בית דין מעמידין להם אפוטרופוס וביוררים להם כולי –

בי"ד appoints for them an אפוטרופוס and they choose for them, etc.

OVERVIEW

ר"נ אמר שמואל taught us that בי"ד appoints an אפוטרופוס for the יתומים and they choose for them a חלק יפה. It is not clear whether בי"ד chooses one אפטורופוס for all the יתומים (as the expression מעמידין להן אפוטרופוס [in the singular] indicates), or one אפטוטרופוס for each יתום (as the phrase ובוררין להן חלק יפה indicates[1]). It is also not clear who are the בוררין (is it בי"ד or the אפוטרופוס) and how are they בורר a חלק יפה for each יתום. This and many other issues will be clarified in this תוספות.

אומר רבינו תם וכן רבינו חננאל דבוררים להם בית דין דצריך שומת בית דין[2] –

The ר"ת and ר"ח say that the words **ובוררים להם** refers to the בי"ד, **that an assessment by בי"ד is required** in order to divide the estate. תוספות explains what is the role of the אפוטרופוס (since בי"ד does the assessment) –

ואפוטרופוס מעמידין להן לשמור לכל אחד חלקו בפני עצמו[3] –

And we appoint the אפוטרופוס for the יתומים, **to protect the assets of each** יתום **individually -**

דעד עתה היה שומר הכל ביחד –

For up till now he protected the entire estate **as one.**

תוספות explains what is meant by בוררין להם [חלק יפה]:

ובוררין על ידי גורל דאין טריחותא להטיל גורלות –

And בי"ד[4] chooses by a lottery, since it is not burdensome to cast lots -

תוספות responds to an anticipated difficulty:[5]

ואפילו בגורל שייך לברור חלק יפה –

And even by a lottery it is possible to choose a good portion -

כגון אם יש שלש שדות דטוב שיטול כל אחד ואחד שדה אחת ויהיה חלקו בבת אחת –

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[1] The phrase ובוררין להן חלק יפה seems to indicate that each אפוטרופוס makes an effort to receive the best חלק for his יתום. See רש"י ד"ה אפוטרופוס וד"ה ובוררין להן.

[2] בי"ד (and not the אפוטרופוס) must evaluate all the assets of the estate (how much each of them is worth) and then divide it evenly among the יתומים.

[3] תוספות is addressing a seeming difficulty. Why does the גמרא say מעמידין להם אפוטרופוס בי"ד וכו' יתומים שבאו לחלוק, seemingly בי"ד appointed for them an אפוטרופוס as soon as they became יתומים to manage their affairs?! תוספות explains that the אפוטרופוס has a new 'job description'; he must now protect the individual assets of each יתום.

[4] See תוה"ר and אמ"ה footnote # 7

[5] We are dividing the estate by a lottery; how is it possible that we choose for each יתום a חלק יפה?!

For instance if there are three fields (and three יתומים), **it is preferable that each** יתום **receive one field and his share will be together in one place -**

ממה שיחלוקו כל שדה לג' חלקים –

Rather that they should divide each field into three portions.[6]

וכמה ענייני ברירות יש בו בחלונות[7] **וסולמות**[8] **ודרך**[9] **–**

And there are many possibilities for 'choosing'; including windows, ladders, and a pathway.[10]

תוספות qualifies this division:

ודוקא בדבר שאין שייך בו גוד או איגוד[11] **חולקין –**

And we divide only something to which the rule of גוד או איגוד does not apply[12] **-**

תוספות proves this last ruling:

ומדקדק רבינו תם דאי חולקין אפילו בדבר ששייך בו גוד או איגוד –

And the ר"ת infers this ruling as follows; **for if you will say that we divide even those things for which גוד או איגוד is applicable,** then **-**

אמאי דחיק בריש האיש מקדש (קידושין דף מב,ב)[13] **יכולין למחות ברוחות –**

Why does the גמרא **in the beginning of האיש מקדש** פרק **awkwardly** answer that **they can protest regarding which direction** their assets are facing, when the גמרא -

הוה ליה למימר דיכולין למחות בגוד או איגוד –

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[6] The meaning of ובוררים להם חלק יפה is that בי"ד tries to see that all of them receive a חלק יפה (but not that we try for each one individually that he should receive a חלק יפה [better than his brothers]).

