

ובוררין¹ להם חלק יפה – And they choose for them a nice portion

OVERVIEW

When heirs divide an estate, if they come to an agreement then whatever they agree to is valid. It is self understood that there is no need for casting lots (as to who gets what) or having the property assessed by outside parties, since they are in agreement as to how the property is to be divided. ר"נ ruled in the name of שמואל that if minor יתומים desire to divide their estate, בי"ד appoints an אפוטרופוס to enact that division (and there is a dispute whether the יתומים can protest when they mature). The issue here is to what extent is the power of the אפוטרופוס, when he makes this division; is it as if the heirs are in agreement and therefore no outside assessment, or casting of lots is necessary, or do we say that the אפוטרופוס is merely an agent and he must rely on assessments and casting of lots to assure that the division was done fairly and equitably. תוספות offers two opinions on this matter.

מלשון בוררין² היה מדקדק רבינו יצחק דהיינו בלא גורל³ דמה ברירה שייך בגורל⁴ –
The inferred from the expression **ובוררין** [and they choose], that this choosing was done **without** casting lots; for how is 'choosing' applicable to casting lots!

והיה מפרש שאין צריכין גורל ולא שומת בית דין וכל החלוקה תלויה בדעתו –
And the would explain that a **גורל** is not required and neither is an assessment by **בי"ד** required, for the entire division of the estate depends on decision of the אפוטרופוס; the division by the אפוטרופוס is made -

כמו שהיו עושים יתומים עצמם אם היו גדולים –
Just as the orphans themselves would have done had they been adults -
ושהיה כל אחד בורר לעצמו וזוכה בשלו⁵ –

¹ There is a dispute among the commentaries whether בי"ד appoints a separate אפוטרופוס for each יתום (as the plural of לשון ובוררין להן would indicate) or that one אפוטרופוס is appointed for all the common heirs (and the plurality of ובוררין refers to the various cases that may come up).

² Choosing indicates careful consideration for the value of each share, and that it should be appropriate for the recipient; it is not done in a haphazard manner.

³ When the אפוטרופוס divides the estate into [two] portions it is not necessary to cast a lot to decide which of the [two] brothers gets which portion, but rather the אפוטרופוס may assign each brother whichever portion the אפוטרופוס decides (is more appropriate).

⁴ Casting lots indicates an indiscriminate way in which the estate is divided. Each individual is at the mercy of the lottery. There is seemingly no choice.

⁵ The heirs would negotiate with each other and try to acquire what is most desirable to each, without resorting to casting lots or outside assessments (providing the heirs agree on the division).

Where each one of the heirs would choose for himself (that which he desires) and would acquire it for himself (without lots or ב"ד שומת). The same applies to the אפטרופוס that there is no need for outside intervention or casting of lots. We rely entirely on the decision of the אפטרופוס

וכן לענין דינא דגוד או איגוד⁶ נמי נראה לרבינו יצחק דהו כיתומים עצמן⁷ –

And it is also the view of the ר"י concerning the concept of גוד או איגוד that the אפטרופוס is just like the יתומים themselves were dividing, and therefore –

ויכולין לחלוק שני חפצים אף על גב דתרווייהו צריכי להאי וצריכי להאי –

They can divide two articles even though that both of the יתומים need each of these two articles –

ושייך ביה גוד או איגוד –

And therefore the rule of גוא"א is applicable, nevertheless the אפטרופוס can divide these two articles giving one to each of them –

שהעמידו חכמים אלו אפטרופים שנעשו על ידי בית דין כמו יתומים עצמן –

For the חכמים placed the אפטרופים which were appointed by בי"ד as if they were the יתומים themselves; in regards –

לחלוק בלא שומת בית דין ובלא גורל דבסברותם לבד תלויה החלוקה –

To divide without an assessment from בי"ד and without a גורל, for the division depends solely on the discretion of the אפטרופים –

כשני אחים גדולים החולקים בנכסי אביהן שבורר כל אחד לעצמו –

Just as two adult brothers who dividing their father's estate where each brother chooses for himself his desired portion –

הוא הדין לענין דינא דגוד או איגוד דמהניא חלוקת האפטרופא לגמרי –

And similarly concerning the ruling of גוא"א that the division of the אפטרופא remains final –

ולא יוכלו למחות כשיגדלו –

⁶ גוד או איגוד literally means, 'you pull or I will pull'. It refers to a case where two partners (or two heirs) own in common an item which is not divisible, and each one desires it. Either of the partners may assess this item at a certain price and say to the other, either you buy me out for this price (and then the item will be exclusively yours), or if you do not want to buy me out, then I will buy you out for the same price (and the item will be exclusively mine). The logic behind this is that the presenter (who is claiming גוד או איגוד) must offer the other the first right to purchase [therefore he will not offer a low price, since the other may then accept the offer and the presenter will lose, on the other hand he will not make it too high for then he will buy it at an inflated price], this assures that the presenter will usually offer a market value price].

