

Guardianship for Orphans in Talmudic law

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ABSTRACT

The article reviews the Talmudic institution of guardianship for orphans, as it appears in sources from Palestine and Babylon, mostly from the second to the fifth centuries CE. It is likely that the foundations of this institution are found in foreign law, but after it was absorbed in Jewish law, it began to build an independent life, and was not necessarily affected by its legal system of origin. The design of the institution was mainly conducted by the Jewish sages of the second-century (Tannaim). The Mishnah and Tosefta are already showing a fairly well-developed system of guardianship laws. This system was not changed substantially afterward, and the later Talmudic sages (Amoraim) continued to develop the institution upon the foundation created by their predecessors. The Talmudic sources present a fairly well-developed institution, from its creation through the duties of the guardian during his tenure to the end of the guardianship term.

INTRODUCTION

It seems that like in other instances, the Greek term for guardian – *epitropos* ('אפרטרופוס')¹, which appears many times in Talmudic literature shows us that it involves an institution which was created in Talmudic law under the influence of Greek and Roman Law, two legal traditions that were prevalent in Palestine at the time of the creation of the institution of guardianship.² This does not mean, at the same time that the principles of the laws of Talmudic guardianship, which I shall not discuss in this short article, are identical to those of any known Greek or Roman law.³ Within this framework I shall confine my analysis to Talmudic Law and its principles exclusively.

Most of the references to the *epitropos* in Talmudic literature relate to his activities as the person responsible for the property of minors⁴ who were orphaned from their fathers,⁵ and it is to this subject which the article shall be devoted. Yet the institution of guardianship also relates to adults, who, due to mental disabilities, are unable to safeguard their property properly.⁶ Guardianship also encompasses the duty to oversee property, the owner of which was still alive at the time the guardian was appointed.⁷ The Babylonian *Amoraim* added a further category of *epitropos* who is appointed by the court to manage the assets of a legally sane individual who was taken captive or was forced to

¹ This way to spell *epitropos* in Hebrew is the common form for spelling this term, especially in later periods of Hebrew, however in many Talmudic sources it appears in different forms. For more details see: the wide variety of forms of the entry “epitropos” in The Historical Dictionary Project of The Academy of the Hebrew Language, <http://maagarim.hebrew-academy.org.il/Pages/PMain.aspx>; KASOVSKY 1956, 260; REINITZ 1984, introduction, II; CHOMEY 2008, 1 n. 1.

² GULAK 1922, 146: «The name epitropos originates in the Greek language and it shows that the institution of guardianship developed amongst our People during the Second Commonwealth under the influence of Greek and Roman Law. However in the days of the Mishnah this guardianship had already taken form, and the laws in respect thereto were established thereafter and remained until the later generations». See also FALK 1978, 326-327.

³ BERMAN 1926, 31; REINITZ 1984, IV-V and the sources cited there in the footnotes. For a comparison between Roman Law and Jewish Law see COHEN 1966, 243-244; YARON 1960, 140-150. For a methodical comparison between Talmudic Law and Roman Law see BLOCH 1904.

⁴ At the end of the Tannaitic period the age of legal majority was set at 12 for girls and at 13 for boys, however this was not always the situation, and beforehand a sexual maturity examination was administered on an individual basis for each child. See GILAT 1990. According to the *Shulkhan Arukh, Hoshen Mishpat* CCXC:1 the father had to appoint an *epitropos* for a foetus which had not yet been born and the *Vilna Gaon* in his commentary there cites the Talmudic source for this. Regarding the age of legal capacity with regard to the laws of acquisition see YARON 1960, 141-145.

⁵ SPERBER 1984, 56: “guardian, trustee (usually of minors, orphans)”.

⁶ For example M. *Bava Kamma* IV:4.

⁷ For example M. *Ketubot* IX:4.

suddenly escape.⁸ In addition, in the later stages one may see that the use of the term *epitropos* was expanded to also describe someone who acts for the benefit of someone else's property even if he is not in fact a real *epitropos* in the legal sense of the word.⁹

From the many sources of appointing an *epitropos* over orphans one may derive three principles:

1. The father is responsible for raising his children and for managing their assets;¹⁰ only if he dies or finds it difficult to act should an *epitropos* be appointed for them.
2. The mother, even if she is alive is not generally thought of as the guardian of her children's property. Below I shall discuss the question whether it is at all appropriate to appoint a woman as guardian (*epitropa*).
3. The function of the *epitropos* relates mainly to managing the assets of the wards, and not to raising or to educating them.¹¹

In the opinion of Asher Gulak the institution of guardianship was introduced into Jewish law «during the Second Commonwealth».¹² Relying on the Apocrypha, Josephus and the Gospels he adds that the introduction occurred already a «few generations before the destruction of the Temple».¹³ Ze'ev Falk also mentions the Second Commonwealth:¹⁴

⁸ BT. *Bava Metsia* 39a and b.

⁹ See SPERBER 1984, 57-58. We have found this term used in this borrowed sense also in an earlier source: T. *Ketubot* I:6 (here and below the reference is to the Saul Lieberman edition of the *Tosefta*): “אין אפטרופוס לעריות” [There is no guardian against unchastity]” (However, FALK 1978, 329 speculates that the source for the idiom comes from the law of an actual *epitropos* – and it means that one does not appoint an *epitropos* for a woman with whom the guardian is forbidden to have a relationship, in accordance with PT. *Ketubot* I:8 25a and therefore he translates this idiom as “There is no guardian for the forbidden degrees”).

¹⁰ This is not the place to enter into the question whether it would be correct to define the father in legal terms as the «natural guardian» of his children. In Talmudic literature the father is never referred to as an *epitropos* and from this fact, and for other reasons, Israel Gilat has concluded that Talmudic law does not relate to the father as an *epitropos*: GILAT 1995, 157-163). For the opposing view that claims that there is substantive recognition in the Talmud of the idea of natural guardianship, even if this term is not used in relation to the father see KAPLAN 2009, 34-38, and compare with the complex view of Rabbi Ouziel: OUZIEL 1991, 143-147.

¹¹ GULAK 1922, 146.

¹² Above n. 2.

¹³ GULAK 1930-1931, vol. 1, 21; vol. 2, 246.

¹⁴ FALK 1978, 326-327. Compare: REINITZ 1984, IX-XI, esp. nn. 32, 35.

During the Second Commonwealth the rights of a fatherless child were no longer protected by a near kinsman: this function now required a new framework... Following the example of the practice of the Greek cities, a person charged with the care of an orphan was called by a Greek term *epitropos*.

Talmudic literature, as it is wont in many places, does not specify the date on which the institution of guardianship was absorbed or created in Jewish Law. The only sign that can attest to this issue are the names of the sages who regulate its operation. It appears that two of the earliest *Tannaim* who are mentioned are Abba Shaul¹⁵ and Rabbi Eliezer ben Yaakov¹⁶ who lived at the end of the Second Commonwealth and who dealt with the laws of an *epitropos*' oath. Reinitz correctly points out that if they are dealing with this detail, one may assume that the basic outlines of this institution had already crystalized in their day.¹⁷ It is interesting also to note that like in many other places, here too the Babylonian *Amoraim* try to offer Biblical support for this institution:¹⁸

But it is in accordance with Rava son of R. Huna, who said in the name of R. Giddal in Rav's name: How do we know that, when [minor] orphans come to divide their father's estate, Court appoints a guardian on their behalf, whether (this is done) to their benefit or disadvantage? [You say,] 'To their disadvantage!' Why? – But [say thus:] to their [subsequent] disadvantage, but with the [original] intention that it shall be to their advantage, from the verse, [and ye shall take] one prince of every tribe (Num. 34, 18).

