

THE ORPHAN IN TANNAITIC LITERATURE

H. Philip Berkowitz

Thesis submitted in partial fulfillment of the
requirements for Degree of Master of Arts in
Hebrew Letters and Ordination

Hebrew Union College-Jewish Institute of Religion
1966

Referee, Professor Alexander Guttmann

THE ORPHAN IN TANNAITIC LITERATURE

Digest

This paper deals with the orphan in Tannaitic literature. The first task was to define the term orphan. This approach lead to the assumption that the orphan was usually a minor, but there is no fixed age limit mentioned to corroborate this. Furthermore, there were no indications as to whether the orphan was without both mother and father.

The next step was to determine how the Bible pictured the orphan. The orphan was the subject of special consideration and protection. Scripture spoke in a very general way, and both the positive and the negative programs that were offered were limited and restricted. There was a need for a more detailed program, and this emerged in the Tannaitic literature.

Three areas for consideration emerged. They were: financial protection, religion and ritual, and "an orphan in her father's lifetime."

The first area, that of financial protection, dealt with such things as the public support of an orphan, charity, inheritance and rights of orphans. The role of the guardian or administrator was defined. In addition this area considered tithing, religious training, responsibility for damages, settlements of debts, and marriage. In the chapter concerned with religion and rituals such subjects as the paschal sacrifice, tithing, marriage and divorce are discussed.

The third area was the concept of an "orphan in her father's lifetime." Here the term orphan was used to refer to a girl whose father

was still alive but was powerless to act on behalf of his daughter.

In conclusion, this paper found that the term orphan was used in three specific ways: 1. a fatherless child; 2. a beast whose dam was dead or slaughtered; 3. an orphan in her father's lifetime. It was evident to the writer that the problem of the orphan was a realistic problem for the rabbis and they devoted time and energy in order to provide financial, physical and spiritual protection for the orphan.

TABLE OF CONTENTS

Chapter		Page
I.	Introduction	1
II.	Definition	3
III.	The Orphan as Pictured in the Bible	4
IV.	Financial Protection	9
V.	Religion and Ritual	24
VI.	An Orphan in Her Father's Lifetime	34
VII.	Conclusion	37
	Bibliography	

CHAPTER ONE

Introduction

This paper will deal with the role of the orphan in Tannaitic literature. From the very outset it will be clear that there is no clear definition for this term. Usually the rabbis will consider the orphan to be a minor, but there is no fixed age limit presented to substantiate this initial assumption, nor is there any reason to believe that the orphan is without both a mother and a father. It will soon become clear that there are three types of orphans according to the Tannaitic literature. They are: 1) the fatherless (or motherless), 2) a beast whose dam is dead or slaughtered, and 3) an orphan in her father's lifetime.

The Torah presents very little in the way of a positive program for treating the orphan. Scriptures speak in a very general way with very few exceptions, and the positive program that is described is very limited and restricted. However, there is little doubt that the orphan was the subject of special consideration and protection.

It becomes evident that a new and comprehensive program was needed. This program emerges in the Tannaitic literature.

The first of the three specific areas with which this paper will deal is that of financial protection. The task will be to bring order out of chaos. In other words, to try to provide some sort of organization in an area in which there is no sequential order. The protection of the orphan entailed matter of public support, charity, inheritance, and rights. The problem of the guardian or administrator will emerge. The particulars about tithing, religious training, responsibility of damages, settlement of debts, marriage and divorce, etc.,

also occupy a central place in this chapter.

From this specific frame of reference, this paper will delve into the area of religion and ritual which could be neither overlooked nor neglected. This includes such subjects as the paschal sacrifice, tithing, marriage and divorce, and the implications about these occupy an important role in this paper.

The last important phase of the paper is the discussion of the concept "an orphan in her father's lifetime." Here the use of the word "orphan" refers to one whose father is still alive but is powerless to act on behalf of his daughter.

It is evident that many different areas of discussion will emerge, but it must be remembered that the goal of the rabbis in this period was to define the treatment of the orphans. It must be emphasized again that the Scripture left a great deal to be desired if a positive program was to be promulgated, and this task was a stupendous and all embracing one.

Definition

In Webster's Dictionary the following is offered as a definition for the word orphan: "a child whose father and mother are dead: sometimes applied to a child who has lost one parent by death."¹

This paper will deal with the role of The Orphan in Tannaitic Literature. Here, too, we seek a definition of the word orphan. One thing becomes clear very quickly, in the Bible and Tannaitic literature there is no clear cut definition for the term orphan. The best that we might succeed in doing is to state that it appears that the rabbis consider an orphan to be one who is a minor, but there is no fixed age set.

It will be possible to note the progression from very little in the way of a positive program for the orphan in the Torah to a clear cut positive program.

At this point it is essential to introduce another term that will appear throughout this paper. That is the term fatherless which simply means not having a father who is alive, or perhaps, lacking a father's protection. For that matter this word could be used to describe one who does not know who his father is. For some unexplained reason, most translations use fatherless interchangeably with orphan. In fact Brown,² Driver, and Briggs use it the same way. This paper will use the words orphan and fatherless interchangeably.

¹ "Orphan," Webster's New World Dictionary, College Edition. 1957, p. 1034

² Brown, Driver and Briggs. Hebrew and English Lexicon of the Old Testament. Oxford, The Clarendon Press, 1907, p. 450.

The Orphan as Pictured in the Bible

Before turning to the Tannaitic sources in search of defining the role of the orphan, it is advantageous to turn to the Torah and view the role of the orphan and what provisions were made for the fatherless during that period. The Torah prescribes that we should not afflict the orphan. "Ye shall not afflict any widow or fatherless child."¹ The book of Deuteronomy further states: "Cursed be he that preventeth the justice due to the stranger, fatherless, and widow.² And all the people say: Amen."