[7] Each child should receive equal amount of lighting in their respective houses, or the division should not cause the (partial) blocking of window rights.

[8] Some properties require ladders to be accessible (which decreases the value of the property); alternately no one should prevent the initial right to place ladders in order to gain access.

[9] The pathways for access should be taken onto consideration, and to insure that all owners have proper easement.

[10] בי"ד is required to make a very careful accounting of the entire inventory of the estate and the various rights, to insure that all the parcels, which will eventually be apportioned, are equal.

[11] גוד או איגוד literally means, 'you pull or I will pull'. Let us assume that there is one item in the estate that all need (a chair for instance), where we cannot actually divide the chair; one party may say to another party you have the option of (pulling away, i.e.) buying this chair from me for a hundred dollars (for instance) and if you do not want to buy it, then I will pull it away from you by paying you a hundred dollars. The one saying גא"א must give the other party the option to do as he pleases, either to buy or to sell. The offering price to buy or to sell must be the same.

[12] תוספות rules that on these objects where גוד או איגוד applies, we do not divide them through גא"א (trading off one asset for another or for money), but rather we leave them as is and let the parties settle it [through גא"א] when they reach maturity. The reason is because we do not know what each one really desires or is willing to give up.

[13] The גמרא there (on מב,א) asks a contradiction on ר"נ from another ruling that יכולין למחות, and answers that ר"נ ruled only when בי"ד did not err in their assessment. The division was done properly. The גמרא asked if there was no error, why (according to שמואל) would they want to protest. The גמרא answers יכולין למחות ברוחות. This means that if one received a property on the north side of the estate, he can protest that he prefers the property on the south side, for he has other properties (not from this estate) there. תוספות maintains that this answer is a דוחק.

Should have said they can protest regarding גוד או איגוד![14]

תוספות anticipates a possible refutation to this proof:

והא דלא קאמר יכולין למחות אם טעו בפחות משתות דמכרן קיים[15] –

And why is it that the גמרא **did not answer that יכולין למחות** in a case where בי"ד **made a mistake of less than one-sixth** of the value, in which case **their sale is valid;** this seems to be a very usual case[16] **-**

תוספות rejects this refutation:[17]

משום דלא מסתבר שיאמר שמואל אם הגדילו יכולין למחות בשביל טעות דפחות משתות –

Because it is not logical that שמואל should maintain that when the יתומים **mature they can protest such a** minor **error of less than a sixth -**

דמודה שמואל ויש ליפות בכך כח בית דין דהוי כמאן דלא טעו כלל –

For in that case **שמואל admits that we should empower the כח בי"ד, because** such a minor mistake **is considered as if the** בי"ד **did not err at all –**

תוספות responds to a possible refutation of the previous assumption:[18]

אף על גב שיכולין למחות ברוחות בזה אין ליפות כח בית דין דאין זה תלוי בשומא[19] –

Even though the יתומים **can be מוחה ברוחות,** nevertheless we cannot compare it to פחות משתות, for **in this** case of רוחות **there is no** reason to **empower the כח בי"ד**

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[14] Let us assume that there was only one chair and only one table in the estate, of equal value. If we maintain that we divide even items of גוד או איגוד (as this chair and table), בי"ד will draw lots and award one the chair and the other the table. The one who received the chair can protest that he prefers the table over the chair. This seems (to תוספות) a much more common issue than רוחות. The fact that the גמרא did not mention it, proves that these גא"א items are not included in the division, but rather בי"ד leaves it up to the יתומים to divide it eventually through the גא"א process when they mature.

