

## Orphans that came

## יתומים שבאו –

### OVERVIEW

ר"נ ruled in the name of שמואל that if orphans (who were minors) come to ב"ד because they desire to divide their father's estate, ב"ד appoints for them an אפוטרופוס to assist them in dividing the estate. תוספות qualifies this ruling.

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**אומר רבינו תם דדוקא שבאו –**

**The ר"ת rules that this law of אפוטרופוס להם מעמיד ב"ד applies specifically only if all the יתומים came and agreed to divide the estate -**

**אבל אם היה האחד מוחה אין להעמיד אפוטרופוס לחלוק בעל כרחם –**

**However if one of the יתומים was protesting and did not want the estate to be divided now, ב"ד does not appoint an אפוטרופוס to divide the estate against their will (of those יתומים who oppose the division now).**

According to תוספות we cannot divide an estate unless all the participants agree. תוספות anticipates a difficulty with this ruling.

**ומחלוקת הארץ אין להביא ראיה שהיו שם כמה יונקי שדים –**

**And we cannot bring proof (in opposition of תוספות ruling; that a division can be made even without the approval of all the participants) from the division of ארץ ישראל in the times of יהושע where there were many nursing children, and still the land was divided, even though these יונקי שדים certainly did not voice their approval. This seems to contradict the ruling of the ר"ת which requires the consent of all participants.**

תוספות replies that there is no contradiction -

**דשאני התם שהיה על פי הדיבור ואורים ותומים<sup>1</sup> –**

**for there (by חלוקת הארץ) it is different from a regular division, since there the division took place according to the word of ה' and the אורים ותומים. Therefore the consent of the participants was not necessary.**

תוספות asks a different question:

**ומיהו קשה מהא דאמר פרק אלמנה לכהן גדול (יבמות דף סז, א) –**

**פרק אלמנה לכה"ג that which is stated in גבי כהן שמת והניח אשה מעוברת ועבדים<sup>2</sup> –**

**Regarding a כהן who died and left over a pregnant wife and slaves -**

<sup>1</sup> See 'Thinking it over'.

<sup>2</sup> וְכִי הָיוּ בִּי יִקְנֶה נָפֶשׁ קָנִין בְּסֻפּוֹ הוּא י' אֶכֶל that ויקרא (אמור) כב, יא states in פסוק that תרומה eat כהן of עבדים כנענים בבו.

**וקאמר התם זכרים יאכלו –**

**And the גמרא there rules,** that if there were **male** children (besides the pregnant mother) then the slaves **may eat תרומה** since they now belong to the sons of the deceased who (are כהנים and) inherited these slaves from their father. The גמרא continues and explains -

**ואי משום חלק העובר פירוש דשמא ימצא עובר זכר<sup>3</sup> –**

**And if you are concerned on account of the share of the fetus;** [תוספות adds] the **explanation** of this question is **that** we are concerned **perhaps the fetus will be a male -**

**וקיימא לן (שם) ילוד מאכיל שאינו ילוד אינו מאכיל<sup>4</sup> –**

**And we have established** a rule **that a born heir feeds** the עבדים with תרומה however **an unborn heir** (i.e. a fetus) **cannot feed** the עבדים תרומה. It should therefore turn out that since this fetus owns a share of all the עבדים (if he is a זכר), so on account of his ownership they should be prevented from eating תרומה because a ילוד שאינו is not מאכיל. The גמרא concludes that this is of no concern, for -

**עבדינן להו תקנתא כרב נחמן דאמר רב נחמן אמר שמואל יתומים שבאו לחלוק כולי –**

**We will institute the enactment of ר"נ, for rules that orphans who wish to divide, etc.** we appoint an אפוטרופוס and divide. Here too we will appoint an אפוטרופוס for this עובר and the אפוטרופוס will designate other properties (not the עבדים) as the rightful share of this עובר. The עובר will not own the עבדים; they will belong to the live brothers, and therefore the עבדים will be able to eat תרומה.<sup>5</sup> This concludes the citation from the גמרא in יבמות.

concludes his question:

**מכל מקום שמעינן מהתם דאף על גב שהאחד קטן ביותר –**

**In any event we derive from the גמרא there that even though one of the heirs is very young** (in fact he is merely a fetus) -

**ואין בו דעת לישראל אם רוצה לחלוק אם לאו דומיא דעובר דעבדינן ליה תקנתא –**

**And he is of no mind to be consulted with if he wishes to partake in dividing the estate or not,** as in the case of the עובר, nevertheless we **institute this enactment** of ר"נ –

**והכא אמרינן דוקא באו –**

<sup>3</sup> If the עובר is a female there is no problem, since she will not inherit anything when there are brothers.