This seems to indicate that in the Torah the orphan is considered to be in a class by him or herself, however, no where in the Bible will a clear definition of orphan be offered. Yet an important Biblical concept was that the Lord will be just to the fatherless. "For the Lord your God, He is God of Gods, the Lord of Lords, the Great Lord, the mighty, and the awful, who regardeth not persons, nor taketh rewards. He doth execute justice for the fatherless and widow and loveth the stranger, in giving him food and raiment."³

The book of Deuteronomy says: "thou shalt not prevent the justice due to the stranger or the fatherless, nor take the widows raiment to pledge. But thou shalt remember that thou was a bondsman in Egypt, and

¹ Exodus 22:21

² Deut. 27:19

³ Deut. 10:18

the Lord thy God redeemed thee, therefore, I command thee to do this thing."⁴

The Prophets take up the cudgel and follow this formula:

"Learn to dwell, seek justice, relieve the oppressed,
judge the fatherless, plead for the widow."⁵

Isaiah goes on to state when he accuses the people of disobeying these holy ordinances. "Thy people are rebellious and companions of thieves; everyone loveth bribes, and followeth after rewards; they judge not the fatherless, neither doth the cause of the widow come unto them"⁶

Jeremiah deplored similar offenses when he cried out that: "They plead not the cause, the cause of the fatherless."⁷ He goes on to address the people and say: "Thus saith the Lord; Execute ye justice and righteousness, and deliver the spoiled out of the hand of the oppressor and do no wrong, do no violence to the stranger, the fatherless, nor the widow."⁸

⁴
Deut. 24:17f

⁵
Isaiah 1:17

⁶
Isaiah 1:23

⁷
Jeremiah 5:28

⁸
Jeremiah 22:3

Ezekiel too states: "They have wronged the fatherless and the
9 widow."

Zechariah was no different when he spoke to the people saying,
"and oppress not the widow, nor the fatherless, the stranger, nor the
10 poor."

It is possible to see that the Torah and the prophets prescribed
to protect the fatherless by not permitting injustice and by avoiding
oppression. In other words, a negative program is offered.

The positive program is found in the Book of Deuteronomy, how-
ever, even in this case it is fairly limited. "When thou reapest the
harvest in thy field, and hast forgot a sheaf in the field, thou shalt
not go back to fetch it, it shall be for the stranger, for the fatherless,
and for the widow, that the Lord thy God may bless thee in all the works
of thy hands. When thou beatest the olive tree thou shalt not go over
the boughs again; it shall be for the stranger, for the fatherless, and
for the widow. When thou gatherest the grapes of the vineyard, thou
shalt not glean after them, it shall be for the stranger, for the father-
less, and for the widow. And thou shalt remember that thou wast a bonds-
11 man in the land of Egypt, therefore I command thee to do this thing."

9
Ezekiel 22:7

10
Zechariah 7:10

11
Deut. 24:19-21

The Book of Deuteronomy states: "At the end of every three years, even in the same year, thou shalt bring forth all the tithe of thy increase, and shall lay it up within thy gates. And the Levite because he hath no portion nor inheritance with thee, and the stranger, and the fatherless, and the widow, that are within thy gates, shall come and shall eat and be satisfied, that the Lord thy God may bless thee in all¹² the work of thy hand which thou doest."

In other words, the Book of Deuteronomy looks upon the fatherless as destitute, and worthy to receive the poor tithe.

In summation Biblical literature saw that the fatherless needed special protection. Very often the orphan was classified with the Levites, the widow, the poor, the proselyte and the strangers. These persons, and the minor, needed special protection. The negative program in the Bible is one where it is necessary to warn against vexing the orphan and doing injustice to him. In addition a positive program was prescribed. When reaping in the field and one forgot a sheaf, or when beating an olive tree, one should not go over the boughs again, or when gathering grapes in the vineyard, one should not go back to glean what one had forgotten. All these were for the fatherless, the impoverished, and those who needed protection. But suppose one did a thorough job, there would be nothing for the poor. Undoubtedly the sages saw the weak point in this positive program.

¹²
Deut. 24:28-29

This task was undertaken, and the program promulgated. This paper will deal with the Tannaitic literature and attempt to show how the orphan was to be treated in this new comprehensive program.

Before we turn to that point, O. J. Baab points out that in the Bible we have no clear proof that the use of ¹³אביו refers to the fact that both parents are dead. Baab suggests that the fatherless was a daughter rather than a son, but this cannot be proved. However, Numbers 27:7-11, which talks about a daughter inheriting from her father when there are no sons, indicates that in the Israelite community they were the objects of special consideration. ¹³ The matter of using ¹⁴אביו to refer to the death of both parents is also suggested by Hastings, as lacking clear proof.

However, in the final analysis, it is evident that orphans are helpless beings. (And from this point it is necessary to see the specifics as they emerged during the Tannaitic period.) What is important is that there is no fixed age limit, that as long as one cannot manage his own affairs he is treated as an orphan. ¹⁵

¹³ O. J. Baab, "Fatherless." The Interpreters Dictionary of the Bible, Vol. II. New York, Abingdon Press, 1962, pp. 246f

¹⁴ James Hastings. "Orphan." Dictionary of the Bible. New York, Charles Scribner's Sons, 1963, p. 715

¹⁵ Maimonides, "Yad," De'ot VI

Financial Protection

The aim of this particular chapter is to present a picture of what may be termed the financial protection of the orphan. This area includes a vast field of particulars. The major difficulty will be to provide some sequential order within a vast area which does not readily lend itself to that purpose. Second will be the overlapping of areas. Thus elements from other areas will undoubtedly be included in this area, and vice versa.

Among the areas that will be covered are the areas of charity and marriage. The matter of the public support of the male and female orphan and inheritance rights are also part of this chapter. It is here that there will emerge the distinction between male and female orphans. The writing of a "prozbul" also will be of importance as far as an orphan is concerned.