[15] There is a משנה (cited in קידושין מב,א) that if בי"ד made a mistake in their assessment by one sixth (the property was worth six סלעים and בי"ד sold it for five) the sale is invalid (according to the חכמים to which ר"נ agrees to). If the mistake was for less than a sixth (it was worth ten and it was sold for nine), the sale is valid.

[16] The fact that the גמרא did not bring this more common case, indicates that the גמרא was not particular in which case it used to demonstrate the מחאה. Therefore there is no proof from the fact that the גמרא did not use the case of גא"א, that we do not divide items of גא"א, for the גמרא does not necessarily mention all the cases even the more common ones.

[17] It may indeed be that a mistake of פחות משתות is common, but the גמרא could not mention it, because for such a minor mistake they cannot protest.

[18] תוספות asserted that by a minor error of פחות משתות there can be no מחאה. Seemingly the complaint of רוחות is more trivial than פחות משתות and yet the גמרא claims that they can be מוחה ברוחות

[19] When בי"ד errs in its assessment (by less than a שתות), then in order to uphold the dignity of the בי"ד, we will not allow the יתומים to overrule the assessment which בי"ד made (since it is an insignificant amount); however when the person is dissatisfied in which direction his property is located, we will not diminish the dignity of the בי"ד, by upholding his request for change, since בי"ד did not rule where his property will be located; it was (merely) ordained by (the chance of) the גורל.

and not permit them to protest, **for this** (the allocation of where the field will be) **is not dependent on the assessment of בי"ד;** rather it was done by lottery –

The distinction between פחות משתות and רוחות will -

וכל שכן דאם נפרש דמכרן קיים ומחזיר האונאה[20] דאתי שפיר[21] –

Certainly be properly understood if we interpret that the ruling of **מכרן קיים** by פחות משתות means that the amount that he was **deceived is to be returned.**

תוספות concludes:

ומיהו יש לדחות דחדא מינייהו נקט[22] –

However this proof **can be rejected, for** the גמרא **mentions** only **one of many** possibilities where they can protest.

תוספות anticipates another proof that we do not divide items of גא"א (and rejects it):

ומההוא דיבמות דפרק אלמנה (דף סז,ב) דמשמע שעושים תקנה לכל העבדים שיאכלו בתרומה-

And from that גמרא in מסכת **יבמות פרק אלמנה, where it seems that we make the תקנה** of ר"נ **in order that all the slaves should eat תרומה[23] -**

שנותנין לבנים כל העבדים וחלק אחד נותנים לעובר כנגדן[24] –

Where we give all the slaves to the (born) **sons, and we give the fetus one share** (of other assets), **corresponding to** the value of the share which each brother received in the slaves -

אין להוכיח דחולקין אפילו בדבר ששייך בו גוד או איגוד כגון העבדים[25] –

We cannot prove that we divide even items where גוד או איגוד applies, like slaves for instance. The reason there is no proof from that גמרא is that **-**

דשאני התם דמתעלה חלק העובר בכך במה שעבדים אוכלים בתרומה[26] –

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[20] When בי"ד errs by a שתות (or more) the entire sale is void; a new assessment and sale needs to be made. If the error was less than a שתות, then the sale is valid. There is a dispute whether the sale is valid as is, and the one who was deceived (for a פחות משתות) must swallow his loss, or even though the sale is valid, nevertheless the difference between the assessed value and the true value must be returned to the rightful party.

[21] In the case of פחות משתות the aggrieved party loses nothing, for the difference is returned to him, therefore he cannot protest; however by רוחות the aggrieved party experiences a real loss when his property is not in the proper location, therefore we accept his protest.

[22] We cannot proof conclusively that there is no division of items where גא"א is applicable, from the fact that the גמרא did not say that they can protest regarding items of גא"א (instead of saying they can protest regarding רוחות), for the גמרא happened to mention [only] one of the many possibilities where they can protest.

[23] See previous תוספות ד"ה יתומין (TIE footnote # 7 and onwards for a more lengthy explanation).