¹⁵ M. *Gittin* V:4. T. *Bava Bathra* VIII:16.

¹⁶ BT. *Gittin* 52b.

¹⁷ REINITZ 1984, IX. However, COTTON 1993, 99 n. 58 claims that these *Tannaim* lived during a later period, and this claim is made in order to support her statement that «by the second half of the second century C.E. the main lines of the institution had already been drawn». Yet HYMAN 1910 –whom she cites there – actually dates Abba Shaul at the time of the Second Commonwealth (volume 3, 1106), in accordance with M. *Middot* II:5, and it should be added that he apparently studied under Rabban Yohanan ben Zakkai (M. *Avot* II:8). Regarding Rabbi Eliezer ben Yaakov, Cotton states without any supporting evidence that this was the second *Tanna* with this name who was a disciple of Rabbi Akiva. However even if we do not have the evidence to decide which of the two sages with the same name spoke here, the fact that he deals with exactly the same Halacha as that which was dealt with by Abba Shaul could actually tilt the scales in favour of the first *Tanna* bearing that name who lived in the time of the Second Commonwealth (HYMAN 1910, volume 1, 181) and who appears together with Abba Shaul in other places in the Tannaic literature (M. *Middot* II:5 and V:4; T. *Menakhot* IX:5).

¹⁸ BT. *Kiddushin* 42a. In later halakic literature various decisors wrote that indeed the activities of an *epitropos* have the validity of a Biblical law. See for example: Nachmanides commentary on BT. *Gittin* 52a s.v. "That which is cited in the Mishnah", and see also BERMAN, 30-31 who tries to find a mention of this institution in various biblical stories, and the criticism of Rabbi Ben Zion Ouziel of this: OUZIEL 1991, 23 in the footnote.

METHOD OF HIS APPOINTMENT

In Tannaitic literature we find three ways by which a person may become an *epitropos* for property of orphans: 1. Appointment by their father during his lifetime; 2. Appointed by the court; 3. Without an appointment but through the performance of an action – through the orphans themselves applying to the person who has agreed to become an *epitropos*. These three types are mentioned in one *Mishnah*:¹⁹

If orphans were supported by a householder, or if their father appointed a guardian for them, he must give Tithes from the produce that belongs to them. If a guardian was appointed by the orphans' father he must take an oath; if he was appointed by the court he need not take an oath. Abba Saul says: The rule is to the contrary.

As well as in one section in the *Tosefta*:²⁰

R. Simeon b. Manasiah says, "Orphans who were supported by a householder—whether their father [before his death], or a court [after the father's death] made them dependent [on him]—he [the householder] tithes and provides food for them for the sake of the social order".

Simple logic dictates that the optimal method of appointment is that by the children's father, and only if the father failed to take care of the appointment before his death should it be undertaken by the court, which acts in the father's place, as stated, in another context, by the Babylonian *Amora* Rami Bar Hama: "Rami Bar Hama learnt: Orphans do not require a *prosbul*, because Rabban Gamaliel and his Court are the parents of orphans".²¹ Maimonides was later to rely upon this saying in his discussion of the order of appointments:²²

When a person dies, leaving some orphans who are past majority and others who are below majority, he must appoint a guardian before his death, who will care for

¹⁹ M. *Gittin* V:4. For a discussion of the dispute in the *Mishnah* see below p. 262. The first two ways are mentioned in other places in the *Mishna* and in the *Tosefta*. See for example: M. *Bava Kamma* IV:4 T. *Bava Bathra* VIII:13. On the question whether there is any connection between these methods of appointment and what transpired in the documents of Babatha regarding the guardianship of her son Jesus see COTTON 1993, 99, and for another view FALK 1978, 328 and OUDSHOORN 2007, 316-317.

²⁰ T. *Terumoth* I:12. However the term *epitropos* is not mentioned here. Rather it appears in the *Halakhot* which appear before this one which also deal with orphans, their property and their tithes, to be discussed later in this paper. See below p. 252.

²¹ *Gittin* 37a, FALK 1978, 328 writes that in most cases «a guardian would be appointed by the father in his will».

²² MT. *Inheritance* X:5.

the portion of the minors until they come of age. If the father does not appoint such a guardian, the court is obligated to appoint a guardian for them until they come of age. For the court acts as the parents of the orphans.

In other words, since the *epitropos* enters into the shoes of the orphans' father the optimal situation is where he is appointed by the latter. However if the father has not done so, the court – who fills the role of the father, at least temporarily and partially – is the body that will appoint the *epitropos*. Below we shall see that the preference for having the father make the appointment is given expression in the fact that the restrictions on the appointment by the court do not exist when it comes to an appointment by the father.

1. APPOINTMENT BY THE FATHER

Talmudic literature does not contain an exact description of the method of appointment by a father, but one may assume that there is no specific procedure for that appointment and it is similar to making a will, whether it be a will of a healthy person or of someone on his death bed.²³ In the Babylonian Talmud it emerges that there may be a situation of the father creating guardianship even where he does not explicitly utter his wish to do so. Thus according to the *Amora Shmuel*:²⁴

Rav Judah said in the name of Samuel: If a [dying] man gave all his property to his wife, in writing, he [thereby] only appointed her guardian. It is obvious [that if he assigned all his property to] his grown up son, he [thereby], merely appointed him guardian. What [is the law, however, if he assigned it to] his young son? – It was stated [that] R. Hanilai Bar Idi said in the name of Samuel: Even [If to] his youngest son who [still] lies in [his] cradle.

From the words of the Talmud it emerges that one should try discern the opinion of the testator²⁵ and assume that he did not intend to bequeath all his property to his wife or to one of his sons, but rather to appoint them guardians for all the surviving orphans. This, as stated, is the case even if this is not the most straightforward interpretation of the testator's words. Furthermore, from this passage it also emerges that this vague declaration may also create a guardian who is completely incapable of filling the role since he is "still in his cradle". This strange conclusion is the product of the assumption that the father is un-

²³ GULAK 1922, 147; FALK 1978, 328; Entsiklopedyah 121b, and see BT. *Ketubot* 109b; *Bava Bathra* 132a.

²⁴ BT. *Bava Bathra* 131b.

²⁵ Thus the medieval commentators understood this, for example *Rashbam ibid.* and Maimonides in MT. *Laws of Acquiring Gifts* VI:1-4.

restricted in the choice of guardians that he appoints, even if the court cannot appoint them, a point which I shall dwell upon later.

It is possible that an implied appointment can already be found in the *Mishnah*:²⁶

If a man deposited money for his daughter with a third person [Heb. *Shalish*], but she says, I trust my [betrothed] husband, the third person must still perform that with which he was charged. So R. Meir. R. Jose says: If it was but a field [that was already bought for her] and she wished to sell it, it must be deemed sold from such time. This applies to a woman that is of age; but as for her that is still a minor, the act of a minor remains void.

The Babylonian Talmud²⁷ already identified that which was stated in the *Mishnah* above with the law of the *epitropos*, and in the wake thereof various commentators adopted the same approach.²⁸ Therefore it is possible that already in this *Mishnah* it emerges that someone who was entrusted with money for the safekeeping of orphans becomes, in practice, an *epitropos* even if he was not explicitly appointed as such, as Falk says with regard to this *Mishnah*:²⁹ «Such a guardian was called a *Shalish*... since the fact that the property is in his control is evidence of his appointment».