The importance of a guardian or administrator will emerge in the following pages. Their role and their responsibilities are clear.

As this area grows, the questions of marriage, tithing, and religious training all become of the greatest importance. The rules of acting on behalf of orphan emerge. Yet, the sages also did not protect the orphans at the expense of others. They, too, were responsible. Thus they, or their guardians, were liable for damages.

The matter of settling debts left by the father is of major concern in this area of discussion. The area will mention the laws concerning the marriage of orphans, the dowry, the use of the poor funds, etc. The Ketubah and the various claims and the technicalities involved

will be of great concern. These will touch upon the area of the maintenance of the widow from the property of orphans and the extent of responsibility that is incumbent upon the orphans. This chapter will also discuss the support of orphans from the tithes, etc.

Just from this short introduction it is evident that many provisions were made in order to protect the orphans. As was already mentioned, it is difficult to provide any sequential order. However, in the final analysis, these provisions will show how vast an area is covered when the protection of the orphan is involved.

The rabbis also stated that "the first born gets a double share of whatever the heirs have no need of searching for (being ready at hand at the father's death)." The sages go on to state that "in all cases except if he planted a tree, built a home, the heirs receive an equal portion, otherwise he takes a double portion."¹

Rabbi Huspith was quoted as saying in regard to the writing of a prozbul that one may write a prozbul "for an orphan on the security of his guardian property."²

According to Lebendiger, Gittin 37a, and Baba Kamma 37a state that "no submission of a prozbul is necessary for loans owed to minor orphans. The court gains power of action against the debtor by the

¹
Tosephta Bekhoroth 6.16

²
Mishnah Shebiith 10.6

fact that it stands in a parental relation to the orphan."³

In the matter of the outright presentation of charity, Rabbi Simeon ben Elazar said that "one does not decide with regard to charity for the poor in the synagogue, and even to cause a male or female orphan to marry; and one does not make a marriage stipulation between a man and his wife, nor does one pray for the sick on the Sabbath. The House of Hillel permits this."⁴

The Tosephta expresses the view that "a male and a female orphan need public support. One provides for the female orphan first and afterwards provides for the male orphan because the male orphan is able to return anywhere, but the woman cannot return anywhere." The text continues and states: "A male and a female orphan request to marry, one brings to marriage the female orphan first, then the male orphan, because of the shame of a woman is greater than that of a man." The text also goes on to show what kind of support is necessary when a male orphan requests to marry. "One rents for him a home and puts out a bed and afterward they cause him to marry."⁵

⁶Lebendiger mentions that the Talmud (Ketuboth 108b) teaches that "If the property left by the father is not sufficient for the support of both male and female orphans, then the whole property should be given to the female. Here the female becomes the practical heir, contrary

³ Israel Lebendiger, "The Minor in Jewish Law" Jewish Quarterly Review, Vol. 7, 1916-17, p. 166

⁴ Tosephta Shabbat 17.22

⁵ Tosephta Ketubot 6.8

to the Biblical law, which declares inheritance is the exclusive right of the males." This is "the climax of reform concerning the support of the female orphan." This refers only to "moveable property." The Gaonic enactment saved to the female minor a claim only equal to but not greater than that of the males.⁶

Rabbi Eliezer says a female orphan ~~who~~ has worn garments. Rabbi Judah said in the name of Rabbi Eleazar, "a female orphan has the income of property. A son whose father died and his mother says won't grow up in my care. The heirs say to her, let him grow up in our care. One may not force him to grow up with a relative who would inherit his property."⁷ The reason for this arose when one child was slaughtered on the eve of Passover. Therefore the Rabbis acted in this manner since there might be the suspicion that the heirs of the orphan might choose to kill him in order to receive his inheritance.

In the case of a person who spreads an evil report and it happens that false witnesses are found, the Tosephta states that the culprit is lashed and he pays 400 zuz. In the case of those who were the plotters, they are the first to go to the place of the stoning. If "she (i.e., the one who spread evil, reported, or was a plotter) was an orphan, she is lashed and he pays 400 zuz, and her Ketubah remains intact. The false plotters are the first to go to the place of the stoning."⁸

⁶
Lecendiger, VI, pp. 488f

⁷
Tosephta Ketubot 11.4

⁸
Tosephta Ketubot 1.5

The services of a guardian or administrator were employed to tend to the orphan. He was to exercise his power to favor the orphan. A special set of laws existed for such circumstances. "If orphans were supported by a householder, or if their father appointed a guardian for them, he must give tithe from the produce that belongs to them." Furthermore, "If a guardian was appointed by the orphan's father he must take an oath (that he has not impaired their property). If he was appointed by the court he need not take an oath." Abba Saul said, "the rule is to the contrary."⁹ The Tosephta states that "the guardians must tithe the orphans property. They may sell homes, fields, vineyards, cattle, slaves, maidservants, in order to feed the orphans and in order to make them a Sukkah, a lulav, fringes, and in order to enable them to fulfill all the commandments which are in the Torah; in order to buy for them a Torah scroll, and prophetic scrolls. But they may not redeem for them captives nor give charity to the poor on their behalf, in other words, that which is not determined in the Torah. They do not have permission to free slaves, but they may sell them to others, and others may free them."¹⁰

An administrator who paid a shekel for orphans is liable to pay a surcharge (compensation to the Temple's shekel collectors to reimburse them for any loss which may occur in making change).¹¹

⁹
Mishnah Gittin 5.4

¹⁰
Tosephta Terumoth 1.10

¹¹
Tosephta Shekalim 1.8

One does not sell land that is in a distant place in order to buy land that is nearer. One does not sell land that is inferior for land that is superior. Schwartz ¹² explains that this situation means that the orphan will lose as a result. One does not litigate matters pro and con, or to bring in or to give away, for orphans. Schwartz offers the conjecture that the meaning of this is one does not litigate in favor of the orphans, or try to collect for a plaintiff from an orphan, until they grow up and defend themselves. But only if they receive court permission do they need a guardian to plan with the orphans at last. This is according to Rabbi Simeon ben Gamaliel who said, "the orphans have only what the guardians give them. They sell slaves and buy with them land." Rabbi Simeon ben Gamaliel also said, "even slaves may not be sold to buy land. The court may not make women or slaves guardians from the very beginning. But if their father appointed them while he was alive they ¹³ may be made guardians.

