Orphans who come to divide, etc. – יתומין שבאו לחלוק כולי

Overview

ר"נ אמר שמואל ruled that if minor[1] orphans want to divide their inherited estate,[2] בי"ד appoints for them executors to carry out the division, and when the יתומים grow up they may nullify this division, according to שמואל, but according to ר"נ they may not nullify it. תוספות qualifies this ruling that we divide the estate.

אומר רבינו תם דוקא שניהם רוצים אבל אחד רוצה ואחד אינו רוצה לא –

The ר"ת rules that we divide the estate **only if both** (all) **of the** יתומים קטנים **want** to divide; **however if one** son **wants** to divide **and one son does not want** to divide, we do **not** divide the estate, but rather leave it as is, until all agree or they achieve maturity.

והיכא שלא באו שניהם אלא אחד והשני אינו בפנינו אמר רבינו יצחק דחולקין[3] –

And in a case **where both** יתומין **did not come** before בי"ד, **rather only one came and the second did not appear before** בי"ד, **the ר"י rules that we divide** the estate-

The ר"י (initially) proves his ruling:

דהא בריש פרק ב' דקידושין (דף מב,א) מייתי לה אחלוקת הארץ שהיו שם כמה יונקי שדים –

For in the beginning of the second פרק of קידושין מסכת the גמרא **brings this** ruling (of יתומין שבאו לחלוק וכו') **in conjunction with the division of ארץ** ישראל,[4] **where there were many nursing babies.**[5]

תוספות is reluctant to accept this as a convincing proof:

ומיהו אין ראיה גמורה משם דלאו לגמרי מדמי לה –

However there is no irrefutable proof from the גמרא in קידושין, **because we cannot compare exactly the** two cases of יתומים and חלוקת א"י -

דחלוקת הארץ היתה על פי הדיבור והיו שם אורים ותומים –

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[1] See 'Thinking it over' # 1.

[2] If the children are all adults, any one of them can (usually) force a division of the estate.

[3] See 'Thinking it over' # 2.

[4] The גמרא there derives the ruling of יתומין שבאו לחלוק וכו' בי"ד מעמידין להן אפוטרופוס from the fact that by חלוקת הארץ it is written (במדבר [מסעי] לד,יח) ונשיא אחד וגו' תקחו לנחול את הארץ; indicating that the נשיא acted as an אפוטרופוס to divide א"י among all the Jews even the יונקי שדים (who were קטנים).

[5] These יונקי שדים did not come before us to claim their share; nevertheless since they did not protest (and the other members of the שבט certainly wanted their share), we divided the entire lot. Similarly here if some of the minor heirs want to divide, we do so, even if not all the heirs are present; as long as no one insists that there should be no division.

For the division of א"י was according to the word of ה', **and the אורים ותומים were there -**

[משום הכי] הגדילו אין יכולין למחות[6] –

[Therefore] it is understood that when these יונקי שדים **grew up they could not protest** the division; however by יתומין (where there is no דיבור or ת"או), perhaps the division which was made without an explicit request is not valid and הגדילו יכולים למחות.

תוספות anticipates another proof and rejects it as well:

ובפרק אלמנה ביבמות[7] (דף סז,ב) דאמר (כולם) זכרים יאכלו[8] –

And in פרק אלמנה in יבמות מסכת **where** רשב"י **ruled** that if there are **male** children (**all**) the slaves **may eat** תרומה -

אף על גב דשמא ימצא עובר זכר[9] דעבדינן תקנתא כדרב נחמן[10] –

Even though there is the possibility **that perhaps the עובר will be a male,** nevertheless they still may eat **for we will provide a solution** to this issue **based** on the ruling **of ר"נ.** This concludes the citation from that גמרא -

נמי אין ראיה[11] דהתם שאני דאף על פי שלא בא כי אם האחד עבדינן להו תקנתא –

That **is also not a proof, since there it is different, for if even only one came** to divide **we will perform this תקנה** of ר"נ -