2. APPOINTMENT BY THE COURT

In this case too the sources do not require a special procedure. From the sources it emerges that if, as stated, the father has not appointed an *epitropos* and if the court – like the orphans' father and as the body responsible for public order – sees that there is need to do so for the orphans' welfare³⁰ (and also where there are mentally disabled individuals) or for the benefit of the public in general, it must take its own initiative and appoint an *epitropos*.

The principle that an *epitropos* should be appointed for the welfare of the wards is mentioned in the *Tosefta*:³¹

²⁶ M. *Ketubot* VI:7.

²⁷ BT. *Ketubot* 70a.

²⁸ CHOMEY 2008, 35-36.

²⁹ FALK 1978, 328.

³⁰ BT. *Gittin* 40a-b speaks of a case where the court appointed an *epitropos* for a minor whose father was alive. This, however, was an exceptional case where the father did not act properly and tried to deceive the court by transferring his slave to his minor son. Nonetheless in order not to harm the minor's property the court appointed him an *epitropos*.

³¹ T. *Yevamoth* IX:2 and compare T. *Terumoth* below n. 63.

A priest who was a deaf-mute, an idiot, or a minor who purchased slaves – they do not eat heave offering. But [if] a court acted in their behalf, or [if] a court appointed guardians for their estates, or [even if] the slaves came to them in an inheritance from some other source – these slaves do eat heave-offering.

Here it involves *Cohanim* (=priests) who are orphans or who are mentally disabled and who have the right to eat *terumah*. But since they have no legal capacity to make an acquisition, if they acquired slaves for themselves, these slaves are not considered their property and are thus not permitted to eat the *terumah* (as opposed to slaves of an adult *Cohen* and of a sane person). Obviously this may inflict financial damage, because instead of *terumah* which the *Cohen* receives for free he now must go out and purchase ordinary food for his slaves. In such a case the court will appoint an *epitropos* for the *Cohanim* and he will acquire the slaves for them; thus the acquired slaves will be able to eat *terumah*.

The initiated appointment by the court is mentioned in the Babylonian Talmud in a case which *prima facie* is very common:³²

R. Nahman said in Samuel's name: When orphans come to divide their father's estate, Court appoints guardians for them, and they select a fair portion for each [orphan].

In other words, it is the court's role to see to it that minors are not being discriminated against, and as the medieval commentator *Menahem haMeiri* explains there:

When adult orphans come to divide an estate with their minor siblings, the court appoints an *epitropos* for the minors who selects a fair portion for them, which is to say that the adult orphans should value the portions and the *epitropos* then comes to select the fair portion, and it is not divided by casting lots.

The Babylonian Talmud speaks about another case where one must be concerned about the assets of heirs who are orphans:³³

Rava said: The law is that we do not distraint upon the property of orphans, but if he [the father] said: 'Give', then we distraint upon it. If he said, '[Give] this field', or 'this mina', we distraint upon it without appointing guardian. But if he said, '[Give] a field', or 'a mina', we distraint upon it and appoint a guardian. The sages of Nehardea say: In each case we distraint upon it and appoint a guardian...

³² BT. *Kiddushin* 42a (and repeated in three other places in the Babylonian Talmud).

³³ BT. *Arakhin* 22b.

This section deals with a case where the father has declared that his children must pay back his debts. The dispute here surrounds the question whether in every case an *epitropos* should be appointed for the heirs, or only in the case where the father has not stipulated a specific property from which to pay back his debt.³⁴ At any rate, it is clear that the appointment of an *epitropos* is meant to avoid harm to the orphans.³⁵

As stated, sometimes an *epitropos* will be appointed in order to prevent minors or incapacitated persons from damaging the public. Thus the *Mishnah* establishes :³⁶

If the ox of a man of sound senses gored the ox of a deaf-mute, an imbecile, or a minor, the owner is culpable; but if the ox of a deaf-mute, an imbecile, or a minor gored the ox of a man of sound senses, the owner is not culpable. If the ox of a deaf-mute, an imbecile, or a minor had gored another, the court³⁷ must appoint a guardian over them and their oxen are testified against in the presence of the guardian.

The background to this *Mishnah* is the fact that at the beginning of the *Mishnah* it states that minors and mentally disabled persons are not liable if their ox has damaged, just as they would not be liable if they themselves damaged.³⁸ Indeed, both the Babylonian and Jerusalem Talmuds reserve the

³⁴ Rashi *ibid.*: “If there is an unspecified field and an unspecified portion then the orphans require an *epitropos* who will be appointed to select a nice portion and to pay the debt from the low value portion”.

³⁵ *Shulhan Arukh, Hoshen Mishpat CX:4*: “Minors whose grantor commanded as follows: give a field or a portion to this specific person, we only attach the property which the minors inherited after we have appointed an *epitropos* for them to maintain their rights”. Also on the previous page in the BT. *Arakhin* there is the idea that one must take care of an orphan in matters of a debt, where they are the ones who are in debt. According to Rav Asi *ibid.* if it was a loan on interest one must see to it that the debt is eliminated, and according to Rabbi Yohanan it should also be done when it involves a claim from the marriage contract of their father’s widow, when she needs money for food for sustenance. The term *epitropos* does not appear there but it is logical that an *epitropos* should be appointed in such a case and so it was ruled by Maimonides on the basis of the things mentioned there (MT. *Laws of Lender and Borrower XII:3*): “If the loan was a debt at interest owed to a gentile, we appoint a guardian, attach the property that the minor inherited, sell it, and pay the debt. The rationale is that the interest consumes the estate. Similarly, if a woman demands payment of the money due her by virtue of her *ketubah* – whether she is the deceased’s widow or divorcee – we appoint a guardian for the heirs”.

³⁶ *M. Bava Kamma IV:4*. And see the *Mekhilta of Rashbi* (Epstein-Melamed Edition), 189 in its completion according to this *Mishnah*.

³⁷ In the manuscripts of the *Mishnah* and the Talmuds the word “court” does not appear, and it seems to be a later addition. Nevertheless, this addition is necessary and logical, and it is reasonable to assume that it reflects the intention of *Mishnah*, which obviously assumed that the court was the appointer, against the backdrop of the fact that the appointment by the court was known to us in the absence of the father, and as stated above.

³⁸ *M. Bava Kamma VIII:4* “It is an ill thing to knock against a deaf-mute, an imbecile, or a minor:

main part of the discussion in the *Mishnah* to the question of paying damages from the *epitropos's* assets or the orphans' assets,³⁹ but a simple reading of the *Mishnah* clearly shows that it comes to create a situation in which one may substitute an ox with no reputation of damaging with one with such a reputation and thus to charge the owner accordingly. In other words the *epitropos* constitutes a replacement for the owners who are mentally disabled. This understanding clearly emerges from the *Tosefta*:⁴⁰

The ox of the deaf-mute, an idiot, or a minor which gored the ox of a person of sound senses – the owner does not have to pay. R. Akiva and R. Jacob say, “the owner, despite his condition] pays half”.

An ox, the owner of which became a deaf-mute, lost his senses, or went overseas—R. Judah b. Neqosa says, “Sumkhos says, Under all circumstances it remains in the status of being deemed harmless, unless they give testimony against the beast in the presence of the owner.” R. Yose says, “They appoint a guardian for it”.

They give evidence against it in the presence of the guardian – the deaf-mute gained capacity to hear, the idiot regained his senses, or the minor reached maturity or the owner came back from overseas, R. Judah b. Neqosa says, “Sumkhos says, ‘Under all circumstances it remains in its original status of being harmless, unless they give testimony against the beast in the presence of the owner yet a second time’”. R. Yose says, “It remains in its established status”.