Rabbi Simeon ben Gamaliel said, "one must not make a change for the better for there is still the possibility that it may turn out to be injurious to the interest of his charge."¹⁴

12
Adolph Schwartz,

13 Tosephta Terumoth 1.11

11
Tosephta Baba Bathra 8.15

It is interesting to note that the law does not always protect the orphan's property. For instance: "the ox of a woman or the ox of orphans or the ox of a guardian or a wild ox, or an ox belonging to a proselyte who died without heirs ... these are all liable to death (if they kill a man)." Rabbi Judah said: "A wild ox or an ox belonging to the Temple, or an ox belonging to a proselyte who died, are exempt from death since they had no owner."¹⁵

In regard to this Lebendiger goes on to state that if a guardian is appointed merely for the purpose of preventing any damages that may be caused by the property of the orphans, as, for example, when he has been appointed to take care of a "shor ha mul'ad," then the guardian is responsible on the occurrence of such damages, for the simple reason that otherwise people will decline the guardianship for such a purpose. Yet Rabbi Jose ben Hanana holds that even in the latter case the guardian first compensates for the damages from his own estate and is then reimbursed by the orphans when they grow up. Lebendiger feels that the statement "and are repaid from the orphans when they grow up" is a later addition.¹⁶

The matter of settling debts is also of great concern to the sages. The Mishnah states that: "Payment may not be taken from mortgaged property at hand, even if this is the poorest land. Payment may

¹⁵
Mishnah Baba Kamma, 4.7

¹⁶
Lebendiger, VII, p. 159

not be taken from the property of orphans save only from the poorest
land.¹⁷ "Thus the orphan daughter had another privilege tended to
her protection and welfare." An attachment could not be used on the
estate of minor orphans to pay the father's debts except "in certain
instances."¹⁸

Regarding (Gittin 48)✓ the payments which are made from the worst
pastures of the fields which orphans inherit, Gittin 50a teaches this
applied to orphans of fullage.¹⁹

The Mishnah further states that (the goods) of orphans that have
been valued (by the court to meet the father's debt must be proclaimed
for sale) during thirty days.²⁰ The Tosephta also states that "(the
advertisement of) orphan's property must be made for thirty days in suc-
cession (before the sale). ... They announce this in the morning and
in the evening when the workers come and go. They state how much was
its estimation, and how much it is worth now."²¹

The rabbis in the Tannaitic period show much concern about the
support, care, and protection of the orphan. Therefore a good number

¹⁷
Mishnah Gittin 5:2

¹⁸
Lebendiger, VI, p. 161

¹⁹
Ibid. p. 165

²⁰
Mishnah Arakhin 6.1

²¹
Tosephta Arakhin 4.1

of laws revolve around the concept of marriage. Normally a man who gave his daughter in marriage without prescribed conditions was not allowed to assign to her less than fifty zuz. In addition, if he, the father, made a condition that the bridegroom should take the bride without a trousseau, under such circumstances the groom cannot say, "After I have taken her into my house, I will clothe her with clothing of mine." The Mishnah and the Tosephta both agree that "he must clothe her while she is yet in her father's house." Both of these sources continue and explain that also in the case of the orphan who was given in marriage, she, too, should be assigned not less than fifty zuz. If, however, there was more in the poor funds, then she²² should be provided according to the honor that is due to her.

²³ The Mishnah and ²⁴ Tosephta state that "if an orphan was given in marriage by her mother or her brothers" and she consented "and they assign to her as her portion a hundred zuz or fifty, when she comes of age she may exact from them what should rightfully (i.e., one-tenth of the estate) have been given to her.

The Ketubah has played a central role in the life of the Jew. The rabbis therefore had to tend to certain situations wherein the

22

Mishnah Ketuboth 6.5
Tosephta Ketuboth 6.7

23

Mishnah Ketuboth 6.6

24

Tosephta Ketuboth 6.8

Ketubah and the orphan were related. For instance, "A widow not receiving payment (of her Ketubah) from the property of the orphans unless she swears (to her claim an oath). But when they refrain from making her swear an oath Rabbi Gamaliel, the Elder, ordained that she would vow to the orphans whatsoever they would and receive her Ketubah."²⁵

The Mishnah further states, "if a woman impaired her Ketubah the rest may not be paid to her unless she swears (to her claim) an oath; (and that) if one witness testified against her that it had been paid (in full), she may not receive payment unless she swears (to her claim) an oath, (and that she may not receive payment from assigned property or from orphans property, i.e., the inheritance) unless she swears to her claim an oath; and (that) if a woman is paid not in the presence of him (that divorced her) she may not receive payment unless she swears (to her claim an oath), so, too, orphans may not receive payment unless they swear (to their claim an oath, namely,) "We swear that our father did not enjoin (in his testament), that this bond of indebtedness has been paid." Rabbi Johanan ben Baroka says: "Even if the son had been born after his father's death he may take his oath and satisfy his claim." Rabbi Simeon ben Gamaliel said: "if there are witnesses (to prove that at the time of his death the father said), 'This bond has not been paid,' he may satisfy his claim without taking

²⁵
Mishnah Gittin 4.3

²⁶
an oath." The Mishnah of Ketuboth goes on and asks, "How does it apply with the property of orphans?" The answer is, if the husband died and left his property to (his) orphans and she seeks to be paid by the orphans, she may not be paid unless she swears (to her claim)
²⁷
an oath.