לפי שיש תקנה גם לעובר ומתעלה חלקו בכך[12] –

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[6] We can (nonetheless) derive from חלוקת הארץ the rule that יתומים שבאו (willingly), הגדילו אין יכולין למחות (even though that חלוקת הארץ was ת"או ע"פ הדיבור), because we may consider their willingness to divide, the equivalent of ת"או ע"פ הדיבור being effective [even] in regards to the יונקי שדים. However if not all the יתומים agreed to divide, then we cannot derive it from חלוקת הארץ since there it was ת"או ע"פ דיבור. (See אמ"ה # 84.)

[7] The wife and עבדים כנענים of a כהן may eat תרומה. If the כהן dies and leave no heirs, they may not eat תרומה.The משנה there on סז,א teaches that if a בת ישראל was married to a כהן and he died and left her pregnant (and she had other sons), her slaves – עבדים כנענים (which she brought into the marriage) may not eat תרומה, because the עובר (who is a partial owner of these slaves, and) even though he is a כהן, does not have the power to allow them to eat תרומה. Only a ילוד (a born child) can be מאכיל, but not an עובר.

[8] רשב"י maintains that if there are בנים זכרים (from the deceased כהן) the slaves may eat תרומה, because the slaves are the property of these בנים זכרים who are כהנים.

[9] If the עובר is a זכר, then it turns out that he owned them (partially) when he was an עובר, which should prevent them from eating תרומה. [If she is a נקבה there is no problem since a בת במקום בנים does not inherit.]

[10] ר"נ rules here that the אפוטרופוס choses a share for each child (and אין יכולין למחות), similarly there we will chose for the עובר other assets of the estate, so that he will have no partial ownership in the slaves.

[11] [Seemingly] there we are choosing a share for the עובר without his consent; this should prove that we can divide the estate without the express consent of all the minor heirs. תוספות rejects this proof.

[12] If we will make the תקנתא so that the עבדים may eat תרומה (which is cheaper than חולין), the share of this עובר will increase (for it will be less expensive to feed the עבדים; increasing the total value of the estate) for he will receive assets to offset their share of the עבדים. However if we do not do this תקנה and will not allow the עבדים to eat תרומה, they may die, thus decreasing the value of the estate and the s'עובר share as well (and even if they are fed חולין it will still decrease (greatly) the value of the estate since חולין is more expensive than תרומה [see תוספות קידושין מב,א ד"ה יתומים]).

Since there is also a benefit to the עובר and his portion of the estate **increases by** doing the תקנתא דר"נ -

במה שיאכלו עבדים של אלו בתרומה שלא ימותו ברעב:

So that the slaves of these children **will eat תרומה and they will not perish in the hunger.**[13]

Summary

If all the (minor) parties agree to a division we appoint an אפוטרופוס to divide; if one expressly disagrees we do not divide; if not all are present, we still divide; however תוספות did not have conclusive proof (unless it is a case where it is clearly beneficial to the absent יתום).

Thinking it over

1. תוספות differentiates whether the יתומים קטנים agree to divide (then מעמידים להם אפוטרופוס), or they refuse (or don't agree explicitly), where we do not divide. Seemingly what difference does it make whether the קטנים agree or disagree, they are not בני דיעה?![14] Their agreement is meaningless!

2. The ר"י refuted the two proofs; on what then did he base his ruling[15] that if one agrees and the other is not present, we do divide?[16]

[13] In a case where it is obviously beneficial for the יתום (or עובר) to divide, then we will surely divide without his express consent (since it is for his benefit; זכין לאדם שלא בפניו); however if it is not clearly beneficial for the יתום (and it might even be detrimental), then perhaps we will not divide unless they give their express consent.

[14] See תפא"י.

[15] See footnote # 3.

[16] See בית יהודה (חי' מהריב"ן).