<sup>4</sup> The same פסוק in (אמור) ויקרא states בלחמו הם יאכלו בלחמו and we have a דרשה that the בית יליד can be בלחמו; that only a born heir can allow the עבדים to eat, but not an unborn heir (an עובר). If the owner died and there are no living children, only the עובר, then the עבדים cannot eat תרומה.

<sup>5</sup> If necessary we can give the עובר some of the עבדים and the others to the brothers. The עבדים of the brothers will eat תרומה while those that belong to the עובר will not eat תרומה (until he is born).

**And here we are saying that this ruling applies only if the יתומים came** and are willing to divide, but not in a case where we do not have the consent of all the participants!

answers: תוספות

**ושמא יש לומר דהתם תקנה היא לעובר –**

**And perhaps one can say; that there it is beneficial to the עובר**, that the עבדים are assigned to his brothers and he receives another portion of the estate –

**שמתעלה חלקו בכך שהעבדים אוכלים בתרומה לפי שהתרומה בזול<sup>6</sup> –**

**For by doing this his share** (of the remaining estate) **increases in value**, since the עבדים can now eat תרומה; this will increase the value of the estate since תרומה is cheaper that חולין.<sup>7</sup>

offers an alternate resolution to the apparent contradiction: תוספות

**ועוד משם לא משמע שאם האחד היה מוחה בפירוש –**

**And furthermore it is not evident from that גמרא that if one of the יתומים would explicitly protest** the division –

**שנוכל להעמיד לו על כרחו אפוטרופוס לחלוק:<sup>8</sup>**

**That we would be able to appoint an אפוטרופוס to divide the estate against his will.** It merely states that we divide it without his specific consent. Therefore it does not contradict the ruling of the ר"ת here that if one of the יתומים explicitly protests, we cannot divide the estate.

## **SUMMARY**

We appoint an אפוטרופוס to divide the estate of minor יתומים, only if they are all in favor; except in the case of חלוקת הארץ (where it was ואו"ת) and in a case where it is beneficial for the יתומים to have the division done now (as in the case of עבדים). Alternately if none of the יתומים protests (even if they are עוברים or יונקי שדים) we assign an אפוטרופוס even if there is no explicit consent.

## **THINKING IT OVER**

<sup>6</sup> תרומה is cheaper than חולין because most people would not want to have חולין; only כהנים can eat it, and if it becomes טמא it has to be burnt, therefore the price of תרומה is less than that of חולין.

<sup>7</sup> If we would not divide now, but rather wait till the יתומים mature, the עבדים in the meantime would have to eat חולין (which is more expensive than תרומה), thereby diminishing the value of the estate.

<sup>8</sup> This (second) answer will also resolve to the first question of תוספות; that by חלוקת הארץ none of the יונקי שדים was protesting the חלוקה.

1. תוספות (in the first answer) maintains that we cannot compare appointing an אפוטרופוס for a regular חלוקה הארץ, since by חלוקת הארץ it was ע"פ בי"ד.<sup>9</sup> How, then can we derive from חלוקת הארץ the rule that מעמידין להן אפוטרופוס?!<sup>10</sup>

2. Does the ר"ת maintain that for חלוקה we require the consent of all the יתומים; or that there can be no חלוקה if one of the יתומים protests, however we do not require their consent?<sup>11</sup>

3. initial statement seems contradictory. It states: דוקא שבאו אבל אם היה. The expression דוקא שבאו indicates that if it was not באו, then we do not appoint an אפוטרופוס even if no one was explicitly מוחה; however the conclusion that אבל אם היה האחר מוחה וכו' indicates that even if not באו, but as long as no one is מוחה, then בי"ד will appoint an אפוטרופוס. How can we reconcile this seemingly contradictory statement?<sup>12</sup>

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<sup>9</sup> See footnote # 1.

<sup>10</sup> See נה"מ and בירורי השיטות.

<sup>11</sup> See נה"מ.

<sup>12</sup> See סוכ"ד אות כג.