From the words of R. Yose it is clear that with his appointment the guardian is meant to fill the place of the owner of the ox where the latter cannot be found or if he lacks mental capacity.⁴¹

3. CREATING *DE FACTO* GUARDIANSHIP

The third and most interesting case is that of an *epitropos* who is not appointed explicitly but acquires this position because the orphans are supported by him. As stated, we found this method in the *Mishnah* and in the *Tosefta*, where the sole activity mentioned is the separation of *terumoth* and tithes for the orphans.⁴²

he that wounds them is culpable, but if they wound others they are not culpable”.

³⁹ PT. *Gittin* V:4 47a and *Bava Kamma* IV:4, 4b; BT. *Bava Kamma* 39a. For a discussion on the Talmuds theories see REINITZ 1984, 3-18.

⁴⁰ T. *Bava Kamma* IV:4.

⁴¹ And see LIEBERMAN 1992, vol. 9, 39 “And it appears that it should be written: and you make the ox into a *Mu`ad* [an ox with a reputation to damage] before guardians. In other words guardianship turns the ox into a *Mu`ad*, and even Sumkhos does not dispute the Halakhah that we appoint an *epitropos* for him in order to protect it”.

⁴² Minors cannot give *Terumah* (M. *Terumot* I:1) and therefore they cannot eat from the produce

It emerges *prima facie* from the *Tosefta*⁴³ that the status of “householder” who supports the orphans is identical to that of the person who was appointed for them by their father or by the court. However, since term “*epitropos*” is absent from this *Tosefta*, and from the fact that in the *Mishnah*⁴⁴ the *epitropos* is the person who was appointed by the father or by the court (whereas the person who supports the orphans is not referred to explicitly by this name), one could argue that in *Tannaitic* literature the “householder” did not possess the status of an *epitropos* in every respect. This in fact is the position of Reinitz who suggests that in the Tannaitic sources this “householder” was not an actual *epitropos* but rather a person who was concerned with separating *terumoth* and tithes for orphans whom he supported.⁴⁵ Nonetheless I am of the opinion that the context in the *Tosefta Terumoth* – viz. its proximity to the two of the most detailed *Halakhot* concerning the laws of guardianship in Tannaitic literature, and its presentation of “orphans who are supported” alongside the two other guardianships as one group with one identical law – points, in this context, to an actual guardian.

Indeed no later than the end of the third century or at the beginning of the fourth century, this *Mishnah* was considered by the important Babylonian *Amora* Rav Nahman not as specific to the law on *terumoth* and tithes, but as the key criterion for establishing the status of such householder as a genuine *epitropos*:⁴⁶

Certain orphans who boarded with an old woman had a cow which she took and sold. Their relatives appealed to R. Nahman saying, what business had she to sell it? He said to them: We learnt in the *Mishnah*: “If Orphans Board With A Householder”.

which belongs to them. The importance of the *Terumah* activity of the *epitropos* for orphans was given expression in the fact that such activity is the first thing mentioned amongst the activities which the guardians do for the benefit of the orphans in T. *Terumah* and *Bava Bathra*, below n. 63.

⁴³ Above n. 20.

⁴⁴ Above n. 19.

⁴⁵ REINITZ 1980, 220-223.

⁴⁶ BT. *Gittin* 52a. It is part of the issue which the aforementioned *Mishnah* discusses and it is the most important issue in the Babylonian Talmud amongst those issues dealing with an *epitropos* for orphans. All the commentators on this episode and the decisors understood that from it the principle emerged that “a householder who willingly supports minor orphans or takes care of their financial affairs has the law of *epitropos* in every respect” (*Shulhan Arukh Hoshen Mishpat* CCXC:24). For a different approach see REINITZ 1980, 224. KAPLAN 2009, 36 also admits that the common understanding is that that “old woman” is considered a female guardian but expresses some doubt about this interpretation.

From the words of Rav Nahman it emerges that it was permitted for that woman to sell the ox for the orphans and that the said *Amora* rejects their relatives' argument that she had no authority to sell on their behalves because she was not the *epitropos* (Rashi, *ibid.* "who appointed [her] *epitropos*?"): he claims that from the *Mishnah* it emerges that one may create a guardianship even without an appointment (Rashi: "we learnt in the *Mishnah* that it was orphans who were supported – even though he was not appointed, he is considered an *epitropos*"). Obviously from this episode in the Babylonian Talmud, one may learn that in such a case a woman could become an *epitropos*. Was this also the case with an appointed *epitropos*? It is this subject that I shall turn to presently.

THE IDENTITY OF THE *EPITROPOS* FOR ORPHANS

The capacity of the father to appoint an *epitropos* is given expression in the *Tosefta* by the fact that he may appoint persons whom the court cannot appoint:⁴⁷

A court may not make (‘עושין’) guardians of women and slaves at the outset [i.e., of its own accord]. But if their [i.e., the orphans'] father appointed them during his life-time, they make (‘עושין’) them guardians.

The simple explanation is that the court is prohibited from appointing the guardians of its own accord ("at the outset"), but if they have been appointed by the father, the court will not prevent this act of appointment (therefore the plural form for "making" (‘עושין,') is used as in the first clause)⁴⁸. In the Babylonian Talmud an adaptation of this distinction is cited in an even sharper manner:⁴⁹

Women, slaves and minors⁵⁰ should not be made guardians: if, however, the father of the orphans chooses to appoint one, he is at liberty to do so.

In these sources there is no explanation for the distinction between the father and the court. One may assume that the logic for this is that the father, who is also owner of the property – and who we presume acts in the best interests

⁴⁷ T. *Terumah* I:11; *Bava-Bathra* VIII:17.

⁴⁸ LIEBERMAN 1992, vol. 1, 304.

⁴⁹ BT., *Gittin* 52a.

⁵⁰ This word "minors" is apparently devoid of all logic, and this has been noted by a number of commentators, however it is found in all manuscripts. And see LIEBERMAN 1992, vol. 1, 303-304.

of his children and appreciates his assets more than anyone else – may think that the best *epitropos* should specifically be a woman (perhaps the children’s mother?) or his slave.⁵¹ On the other hand, the court which is further removed from the property and from the orphans is prevented from doing this, as there would be an assumption that most women and slaves function less well than do free men, and as Rashi explains there in this section of the Babylonian Talmud:⁵² “Women – it is not their way to go out and to come and to toil.⁵³ Slaves – are not trustworthy”. By contrast, from the words of the Babylonian Talmud⁵⁴ it emerges that there are no restrictions whatsoever on the identity of the guardians appointed by the father, and as a matter of principle he can also appoint “his youngest son who still lies in his cradle”.

In the *Beriatha* which only appears in the Babylonian Talmud we learn of another restriction imposed on a court appointment:⁵⁵

Our Rabbis taught: Six things were said of the ‘amme ha-arez’: We do not commit testimony to them; we do not accept testimony from them; we do not reveal a secret to them; we do not appoint them as guardians for orphans; we do not appoint them stewards over charity funds...

From the general details which appear here one may deduce that ignoramuses are suspected of being cheats and thieves, and therefore they should not be appointed as guardians, for we fear that they may harm the property of the orphans.⁵⁶

⁵¹ It does not go without stating that according to the *Mishnah* a person may appoint his wife as guardian to manage his affairs. M. *Ketubot* IX:4: “If a man set up his wife as a shopkeeper or appointed her a guardian he may exact of her an oath whensoever he will”. See also what is stated in the Babylonian Talmud, above n. 24. For a wider discussion on the appointment of women and the reasons to limit this see REINITZ 1985, 167-173.