If a man was married to two wives and they died and he then died, and the orphans claim the Ketubah of their mother, and there is but (enough for the two Ketuboth), they share equally. If there was a surplus of one dinar, each of them takes the Ketubah of their own mother, (and share the remaining dinar with the other heirs). If the orphans said, "We reckon the value of the property of our fathers at one dinar more" so that they may take their mother's Ketubah, they do not listen to them, but they estimate the value of the property before the court
²⁸
(when the father died).

The rabbis further ordained that, "The widow receives her maintenance from the property of the orphans (as arranged in the Ketubah), and the work of her hands belongs to them; but they are not responsible for her burial. Her heirs that inherit her Ketubah are responsible
²⁹
for her burial.

²⁶
Mishnah Shevuoth 7.7 and Mishnah Ketuboth 9.7

²⁷
Mishnah Ketuboth 9.8

²⁸
Ibid. 10.2

²⁹
Ibid. 11.1

According to the Tosephta, when "a widow demands her Ketubah, those who inherit her say to her: "You received your Ketubah." As long as she is not married they must bring proof that she received the Ketubah. When she remarried they must bring proof that she did not receive the Ketubah. When she sold the Ketubah or pledged it as a security, or if she uses the Ketubah as a mortgage, she loses her sustenance (i.e., she is not entitled to receive any benefits). Rabbi Simeon said even if she sold a little, or if she pledged a little, she makes a small portion as a mortgage, she loses her sustenance. One need not say after her husband died, but also while her husband is alive, and she writes; these I sold for the Ketubah, these I sold for food, according to Rabbi Judah. Rabbi Jose said, she sells just for the sake of selling, (and therefore) her authority is good since a widow does not sell with the authority of the court, the inheritors or those who come with authority, (i.e., those who were sold the Ketubah, or were given the Ketubah as a gift)³⁰ may sell without the court's authority. Rabbi Simeon asked, why do they say a widow sells without the court's authority? To improve the strength of the orphans. In order not to squander their property.³¹ This latter point is extremely important in the case of the orphan. The Rabbis have gone to the effort to protect the property of the orphans.

³⁰ 99 4. 388 'העל, מ'העל, (אין מן הדין) הדין / 151

³¹ Tosephta Ketuboth 11.1

Orphans were supported by a householder or their father appointed for them, (a guardian), or the court supported them with a tithe, and fed them for the sake of social order. Similarly Rabbi Simeon ben Menasiah stated that an orphan of a Levite who was reared by the householder; from the tithe, and he fed him for the sake of social order; if he was to grow up with a Kohen or a Levite or a ³² (a person in the category of the poor), behold he would feed him from his own. Schwartz states that thus it is forbidden to give Trumot and Maesrot under the pretense of charity, ³³ A Kohen or a Levite would feed him from his own portion.

In other words, if he were a Kohen he would feed him from the Terumah, if he were a Levite, he would feed him from the ^aMaeser Rishon, and if he were ^{a poor person}an ~~Oni~~, then he would feed him from the Maeser Oni. Schwartz attributes this to the fact that the orphan is not used to eating with him. ³⁴

Schwartz explains that in the case of an orphan who is reared with a householder, if he were to be given the tithe to eat, the Levites ³⁵would not receive anything to eat.

³² Tosephta Terumoth 1.12

³³ Schwartz, loc. cit. p. 242

³⁴ Ibid. p. 240

³⁵ Ibid. p. 242

In summation many interesting facts regarding the protection of orphans have emerged. In the realm of inheritance the first born is accorded special consideration in most cases. There is also special distinction made with respect to male and female orphans. There is the view that both need public support but the female orphan was to be cared for first and then the male. This rule was also applicable in the realm of marriage.

The role of the guardian is delineated. The choice of a guardian and the rules governing his conduct and the extent of his responsibility have also emerged. This included such things as the need to tithe the orphans property or contract sales for the orphan. Here the guardian or administrator could go to almost any extreme in order to provide a religious education for his charge, but the guardian had no right to dole out charity or redeem captives for their charges. The guardians could not sell land of inferior quality in order to buy a superior plot of land. This had to wait until the orphans matured and could act on their own behalf. It is also interesting that women and slaves could not become guardians. The only exception would be if the father specifically appointed them.

The matter of protection of the orphan did not cancel out the responsibility of the orphan with respect to other individuals property. However, in such a situation the guardians were held responsible, until the orphans matured. The sages even went to the extent of discussing the obligation of the orphans in settling the debts of their fathers.

The marriage of the orphan was an obligation as much as was the support and care of an orphan. The orphan, like anyone else, was to

receive a minimum dowry of fifty zuz, and if the poor funds contained a surplus, then the orphan would receive a greater sum according to the honor due her. The intricacies of the impairment of the Ketubah are also of consequence in the area of protecting the orphan. The role of the widow in relation to the orphan and his or her protection are also important since the widow could act on behalf of the orphan but was not allowed to squander the orphan's property.

In final analysis we have come a long way from the biblical period. The unspecific in the realm of caring for the orphan has now reached a technical but specific frame of reference.

Religion and Ritual

One of the main concerns was the financial protection and care of the orphan. However, the rabbis of the Tannaitic period realized that while this type of consideration for the orphan was necessary; it was not sufficient. The matter of instruction within the framework of religion and ritual could not be, and was not, overlooked nor neglected. Thus the rabbis dealt with questions concerning the paschal sacrifice, the problem of tithing, and intricate proceedings that revolved around the Ketubah. The subject of divorce, leverite marriages, etc., all fall within the scope of this discussion.