[24] It would seem from that גמרא that we do divide (even) items where גא"א applies, such as the עבדים in return for something else.

[25] We are giving all the עבדים to the sons and something else for the עובר in return; this is the classic case of גא"א.

[26] See תוד"ה יתומין (TIE footnote # 12).

There it is different, for the value **of the s'עובר share increases by** allowing **the slaves to eat תרומה**

ויש לעובר בכך חלק יפה יותר[27] **–**

So that the עובר will receive a more valuable share.

תוספות offers a different explanation to the solution mentioned regarding the עבדים:

ועוד לא לכל העבדים באנו לעשות תקנה אלא לחלק הבנים שנולדו[28] **–**

And furthermore we are not enforcing this תקנה for all the slaves, but only for the portion that belongs **to the born children.**

תוספות continues that it is possible that all the slaves are given to the sons:

ועוד [ה"מ[29]**] שיש שדות שיכולין ליתן לעובר כנגד העבדים–**

And in addition we may give all the slaves to the born sons and none to the עובר **in a case where there are fields** in the estate (besides the עבדים), in which case **it is permissible to give** fields **to the עובר corresponding to the** (single share) **value of the עבדים -**

שיש כח לבית דין לעשות כן[30] **כדאמרינן בהניזקין** (לקמן דף נב,א) **–**

For בי"ד has the power to do so as the ברייתא **states in הניזקין** פרק.[31]

תוספות presents a related issue:

ושותף הבא לחלוק שלא בדעת חברו –

And a partner who wishes to divide the assets of the partnership, **without the knowledge of his partner;** one partner wants to remove all his assets from the partnership and leave his friend with his share of the partnership **-**

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[27] The proposed limitation of dividing גא"א items is limited to cases where the one who is presented with the גא"א option will not gain from such a division; here however the עובר stands to gain by accepting the גא"א division, therefore we do divide the גא"א assets.

[28] Let us assume that there were two born children and one עובר. There were also three slaves in the estate. תוספות maintains now that we give two עבדים to the sons (their share) and these עבדים may eat תרומה, and one עבד is given to the עובר (his share) who may not eat תרומה. Therefore it is not a case of גא"א, since we are dividing the slaves. [See (however) בית ישראל, who finds this explanation puzzling.]

[29] This can be read either as הני מילי or (as the נח"מ states) הכא מיירי.

[30] The אפוטרופוס (and certainly בי"ד) may sell the slaves of the יתומים in order to buy fields with the proceeds (but not the reverse), since fields are more valuable (and stable) than עבדים. It is therefore understood that בי"ד can sell the s'עובר share of the עבדים to the brothers and receive fields as payment.

[31] In summation: according to the first explanation of תוספות we give all the עבדים to the brothers and the עובר receives מטלטלין (or money) in return; even though it is גא"א, nevertheless it is for the benefit of the עובר. According to the second explanation (the first ועוד) we split up the עבדים between the brothers and the עובר (where the עבד of the עובר cannot eat תרומה). According to the last explanation (the second ועוד) we give all the עבדים to the brothers provided there are fields with which to compensate the עובר; otherwise we split the עבדים (as in the second explanation).

מספקא לרבינו יצחק אם יכול לחלוק הקרקעות ששייכא קפידא ברוחות –

It is doubtful to the ר"י whether he can divide the properties (שלא בדעת חבירו), **since being particular as to the location[32] is relevant.[33]**

תוספות anticipates a possible resolution to this dilemma, but rejects it:

ואין לדקדק מהא דאמר בפרק בית כור[34] (בבא בתרא דף קו,ב) –

And we cannot infer from that which the גמרא **states in פרק בית כור -**

אלא מעתה הני בי תלתא אחי דקיימי ואזול תרי מינייהו ופלוג הכי נמי דבטלה מחלוקת –

But now (according to רב) **these three brothers that exist and two of them went and divided** the estate into three parcels, would you **also assume that their division is nullified?!** This concludes the citation from the גמרא; continues תוספות -