⁵² And also LIEBERMAN 1992, vol. 1, 303; FALK 1978, 328. And see KAPLAN 2009, 37: «The rule disqualifying women and others from serving as court-appointed guardians is found in the first chapter of *terumot*, after various other rules empowering the guardian of orphans to act in a manner that promotes their best interests and prohibiting dangerous actions on their behalf that do not further their best interests. This context suggests that the Sages were of the opinion that the disqualification of women, slaves and minors was also in the orphans’ best interest».

⁵³ The Babylonian Talmud already distinguishes between men and women in managing property, *Bava Kamma* 15a: “Men can negotiate in business, women cannot”.

⁵⁴ Above n. 24. Reasons for why the father can do this are cited in *Entsiklopedyah*, 122a.

⁵⁵ BT. *Pesachim* 49b. We should view this source against the backdrop of its context which is the episode dealing with the harsh disparagement of ignoramuses and their many faults, especially the fact that they do not observe the law. Nonetheless it is worded as if it was a genuine legal instruction, and the medieval commentators have indeed ruled that it does have practical application.

⁵⁶ Compare this to the words of Rav Ashi (BT. *Bava-Metsia* 70a) regarding one who is qualified to manage the finances of orphans: “But, said R. Ashi, we seek out a man whose property is secure, who is trustworthy, obedient to the law of the Torah, and will not suffer a ban of the Rabbis, and the

The Babylonian Talmud added more restrictions on the identity of the guardians whom the court can appoint, and clearly this is also out of fear of harm to the property of the orphans. Thus Rav Huna declared:⁵⁷

R. Huna said: “A minor is not permitted to enter upon a captive’s estates, nor the next of kin upon a minor’s estates, nor a next of kin of a next of kin upon a minor’s estates”... “Nor a next of kin of a next of kin upon a minor’s estates” – this refer to a brother on the mother’s side. “Nor a next of kin upon a minor’s estates: since he [the minor] cannot protest, he may take presumptive possession thereof”.

R. Huna’s rule, as the latter stratum of the Talmud (*Stamma*) explains, establishes that one should not appoint a relative to manage the assets of a relative because he is likely to take control of their assets with the claim that he has inherited them, “since the minor cannot protest... and it is better for them to appoint a stranger who cannot claim inheritance in them” (Rashi, *ibid.*). And to be on the safe side (and for an “extra safeguard”, as Maimonides puts it)⁵⁸ even a relative of a relative should not be appointed, even if he is not a direct relative of the minor, because he is likely to seize the assets for the benefit of his relative.

We have found in the Babylonian Talmud that there is also a general affirmative guideline regarding a person who is suitable to be appointed an *epitropos*.⁵⁹

Said Abaye: Anyone who appoints a guardian should appoint one like this man who understands how to turn [the scales] in favor of orphans.

In other words one should appoint a person who is concerned with the interests of the orphans.⁶⁰

money is given to him in the presence of a court”. In Minor Tractate *Derekh Eretz Zuta* ch. X (there is a dispute over the time and question whether this source originates from the period of the Talmud or was a later institution), we find a quote by R. Yose: “the bloodletting healer, the tanner, and the builder are not appointed charity collectors for the town or guardians”. In all probability, and in light of the words in BT. *Kiddushin* 82a, the reason is that because of their lowly professions they would not be able to act in the best interest of the orphans or perhaps they were suspected of theft.

⁵⁷ BT. *Bava Metsia* 39a. As to the question of the appointment of a relative, the article in REINITZ 1986 is devoted. To a discussion of Rav Huna’s theory and the way in which it has been interpreted in later periods, see *ibid.* especially pp. 157-167. According to him at pp. 155-156, contrary to Roman Law, in Tannaitic literature there is no preference for the appointment of relatives as guardians, and yet neither is there any restriction on appointing them if the court views them as appropriate for the task. For the position which advances prohibiting the appointment of relatives see FALK 1978, n. 9.

⁵⁸ MT. *Inheritance* VIII:2.

⁵⁹ BT. *Ketubot* 109b.

⁶⁰ Compare above alongside n. 32 onwards.

The Talmudic Law that distinguishes between an appointment by the father and an appointment by the court, and the reasons for this are neatly encapsulated in Maimonides:⁶¹

If the dying person ordered: “Give the minor’s portion of my estate to him. Let him do whatever he wants with it”, he has the license to deal with his own estate in this manner.

Similarly, if the dying person appointed a minor, a woman or a servant as the guardian for the minors, he has the license to deal with his own estate in this manner. A court, by contrast, should not appoint a woman, a servant, a minor or an unlearned person who is suspect to violate the Torah’s prohibitions’ as a guardian.

Instead, they should seek out a faithful and courageous person who knows how to advance the claims of the orphans and bring arguments on their behalf, one who is capable with regard to worldly matters to protect their property and secure a profit for them. Such a person is appointed a guardian over the minors whether or not he is related to them. If he is a relative, however, he should not take control of the landed property.

THE TASK OF THE *EPITROPOS* FOR ORPHANS

From the previous discussion relating to the appointment it is clear that the aim of the *epitropos* must be to act in the best interest of the orphans, and therefore the court is restricted with regard to appointing a person whom we fear will not operate in an optimal manner. We have also seen above⁶² a series of cases where the initiated appointment of an *epitropos* was required for the purpose of managing the property for the benefit of the orphans.

A detailed breakdown of the *epitropos*’ activities may be found in the *Tosefta*:⁶³

[10] Guardians separate *Terumah* (priestly offering on produce) and give tithes on the property of orphans. They sell houses, and vineyards, cattle [and] male and female slaves, in order to provide food for orphans [and] to prepare for them a sukkah, lulab, and show-fringes, and [to perform for them] every obligation which is stated in the Torah—to purchase for them a scroll of the Torah and Prophets, [that is,] a duty the scope of which is clearly delimited in the Torah.

But they may not redeem captives on their behalf [i.e., with funds from these sales], nor, in the synagogue, levy upon them charity to the poor, [that is, any] duty the scope of which is not clearly delimited in the Torah.

⁶¹ MT. *Inheritance* X:6.

⁶² Above, pp. 251ff.

⁶³ T. *Terumoth* I:10-11, and repeated in T. *Bava Bathra* XIV:16 and with changes in BT. *Gittin* 52a.

And they are not permitted to set [the orphan's] slaves free, but they may sell them to others so that they may set them free. Rabbi says, "I say that [the slave] may give him his value and redeem himself".

[11] [Guardians] may not sell [property of orphans] that is at a distance in order to purchase [property] that is near; [nor may they sell] that which is of low quality in order to purchase that which is of high quality.

They may not litigate for the orphans [neither in cases in which the orphans stand] to incur a liability nor [in cases in which the orphans stand] to receive a benefit, neither to make a claim [against others] nor [in cases of] a claim being made [against the orphans], unless they have received permission from a court...

[Guardians] may sell slaves in order to purchase landed property, but they may not sell landed property in order to purchase slaves. Rabban Simeon b. Gamaliel says, "[They may] not even [sell] slaves in order to purchase landed property".