The Mishnah and the Tosephta discuss the Paschal sacrifice. The Mishnah states: "If a woman was living in her husband's house and her husband slaughtered the Passover offering for her, and her father slaughtered for her, she shall eat from that of her husband. If she went to keep the First Feast in her father's house, and her father slaughtered for her, she shall eat it in which place she will. An orphan for whom many guardians have slaughtered may eat it in which place he will. A slave belonging to joint holders may not eat from the Passover offering of both. He that is half slave and half free¹ may not eat from that of his master. The Tosephta also concurs that an orphan whose guardians slaughtered for him may eat of the

1

Mishnah Pesachim 8.1

sacrifice (i.e., the Paschal sacrifice) wherever he wishes.²

If he (the orphan) has been entered as a guest by one of the guardians then he should eat at the place where he has been entered as a member of the group. If he be entered as a guest of two guardians to eat two paschal sacrifices, he should eat the sacrifice which was slaughtered first.

Turning to the problem of the tithe, the Mishnah states: "If orphans were supported by a householder or if their father appointed a guardian for them, he must give tithe from the produce that belongs to them."³ The Tosephta talks about cattle that has become mixed up with respect to an existing doubt whether it has been tithed or not. The Tosephta suggests that they be left to pasture until they are no longer fit for sacrifice. If, however, there is doubt about eleven heads of cattle, they should die. Then the Tosephta talks about the tithing of cattle of orphans, the cattle should be sold so that it may⁴ be considered as a lost article and thus be returned to its owners.

The Tosephta relates that "one was counting and skipped from that which was counted to that which was not counted, if he recognized it, he is exempt and they are obliged. If not, all of them are exempt."⁵ If an orphan or a purchase behold all are exempt (from tithes).

²
Tosephta Pesachim 7.3

³
Mishnah Gittin 5.4

⁴
Tosephta Bekhoroth 7.15

⁵
Tosephta Bekhoroth 7.12

This term orphan is an interesting aside to our subject, and its explanation is found in the Mishnah:⁶ "All are brought into the cattle pen to be tithed save only beasts that are crossbred, or trefah, or born from the side (of the mother beast) or too young, or orphans. "Orphan" means one whose dam is dead or slaughtered. Rabbi Joshua says, "Even if the dam was slaughtered but its hide is still whole, the beast does not count as an orphan." The Tosephta gives the same account except that in this instance it was Rabbi Eliezer from Br'tutah who is attributed as quoting Rabbi Joshua. In this same account Rabbi Akiba stated that he heard that even those excluded from tithes as our Mishnah lists should be brought to the tithed. Rabbi Simeon seems to back this statement up by saying none too young must be brought to the cattle pen to be tithed.⁷

Concerning the Ketubah there are numerous regulations which in one way or another have a connection with orphans. For instance, if a woman "diminishes a Ketubah (i.e., admits that part of the Ketubah was paid) collect without an oath. How is this so? There was a Ketubah which was worth 1000 zuz. The woman said, "I did not receive (my Ketubah) and she has but one mina, she collects without an oath.

ה'ר"ה ש"ס

⁸

states when she said, "I have an

6

Mishnah Bekhoroth 9.4

7

Ibid. 7.6

8

86 '8 ה'ר"ה ש"ס , נאמן מאו"א

agreement between us," that is to say this was in the presence of witnesses, he is obligated to fulfill all that is written in the agreement, but if there was an agreement between them not to collect but one mina, this type of a contract is valid, even to collect from mortgaged property. *דלוקט' 1157* discussed Rashi's commentary. Rashi said, still regarding this matter, if in the presence of witnesses he accepted the responsibility of 1000 zuz he must pay, but if he believed her that she would only demand one mina then she may collect without an oath.

The Tosephta then gives a second example how a woman who diminishes her Ketubah may collect without an oath. With respect to mortgaged property, one need not say that she can (sell it) only after her husband died, but even while her husband is alive. A final instance is with respect to the property of orphans, one need not say (only)

דלוקט' 1158 from the property of the older brothers⁹ but from the property of the younger brothers.

The Mishnah specifies that if a man divorced his wife and married her again, she is permitted to marry her deceased husband's brother; but Rabbi Eliezer forbids it. So, too, if a man divorced (his wife who was) an orphan and married her again, she is permitted to marry her deceased husband's brother; but Rabbi Eliezer forbids it. If a minor was given in marriage by her father and she was divorced, she is

⁹ Tosephta Ketuboth 9.4

deemed "an orphan in her father's lifetime," (i.e., she does not count¹⁰
as within her father's control and he cannot give her in betrothal),
if he married her again all agree that she is forbidden to marry her¹¹
deceased husband's brother.

The Mishnah proceeds to relate that "if two brothers were married
to two sisters that were minors and orphans, and the husband of one of
them died, she is exempt (from the leverite marriage) by virtue of being¹²
the sister of his wife. In other words she is exempt because of the
dictum expressed in Leviticus which states: "Do not marry a woman as
a rival to her sisters and uncover her nakedness in the other's life-¹³
time."