דמשמע שהחלוקה קיימת[35] אף על גב דבקרקע מיירי שהחלוקה שבקרקע קיימת –

So it appears (from the tone of the question) **that the division remains, even though we are discussing land, for** the assumption is **that** an equitable **division of land is substantiated.** This would seemingly resolve the doubt of the ר"י[36] –

תוספות rejects this solution:

איכא למימר[37] היינו[38] כשחזר וחלקו עמו נפל לו בגורל אותו חלק עצמו שנפל לו בתחילה –

We can say that the חלוקה is קיימת, only in a case **where when they went back**

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[32] Assuming the partnership consisted of two fields of equal value, the one partner cannot choose a field by himself (even with a גורל) and leave the other field for the absentee partner, for perhaps the absentee partner prefers the other field because of its location and proximity to other properties he owns. See 'Thinking it over'.

[33] תוספות cited previously the גמרא in קידושין that יכולין למחות ברוחות.

[34] The גמרא there cites a מחלוקת between רב ושמואל in a case where two brothers divided the estate, and later a third brother appeared (whom they did not know previously that he existed). רב rules the entire division is nullified (בטלה מחלקות), and they have to divide again anew amongst the three brothers. שמואל maintains (מקמצין), that each brother gives a third of his property (a sixth of the original estate) to the new brother (so each one receives two sixths or one third of the entire estate).

[35] תוספות now understands the rhetorical question, 'הכי נמי דבטלה מחלוקת', to mean that the third (absentee) brother must accept the remaining parcel (since all three parcel were equal and a גורל was made). He cannot be מוחה ברוחות.

[36] In a case of two partners where one made an equitable division, the second cannot be מוחה ברוחות (if it is done by lottery); for otherwise why is the חלוקה valid here by the three brothers, if the absentee brother can be מוחה ברוחות.

[37] We can assume that the absentee partner can be מוחה ברוחות and similarly here the absentee brother can demand a new גורל since he too can be מוחה ברוחות, and when the גמרא ruled קיימת חלוקתם that is in a limited manner as תוספות continues to explain.

[38] Let us assume there were three brothers and many fields. The two brothers divided all the fields into three equal parcels and drew lots for their shares. Brother A received parcel A and brother B received parcel B. When brother C arrives, he can cast a lot for all three parcels, if he is allotted parcel C (the original parcel allotted to him by the first lottery), then brothers A and B receive parcels A and B respectively without any requirement for a new lottery as to who will receive parcels A and B. This is the meaning of קיימת חלוקתם. If however brother C did not receive parcel C in his lot (but either A or B), then brothers A and B must cast new lots to determine who receives the remaining two parcels. In any case brother C can certainly demand a new גורל (for himself) since he can be מוחה ברוחות.

and divided it with the third brother; **he received the same parcel that was allotted to him originally** -

כשחלקו השנים בלעדיו דאז קיימת חלוקתם –

When the two brothers divided without the third brother, **it is** only **then that their division remains -**

אבל מכל מקום חוזר ומטיל גורל עם שניהם כאילו באים לחלק בתחילה:

However the third brother casts **a lottery with both** brothers (for his share) **as if they are initially dividing** (without any prior division).

Summary

It is בי"ד who assesses the value of the estate, if the minor children wish to divide it. The division is done by lottery but it does not include single use items which are divided by גוד או איגוד (when the יתומים reach maturity). תוספות questions whether מחאה ברוחות is applicable where one partner wishes to remove his assets from the partnership without the participation of the remaining partner.

Thinking it over

תוספות questions whether מחאה ברוחות is applicable where one partner wishes to remove his assets from the partnership without the participation of the remaining partner.[39] Seemingly if the division was done properly (ע"פ שומת בי"ד or similarly) and he is taking his half of the property through a גורל, what right does the other partner have to complain? If he were here he would also be forced to accept this גורל?[40]

[39] See footnote # 32.

[40] See עד"ז in אמ"ה # 111.