One may see that all the activities indeed relate to managing the orphans' property and their finances in their best interests. The *Tosefta* covers four planes of activities:

1. Activities required for the sake of feeding the orphans – one may assume that the words to "feed the orphans" apply also to the activities of separating *Terumah*, and thus indeed it emerges from both Talmuds.⁶⁴ From the *Mishnah* it emerges that if there is a need, the *epitropos* can also borrow money for the sake of the orphans.⁶⁵
2. Activities required for the sake of upholding religious obligations which incur financial costs – the *epitropos* must assist the orphans in upholding the *mitzvot* imposed upon them, even if the obligation is merely pedagogic since they are still minors. Clearly the Talmudic law views the upholding of *mitzvot* as an activity which is in the best interest of the orphans. However there is a restriction and it must be confined to something which "has a limit" as the Babylonian Talmud puts it. In contradistinction they cannot use their property to uphold a *mitzvah* where the expense is not fixed, and as Rashi explains there: "Charity – has no limit since paupers may be found at all times and thus their money would be completely used up".⁶⁶

⁶⁴ PT. *Teruma* 1:1 40b; BT. *Gittin* 52a, there the text is set out as follows: "Guardians set aside *terumah* and *tith* which is meant for consumption and not for storing" and see LIEBERMAN 1992, vol. 1, 300-301 and n. 24, and see above the *Tosefta* in n. 31.

⁶⁵ M. *Shvi'ith* X:6: "R. Huspith says: They may write a *prozbul* for a man on the security of his wife's property, or for an orphan on the security of his guardian's property". This case involved orphans who did not own any land and it was clear that it involved orphans who borrowed and not orphans who lent, because in the latter case they do not need a *prozbul* in order that their loans do not become extinguished (see LIEBERMAN 1992, vol. 2, 592 and n. 49).

⁶⁶ It is possible that later on this restriction was somewhat weakened. See the story with Rabbah

3. Activities for the sake of improving the property or preserving its value – the sale of assets is only permissible if it will definitely assist in preserving the value of the orphans’ assets. This is not the place to detail the various considerations behind each and every circumstance treated in the *Tosefta*. It is sufficient to state that, for example, exchanging lands is forbidden according to the Babylon Talmud because there is an inherent risk therein, even if *prima facie* the new asset is better than the old one.⁶⁷ Nonetheless from the ruling made by the Palestinian *Amora* R. Yehoshua ben Levi – who allowed the sale of fields in order to purchase oxen for agricultural labor – it emerges that the sale of assets is permitted where it is clear that the sale will increase the overall value of the orphans’ assets.⁶⁸ The Babylonian *Amora* R. Nahman also permitted the *epitropos* to buy clothes from the property of the orphans, if he assumed that suitable clothing would assist him in managing their property in a more efficient manner.⁶⁹ From these cases one may conclude that the *Amoraim* tempered the Tannaitic restrictions where they thought it was clear that it should be done for the benefit of the orphans’ property, which is the highest principle in the activities of the *epitropos*.
4. Litigation relating to the property – from the wording of the *Tosefta* it emerges that an *epitropos* is forbidden to conduct any litigation relating to the orphans’ property unless he received permission to do so from the court, which would in all probability evaluate the circumstances of the case. Nonetheless the Talmuds tried to relax this restriction and the *Amoraim* disagreed as to whether there are cases in which the *epitropos* is permitted to litigate – where it is absolutely clear to him that this will be to the orphans’ benefit – and on the question what will happen where he has lost.⁷⁰

It should be added that according to the later Babylonian *Amora* R. Rava the law of the *Mishnah* which states that minors may sell chattel⁷¹ does not apply if an *epitropos* was appointed for them.⁷² The explanation given by R. Yohanan

who justified imposing the giving of charity on orphans, in BT. *Bava Bathra* 8a.

⁶⁷ BT. *Gittin* 52a: “The guardians are not at liberty to sell a distant [field] of their wards in order to redeem one that is nearby or to sell a bad [field] with the idea of redeeming a good one, since there is a risk that the crops may be struck with blight”.

⁶⁸ Ibid.

⁶⁹ BT. *Gittin* 52b, below n. 91.

⁷⁰ See LIEBERMAN 1992, vol. 1, 302-303; Entsiklopedyah, 124a.

⁷¹ M. *Gittin* V:7, T., *Gittin* III:12.

⁷² BT. *Ketubot* 70a.

in both Talmuds⁷³ is that we only give orphans the possibility of selling assets “for them to live”, in other words in order that they should be able to buy food. However in a case in which there is an *epitropos* whose job it is to provide livelihood, there is no reason to assign legal validity to their sale, since there is someone who will take care of them and there is a presumption that he will exercise better discretion.

OVERSEEING THE ACTIVITIES OF THE *EPITROPOS*

We saw in the previous section that in order to litigate in relation to the orphans’ property, the *epitropos* is required to receive permission from the court. Yet such a permission would also indicate that the guardian is not completely independent in exercising his discretion.⁷⁴ The *Mishnah* also categorically establishes that the *epitropos* has no possession of the orphans’ assets,⁷⁵ for if the guardian takes care of the assets for the benefit of the orphans with the permission of the court, his activity cannot constitute proof of ownership.

THE OATH OF THE *EPITROPOS*

The purpose of every oath is to ensure that the person taking it may be trusted. Already in the earlier period⁷⁶ *Tannaim* disagreed as to whether we should make the *epitropos* take an oath at the end of his tenure that he satisfactorily handled the property of the orphans or that he has not retained anything in his possession.⁷⁷ This dispute has three sources. The *Mishnah*⁷⁸ points to a controversy between *Tanna Kamma* (first, anonymous opinion) and Abba Shaul as to which type of *epitropos* must be made to swear an oath: according to *Tanna Kamma* it only applies to a guardian appointed by the father, whereas

⁷³ PT. *Gittin* V:8, 47b; BT. *Gittin* 59a.

⁷⁴ Many medieval decisors have argued on the basis of this *Tosefta* that any activity which the *epitropos* is forbidden to do shall be permitted if the latter receives the court’s permission. See sources in LIEBERMAN 1992, vol. 1, 302 n. 29.

⁷⁵ M. *Bava Bathra* III:3. Possession is a presumption in favour of the possessor of an asset, if certain conditions have been fulfilled, that the asset indeed belongs to him.

⁷⁶ Above, nn. 15-16.

⁷⁷ Both the date of the oath and its content have not been explicated in Talmudic literature, however logic dictates that this was the intention, and thus it has been elaborated upon in the literature of the medieval decisors and in Halakhic literature. Some researchers also accepted this interpretation. See REINITZ 1984, 199; FALK 1978, 331; GULAK 1922, 152 and especially n. 196 regarding the content of the oath; KAPLAN 2009, 37-38.

⁷⁸ Above, nn. 15-16.

according to Abba Shaul it is precisely that person who was appointed by the court who should swear an oath. According to the version in the *Tosefta*, Abba Shaul appears to hold that both types of guardians should be obligated to take an oath.⁷⁹ But the commentators of the *Tosefta* as well as some modern scholars⁸⁰ have claimed that the word “also” which appears in the *Tosefta* was erroneously inserted and therefore the words of Abba Shaul are identical to his words in the *Mishnah* (only the guardian who was appointed by the court should swear). The third source is a *Beraitha* cited in the Babylonian Talmud, presenting the opinion of R. Eliezer ben Yaakov⁸¹ stating that both types of *epitropos* must take the oath. This last source, however, has no parallel anywhere else and the Jerusalem Talmud does not mention it at all.

Prima facie the logic in the more expansive opinion that always requires an oath is more obvious. Because of its serious ramifications, Jews generally tried to avoid an oath. If the *epitropos* is required to swear, he will probably be deterred from embezzling the orphans’ property. However it emerges that *Tanna Kamma* and Abba Shaul (certainly according to the version of the *Mishnah*) thought that it is not always correct to take an oath. The Talmuds⁸² have tried to understand their opinions against the backdrop of the purpose of the *epitropos*’ role and against the backdrop of the method of his appointment.