¹⁴
The Mishnah goes on to mention that "if a man married two
orphans that were under age (and not related) and he died, consummation
or halitzah with one exempted her co-wife" (from a leverite marriage of
halitzah). This is after she becomes of age, because, according to the¹⁵
Mishnah she cannot be part of the halitzah ceremony. The Tosephta

¹⁰
Herbert Danby. The Mishnah. London, Oxford University Press, 1933
p. 238

¹¹
Mishnah Yebamoth 13.6

¹²
Ibid. 13.7

¹³
Leviticus 8.18

¹⁴
Mishnah Yebamoth 13.9

¹⁵
Ibid. 12.4 Tosephta Yebamoth 13.7

16
goes on to explain, "He who was married to two orphans who were under age, and the husband died." In other words there were no children as a result of this marriage and they both come under the law of a lev^{1 a} marriage. "The brother-in-law had intercourse with the first one, and then he also had intercourse with the second one, both of them are forbidden to him." However, according to 17 the Talmud (Yebamoth פ"ג י"ג י"ד) states that he is not forbidden to the first orphan. This conflict may be resolved in the following way. It can be assumed that the Tosephta 18 is defective. This is the way Maimonides resolves this problem. This would be in the instance where the brother-in-law had intercourse with both orphans. He did not cause the first one to be forbidden to him, but as long as the second one does not exercise her right of re- 19 fusal, then the first one is forbidden. The Tosephta continues and states that: "Rabbi Eliezer said in this case as in similar ones it is taught that a minor is instructed to exercise the right of refusal within thirty days. No matter whether they had intercourse or what

16
Tosephta Yebamoth 13.7

17 ש"ק פ"ג י"ג י"ד

18
Mishnah Torah (פ"ג י"ג י"ד) פ"ג י"ג י"ד

19
Tosephta Yebamoth 13.7

both say, they force him to perform a leverite marriage. After thirty days they request him to perform a leverite marriage. If she said I had intercourse, and he denies this, behold she goes forth with a divorce. If he said I had intercourse and she denies this, she is sent forth with a divorce and a leverite marriage. Even if he retracts this statement and denies having intercourse, nevertheless she is divorced. She receives a get and there is a leverite marriage.

The Mishnah remarks that "if a man was married to two orphans (that were not related) that were minors, and he died, if the deceased husband's (elder surviving) brother had intercourse with the first and then again with the second wife of his brother, this does not render the first ineligible (to continue the leverite marriage)."

The Tosephta relates the example that if two brothers were married to two sisters that were orphans, one was a minor and the other was a deaf mute. If the husband of the minor dies, the deaf one is sent forth with a divorce and the minor must wait until she is of age to perform the leverite ceremony. If the husband of the deaf one dies the minor goes forth with a divorce and she is considered free.

According to

it is evident that

20

Mishnah Yebamoth 13.9

21

Tosephta Yabamoth 13.6

22

דברי חכמים

cit. p. 109

both orphans are considered to be free from their contract of their father. The reason the deaf one is sent forth with a divorce is because the marital obligation toward her younger sister forbids him to marry her since her sister is bound to him; and the obligation to perform the leverite marriage with the younger sister is not postponed because she is the sister of his wife who is deaf. This is because of the disadvantages involved in their marriage. Furthermore, they are not like two sisters who were under age when he may postpone his marital bond. This is because of the law which forbids a man to marry his wife's sister if his wife is still alive. In this instance both marriages were of equal advantage. In the situation where the minor must go forth with a divorce the commentary goes on to explain that one may think that perhaps the marriage of the deaf sister was more important, but the marital obligation forbids her younger sister to marry him. The reason for the deaf sister being forbidden all the time is that she is the sister of the woman he divorced and halizah is impossible. However, if he had intercourse with her because he was jealous, he must nevertheless divorce her with a bill of divorce, like any other deaf woman.

23

The Tosephta specifies, "That the rule is after one exercises the right of refusal after a divorce, the woman is forbidden to return to her husband, but if there was a refusal after a divorce she may return to him." The Tosephta continues and relates the rabbis point out that no matter what happened because she went forth with a get, she can-

23

Tosephta Yebamoth 13.5

not return to him. Once a man married an orphan and he divorced her. She returned to him, and he refused, and she married another, and he died. The rabbis asked Rabbi Judah the son of Baba, "can she return to her first husband?" He answered emphatically, "since she went²⁴ forth with a divorce, she is forbidden to return to him."

In retrospect it is evident that the religious welfare of the orphan was of utmost concern to the rabbis. They were concerned with the matter of the paschal sacrifices. No matter how many guardians slaughtered the paschal sacrifice for the orphan, it was necessary for the orphan to eat of this sacrifice, and the rabbis entitled him to choose which ever sacrifice he wished. If, however, he was a guest of one guardian he should eat at that place. If he was the guest of two guardians, and both slaughtered the paschal sacrifice, he should eat of the one that was slaughtered first. Thus it becomes evident that the orphan had to partake of the sacrifice like his fellow Jews.

Although the financial concern was important as far as the orphan was concerned, this did not free him or his guardian, from tithing the produce that belonged to him. There is an interesting use of the word orphan. Here according to some opinions, the orphan is exempt from tithes. Here the word orphan refers to one whose dam is dead or slaughtered. Whether the orphan is exempt from tithes or not is not consequential, but what is of vital interest is the usage of the term orphan in this instance.

²⁴
Ibid.

This chapter went on to discuss the problem of orphans who were divorced. There are the conflicting opinions that orphans who were divorced and then remarried the same man, who later died, could marry his brother. The other point of view is that in such a situation the orphan could not marry her deceased husband's brother. There was the instance where a minor married and was divorced, she is deemed an "orphan in her father's lifetime." This particular case will be expounded in greater detail in the following chapter. Yet, here is yet a third usage of the word orphan. Following this we see a discussion about particular instances which revolve around the question of marriage, levirate marriage, and divorce under various conditions.

In the final analysis the orphan is tendered special consideration in the realm of religion and ritual. It is not surprising to see such a situation since the rabbis were concerned with the spiritual aspects as well as the physical and to ignore one or the other would have been inconsistent with Judaism.

An Orphan In Her Father's Lifetime

The chapter is devoted to the concept of *אלמנה ואלמנה* an orphan in her father's lifetime. This concept refers to the fact that a minor who was given in marriage and is divorced, is considered an orphan in her father's lifetime. This means that her father is powerless to act on her behalf to arrange another Kiddushin. This chapter will go on to illustrate an example of an orphan in her father's lifetime.

Also discussed in this chapter are the nine specific instances wherein the father of a woman cannot annul her vows and her vows must therefore remain binding.