⁷ One may think that the אפטרופוס may distribute the assets of the estate that are easily divisible; for instance cash, or fields which are of equal value, however concerning items that are not divisible [for example there is one chair and one desk in the estate], one may think that the אפטרופוס should allow it to remain in the estate and when the children will mature they will resolve the issue through גוא"א or some other means. The ר"י maintains that even in such cases the אפטרופוס can do as he pleases [and give one the chair and the other the desk (as long as they receive equal monetary value, and/or any discrepancy is offset through other means)].

And the יתומים cannot protest when they mature.⁸

ורבינו תם מפרש דהיינו דוקא בגורל⁹ וכי טריחותא להטיל גורלות¹⁰ –

However the ר"ת explains that בוררין means only with a גורל; for is it bothersome to cast a גורל –

– וגם צריך שומת בית דין ודוקא בדבר דלא שייך ביה גוד או איגוד¹¹ –

And in addition it is necessary to have a שומת בי"ד before the אפוטרופוס can divide the estate, and their division is valid only by items where גוא"א is not applicable.

תוספות responds to an anticipated question; how can we say בוררין and גורל together they seem two contradictory terms, תוספות replies:

ובוררין שייך שפיר בגורל –

And the term בוררין is applicable by a גורל –

כגון אם יש שם שלש שדות שלא יחלקו כל אחת לג' חלקים –

For instance if there are three fields in the estate, the idea of בוררין assures us that we should not divide each field into three portions and give each of the three children a portion in each of the fields –

אלא בוררין כל אחת לבדה שיהא כל אחד חלקו אחד בבת אחת¹² –

but rather to choose each field individually so that each one will have his share in one place –

וכמה ענייני ברירות יש בחלונות¹³ וסולמות¹⁴ ושייך לומר שפיר חלק יפה –

And there are many instances of ‘choosing’ even if a גורל is used, i.e. concerning windows and ladders, and indeed we can properly say they choose for each a ‘nice portion’.

תוספות concludes:

⁸ This is the opinion of (דידיה) רב נחמן.

⁹ After the אפוטרופוס has divided the estate in the appropriate amount of portions, lots are cast to assign each heir to his respective portion. This insures that the division will be fair.

¹⁰ If there was a difficulty in casting lots, then one may argue that it is an undue burden for the אפוטרופוס (who is volunteering his time) to bear. However casting lots is not bothersome at all.

¹¹ If there are items that are one of a kind (and not divisible) they have to remain in the estate until the יתומים mature and they will deal with it then. See ‘Thinking it over’.

¹² There is a science in dividing the estate into equal portions (even without assigning them). This is בוררין.

¹³ Let us assume the estate has four houses (and two heirs) where two of the houses have sufficient windows while the other two are lacking window space, it is the responsibility of the אפוטרופוס to see that each portion contains a house with sufficient window space.

¹⁴ These are ladders to service attics. The upper storied apartments have to be divided that there are the same number of ladders in each portion, etc.

ושוב הודה רבינו יצחק לפירוש רבינו תם:

And, ultimately, the ר"י accepted the ruling of the ר"ת.

SUMMARY

Initially the ר"י maintained that the אפוטרופוס has the power just as if the adult brothers themselves would divide, therefore there is no need for assessments or גורל and it can be done even by items which would normally require גוא"א. However the ר"ת maintains that שומת בי"ד and גורל are required and they cannot divide items of גוא"א. The ר"י ultimately agreed with the ר"ת.

THINKING IT OVER

Why indeed (according to the ר"ת) cannot the אפוטרופוס implement the rule of גוד או אגוד when it is necessary [especially if it done with שומת בי"ד]?¹⁵

¹⁵ See סוכ"ד בשם הריטב"א.