No one disputes the reason of Abba Shaul that an *epitropos* who was appointed by the court should swear, since apparently it has already been explained (for example in the *Tosefta*) that one who is appointed by the court is a “paid bailee” (the Jerusalem Talmud explicitly mentions this reason for Abba Shaul’s words). The explanation of both Talmuds for this salary is that one who has been appointed by the court has “profited” by the fact that he has obtained the reputation of being a trustworthy person, and therefore he will not refuse to be appointed even if he shall be required to take an oath. In contradistinction the *epitropos* who has been appointed at the request of the orphans’ father, is doing it only as a favor to the father, without profiting, and will not agree to accede to the request if he would then be compelled to take an oath at the end. It should be noted that the Babylonian *Amora* Shmuel, who, as we have already seen, played a relatively important role in creating the laws of guardianship in the Babylonian Talmud, held that the law follows Abba Shaul.

⁷⁹ T. *Bava Bathra* VIII:16 “Abba Saul says: Also one whom a court has appointed is required to take an oath, because he is in the status of a paid bailee”.

⁸⁰ EPSTEIN 1957, 93 and 162; LIEBERMAN 1992, vol. 10, 430.

⁸¹ Above n. 16.

⁸² PT. *Gittin* V:4 47a, and see also *Bava Kamma* IV:2, 4b; BT. *Gittin* 52b.

In contradistinction, regarding the opinion of *Tanna Kamma* there is a dispute between the two Talmuds. The Babylonian Talmud uses similar logic to that which was used in the case of Abba Shaul and assumes that a reasonable person would not accede to the father's request unless he owed him a favor. In such a case an oath would not deter him from fulfilling his obligation. Yet the *epitropos* does not owe the court anything and therefore would not accede to its request if he will be compelled to take an oath. But the Jerusalem Talmud explains this differently. In its opinion the father has no tools to examine whether the *epitropos* whom he appointed is a trustworthy person, and because of the fear that he may not be such an honest person – he should take an oath at the end of his job. However the court will select a person who has the reputation of being trustworthy and therefore there is no need to make him swear.

The dispute on the opinion of *Tanna Kamma* illustrates the tension between the need, on the one hand, to deter an *epitropos* from abusing his position and, on the other, not to discourage him from accepting this role. The Jerusalem Talmud's interpretation of *Tanna Kamma*'s opinion places an emphasis on the fact that the oath is administered where there is a concern over trustworthiness, whereas the Babylonian Talmud when addressing both opinions (and the Jerusalem Talmud when addressing the opinion of Abba Shaul) in practice says that it would always be appropriate to administer the oath, but because there is a concern that people will refuse to take upon themselves such a demanding position, it behooves us to exempt them from the oath, unless there is another incentive or compensation to accept the position.

REPORTING

In the last generation of *Tannaim*, many generations after the dispute over the oath, another dispute erupted regarding the duties of an *epitropos* upon the termination of his position:⁸³

“Guardians must make account with the orphans [of all business dealings they have engaged in] at the end [of their tenure as guardians]”, the words of Rabbi.⁸⁴ Rabban Simeon ben Gamaliel says, “Orphans have nothing other than that which the guardians have left them⁸⁵ [i.e. no accounting need be made]”.

⁸³ T. *Terumoth* I:11; *Bava-Bathra* VIII:15; BT. *Gittin* 52a.

⁸⁴ The last two words do not appear in most manuscripts of the Babylonian Talmud. However one may see these words as a continuation of what Rabbi said in the previous sentence, see *ibid*.

⁸⁵ Babylonian Talmud: “Rabban Simeon Ben Gamaliel, however, says that this is not necessary”.

In the opinion of Rabbi the *epitropos* must file a report of his activities and must justify the value of the property which exists at the time of the termination of his position. His father, Rabban Shimon ben Gamliel, thinks that there is no need for this, and the *epitropos* simply transfers the property remaining in his possession to the orphans. Obviously the question arises whether there is a connection between the oath and the report, and the medieval decisors indeed disagreed about this.⁸⁶ Nonetheless the fact that the oath is not mentioned at all in *Tosefta Terumoth*, and the fact that even in *Tosefta Bava-Bathra* these two subjects appear very far from, and with no apparent connection to, one another, show that even without a connection to the dispute between the early *Tannaim* in relation to the obligation to make an oath, Rabbi held that every *epitropos* must file a report on the value of the assets, whereas Rabban Shimon ben Gamaliel held that he will always be exempt from having to do so.

THE TERMINATION OF THE *EPITROPOS*' POSITION

The duty of the guardian commonly comes to an end as soon as the orphans have reached the age of maturity. In all probability this is what Rabbi was referring to in the *Beriatha* which was discussed above: "Guardians must make account with the orphans at the end",⁸⁷ and as Rashi says in the parallel case in the Babylonian Talmud *Gittin* "at the end – when they grow up". Beyond this situation Talmudic law recognizes two other possibilities for the termination of guardianship: the retraction of the position by the guardian and his removal by the court. The possibility of the *epitropos* retracting his position is very limited. According to the only source discussing this in the Talmudic literature, the *Tosefta Bava Bathra* VIII:12, one may only do this very soon after one's appointment, before beginning to actually administer the orphans' assets:

Guardians before they have made possession of the estate of orphans can retract. Once they have made possession of the estate of orphans, they cannot retract.

It is reasonable to assume that this passage refers to a person who was requested by the father or the court⁸⁸ to fulfil the role and that in practice he was

⁸⁶ For a summary of the views see REINITZ 1984, 232-241; CHOMEY 2008 144-147.

⁸⁷ T. *Terumoth* I:11.

⁸⁸ This is how the decisors understood it. In this regard and likewise for various explanations as to why he cannot retract at more advanced stages, see REINITZ 1984, 143-144. *Ibid.* later on there is a broader discussion of the opinion of the medieval and modern period decisors who tried to deal with this harsh restriction of his inability to resign even in justifiable circumstances, for example creating

permitted to decline,⁸⁹ however he could not retract if he already began his activity as *epitropos*. While there is no straight forward explanation for this distinction, one can speculate that in light of what we saw above, finding a suitable *epitropos* is not always an easy task, so the search process for another appropriate *epitropos* would take time during which the property would be left unsupervised and would be harmed, or there may be a fear that the orphans' property would be harmed when transferring the management thereof from the possession of one *epitropos* to the other.

While the removal of an *epitropos* is not mentioned in the Tannaitic sources, common sense dictates that there is no reason to leave an *epitropos* in his position if he abuses his position and does not act in the best interests of the orphan, and *a fortiori* if he damages their property. Indeed in the Babylonian Talmud the possibility of a removal is accepted, however it emerges that it was not always sanctioned:⁹⁰

Amram the dyer was the guardian of [some] orphans. The relatives came to R. Nahman and complained that he was [buying] clothes for himself from the property of the orphans. He said: [He dresses so] in order to command more respect. [But, they said,] he eats and drinks out of their [money], as he is not a man of means. I would suggest, [he replied], that he had a valuable find. [But, they said,] he is spoiling [their property]. He said: Bring evidence that he is spoiling it and I will remove him.

For R. Huna our colleague said in the name of Rav: If a guardian spoils the orphans' property we remove him. For it has been stated: If a guardian spoils the property, R. Huna says in the name of Rav that we remove him, while the School of R. Shilah say that we do not remove him. The law, however, is that we remove him.

From the end of the excerpt one may see that at the beginning of the *Amoriac* period a dispute took place over the question whether one may remove an *epitropos* who forfeits the orphans' assets.⁹¹ Nevertheless it was accepted that the Halakhah follows Rav, in all probability as the result of the story involving

a distinction between a guardian appointed by the father and that appointed by the court.

