5; while the other partner used the slave for years 2, 4, and 6. A third party came after 3 years and claimed that it is his field. רבא ruled that it depends whether the two partners wrote an עיטרא (stating their arrangement of 1,3 5 and 2,4,6), in which case the מערער has no standing and it remains by the partners, or whether they did not write an עיטרא, so if the מערער can show that he is a מרא קמא and they have no proof that they bought it from him, he takes away the slave from them (see footnote # 6). In any case we see that generally there is a difference whether or not there is an עיטרא, however by יתומים we ruled that even if there is an עיטרא (which seemingly guarantees the rights of the קטן), nevertheless we are concerned. This proves that by יתומים we are more concerned than by other cases. The same applies to the concern of שמא מת, that even though generally we are not concerned for שמא מת, but when it comes to יתומים we are concerned.

[6] The מערער (see footnote # 5) claims that even though the partners made a חזקה for three years, it is not a valid חזקה, since neither partner worked with the slave for three consecutive years. This claim is valid only if there was no עיטרא, however if there was an עיטרא so there is publicity that they are both partners and they decided to divide it in this manner, therefore the מערער should have made a מחאה. עיי"ש.

[7] The captors assault them and punish them, etc.

[8] See footnote # 2.

[9] See תוס' ב"מ לב,ב ד"ה דלמא.