⁸⁹ FALK 1978, 329 notes: "A guardian's duty was difficult and unpaid; people would frequently avoid such an appointment, and if appointed would want to retract: 'Guardians who have not taken possession of the orphan's property may retract, once they have taken possession they may not retract' (T. *Bava Bathra* VIII 12)". However above in the discussion of the oath we saw that there are reasons for why a person would wish to accept this position upon himself. Therefore one may add that it may be possible that the appointment of an *epitropos* brought with it an upgrade in his social status, as perhaps emerges from the story above in n. 69.

⁹⁰ BT. *Gittin* 52b.

⁹¹ It is difficult not to be startled by the opinion of R. Shilah and indeed there have been various attempts to explain his opinion: See: REINITZ 1984, 185-192.

Rav Nahman. From this story one may learn that the relatives of the orphans indeed acted according to the simple logic which says that one may remove an *epitropos* from his position if he harms the property of the orphans. While Rav Nahman⁹² explicitly accepts such a possibility, he declares that one must be certain that the activities of the *epitropos* were indeed not in the best interests of the orphan, but that for the purpose of removing the guardian from his position there was need for a witness, as the claims of the relatives are biased in this matter or possibly they are interested in removing the *epitropos* for other reasons.

CONCLUSION

This short article reviewed the institution of guardianship for orphans in Talmudic literature, i.e. the sources from Palestine and Babylon, mostly from the second to the fifth centuries CE. Apparently, the foundations of the institution were taken from the foreign law, and therefore it is no coincidence that it preserves the Greek name *epitropos*. However, after the absorption of the institution in Jewish law, it began to develop its own unique character. Like other legal institutions that were taken from Greek and Roman laws, the laws of the *epitropos* were formed by the *Tannaim* and *Amoraim*, who did not necessarily know the original laws of this institution. Furthermore, in some cases they tried to show that the *epitropos* laws have biblical sources.

The early sages who dealt with the *epitropos* are dated to the first century CE, before the destruction of the Second Temple. However, the main design of the institution was made by the *Tannaim* of the second century. The two main compositions that are summarizing the Tannaitic law (mostly from the second century) – the *Mishnah* and *Tosefta* – already present a fairly well-developed system of guardianship for orphans. This system was not changed substantially later, but both Jerusalem and Babylonian Talmuds, mainly in the third and fourth centuries, continue to develop the institution, upon the foundations created by their predecessors. The combination of all Talmudic sources presents a well-developed institution. The law deals with all the stages: from the appointment of the *epitropos*, through his duties during his officiation, to the end of his job.

⁹² Rab Nahman was one of the greatest rabbinic judges in his period and held that his court was superior to the rest of the Jewish courts in Babylon. See: RADZYNER 2014, 346-348.

BIBLIOGRAPHY

- BT. = Babylonian Talmud
 M. = Mishnah
 MT = Maimondes, Mishneh-Torah
 PT. = Palestinian (Jerusalem) Talmud
 T = Tosefta

- BERMAN 1926
 Y. BERMAN, *Shitat Apotropsut beIsrael*, in: *Sefer ha-yovel le-Rabi Yehudah Leb Hakohen Fishman*, Jerusalem, 30-42 (Heb.).
- BLOCH 1904
 M. BLOCH, *Die Vormundschaft nach mosaisch-talmudischem Rechte*, Budapest.
- CHOMEY 2008
 O. CHOMEY, *The Institution of apotropous (guardian) in Jewish Law as reflected in Legal Deeds*, Ph. D. Bar-Ilan University (Heb.).
- COHEN 1966
 B. COHEN, *Jewish and Roman Law, a comparative Study*, New York.
- COTTON 1993
 H.M. COTTON, *The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia*, «The Journal of Roman Studies» 83, 94-108.
- ENTSIKLOPEDIYAH
Entsiklopedyah Talmudit; le-'inyene Halakhah, vol. 2, "אפוטרוסות", pp. 121a-129b (Heb.).
- EPSTEIN 1957
 J.N. EPSTEIN, *Introduction to Tannaitic literature; Mishna, Tosefta and Halakhic Midrashim*, Jerusalem & Tel-Aviv (Heb.).
- FALK 1978
 Z.W. FALK, *Introduction to Jewish Law of the Second Commonwealth*, vol. 2, Leiden.
- GILAT 1990
 I.D. GILAT, *Ben 13 l' mitzvo'*, «Mehqerei Talmud» 1, 39-53 (Heb.).
- GILAT 1995
 I.Z. GILAT, *Does the Financial Right of a Father over his Children Stem from his Guardianship Role? – Jewish Law Perspective*, «Bar Ilan Law Studies» 12, 119-163 (Heb.).
- GULAK 1930-1931
 A. GULAK, *The Right of Ownership of Property of a Heathen Slave according to Talmudical Law*, Tarbiz, 1(4), 20-26; 2(2), 246 (Heb.).
- GULAK 1922
 A. GULAK, *Yesode ha-mishpat ha-'Ivri: seder dine mamonet be-Yisra'el 'al pi meqorot ha-Talmud yeha-poskim*, Berlin (Heb.).
- HYMAN 1910
 A. HYMAN, *Toldot Tanna'im ve-Amora'im*, London (Heb.).
- KAPLAN 2009
 Y.S. KAPLAN, *The changing Profile of the Parent-Child Relationship in Jewish Law*, «Jewish Law Annual» 18, 21-79.
- KASOVSKY 1956
 CH.Y. KASOVSKY, *Thesaurus Mishnae; concordantiae verborum quae in sex Mishnae ordinibus*, Jerusalem (Heb.).
- LIEBERMAN 1992
 S. LIEBERMAN, *Tosefta ki-fshutah, a comprehensive Commentary on the Tosefta*, Jerusalem (Heb.).
- OUDSHOORN 2007
 J.G. OUDSHOORN, *The Relationship between Roman and local Law in the Babatha and Salome Komaise Archives*, Leiden-Boston.
- OUZIEL 1991
 B.M.H. OUZIEL, *Sefer*

Sha'are 'Uzi'el: ha-shofet halakhot pesuqot u-ḳetsuvot, yeha-mishpat, meḳorot ha-halakhah ba-Talmudim ye-shiṭot mefarshav, vol. 1, Jerusalem (Heb.).

RADZYNER 2014

A. RADZYNER, *Dine qenasot: a Research in Talmudic Law*, Jerusalem (Heb.).

REINITZ 1980

Y.K. REINITZ, *Guardianship by virtue of Orphans Boarding with the Householder*, «Bar Ilan Law Studies» 1, 219-250 (Heb.).

REINITZ 1984

Y.K. REINITZ, *The Guardian of Orphans in Jewish law: his Responsibility, Methods of Supervision and Control over Him*, Ph. D. Hebrew University (Heb.).

REINITZ 1985

Y.K. REINITZ, *Appointment of a Women as a Guardian*, «Bar Ilan Law Studies» 4, 167-203 (Heb.).

REINITZ 1986

Y.K. REINITZ, *The Legal Standing of the Orphan's*

Relatives in Jewish Law and in the Capacity and Guardianship Law (1962), «Bar Ilan Law Studies» 5, 151-180 (Heb.).

SPERBER 1984

D. Sperber, *A Dictionary of Greek and Latin legal Terms in rabbinic Literature*, Ramat-Gan.

YARON 1960

R. YARON, *Gifts in Contemplation of Death in Jewish and Roman Law*, Oxford.