If a man divorced his wife and married her again, she is permitted to marry her deceased husband's brother, but Rabbi Eliezer forbids it. So, too, if a man divorced (his wife who was) an orphan and married her again, she is permitted to marry her deceased husband's brother: but Rabbi Eliezer forbids it. If a minor was given in marriage by her father and she was divorced, she is deemed an orphan in her father's lifetime. Bertinoro explains that although her father is still alive, she is still considered as an orphan with respect to Kiddushin, and her father has no power to arrange the Kiddushin thus she is considered an orphan in her father's lifetime. Even if she were to return to her status of younger days, she could not perform a leverite marriage. If he married her again all agree that she is forbidden to marry her deceased husband's brother.¹

¹
Mishnah Yebamoth 13.6

Another instance is if an orphan was betrothed and then divorced. Rabbi Eleazer says: "He that seduces her is exempt, but he that² violated her is culpable.³ In this case her law is that of an orphan whose father is still alive."

A betrothed maiden, her father, or later her husband, are able to annul her vows. There are these things which prevent the annulment of vows:

1. If her father gave her in marriage when she was a ²¹⁶⁷ or a ²¹⁶⁸ and she was then divorced or widowed. In this case she went forth from her father's domain and is called an orphan in her father's lifetime.
2. If her father died.
3. If she is divorced and leaves her father's home, he cannot⁴ annul her vows.

The Mishnah enumerates nine women whose vows remain binding.⁵ They are: she that was past her girlhood and "an orphan" (in her father's lifetime when she vowed) i.e., her husband died; she that was still in her girlhood and "an orphan" (in her father's lifetime when she vowed), and is now past her girlhood; she that was "an orphan" (in her father's lifetime when she vowed), and is still in her girlhood; she that was past her girlhood and whose father was dead (when she

² In some texts reads violated or seduced

³ Mishnah Ketuboth 3.6

⁴ Mishnah Nedarim 10.1

⁵ Mishnah Nedarim 11.10

vowed); she that was still in her girlhood (when she vowed) and she then grew past her girlhood and her father died; she that was still in her girlhood (when she vowed) and that is still not past her girlhood; she that was still in her girlhood (when she vowed) and whose father was alive, and after her father died she grew past her girlhood; she that was past her girlhood (when she vowed), and her father was still alive; and she that was still in her girlhood (when she vowed) and that has grown past her girlhood and whose father is still alive. Rabbi Judah says: "Also if a man had given in marriage his daughter that was yet a minor, and she became a widow or was divorced and returned to him, and that is still in her girlhood."

This chapter is yet another usage of the term *אורח*. Here the concept *אורח* an orphan in her father's lifetime is discussed. What this term refers to is a divorced minor whose father is still alive but is powerless in certain realms. Thus the word *אורח* in this instance, has taken on an entirely new connotation. For good reason it is understandable why this word is used since the minor who is divorced is left helpless in acting in various ways and her father is legally unable to act on her behalf.

Conclusion

The aim of this paper was to define the orphan in Tannaitic literature. The justification for this was the fact that although biblical literature presented a positive program concerning the orphan; it was quite vague in that it did not promulgate the specifics. Thus the Tannaitic period was where the specifics emerged.

The first chore was to define what is meant by the word orphan. In the process it became evident that the word fatherless could be used interchangeably with orphan. The unresolved question was whether an orphan is a child whose father and mother are dead, or if the term orphan is a child who has lost one parent, either father or mother, by death. The Bible does not indicate what circumstances make a child an orphan, but it is clear that the orphans are helpless beings, and are the objects of special consideration. To complicate this matter further, there is no fixed age limit of an orphan. In any event the first of three different usages of the term "orphan" occurs in Biblical literature wherein the term refers to the child that is fatherless. Tannaitic literature continues this usage and adds to it two others. The second was when the word "orphan" referred to a beast whose dam was dead. The third referred to an "orphan in her father's lifetime."

This paper followed the procedure of dealing with three specific areas of concentration. The first was that of financial protection. The second area was that of religion and ritual, and the third area was a discussion of the concept "an orphan in her father's lifetime."

The chapter that dealt with financial protection covered a vast field of particulars. Thus the Tannaitic literature mentioned such

specifics as public support and the use of poor funds to care for the male and female orphans. It is important to note that there was a distinction made between the male and female orphans. The matters of inheritance and the settlement of debts left by the father received considerable treatment. This area dealt with the guardian or administrator. The sages defined the role that they were to play as well as their responsibility. The matter of appointing a guardian was also of concern. There were matters of marriage, tithing, and religious training which enter into the area of religion and ritual, and also overlap into the area of financial protection. They become of paramount importance. This area extended even beyond these bounds to include the widow and implications involving the Ketubah.

In addition to all of this, in the area of financial protection, the Tannaitic literature also mentions some of the responsibilities of the orphans, since not even they, with their special status, were exempt from certain responsibilities. It was necessary to clearly define in what areas they did not have immunity.

The area of religion and ritual was not overlooked in the preparation of a clarification of the role of the orphan in Tannaitic literature. Thus they are concerned with such things as the provision of paschal sacrifice for the orphan, tithing, marriage, divorce, levⁱ~~irate~~^a marriage, and halitzah.

The paper then turns to the concept of an "orphan in her father's lifetime." This is one of the three different usages of the term orphan.

In this instance the father is still alive but it is determined that his daughter is no longer under his control.

In final analysis the positive program that defined the role of the orphan is one wherein not only was the orphan protected financially and physically, but the orphan was also protected spiritually. Needless to say, the sages of the Tannaitic period in defining the role of the orphan acted in a most admirable manner in promulgating a specific program to care for the orphan. This, to the ^{Rabbis}, was a realistic problem of their daily life.

Bibliography

Baab, O. J. "Fatherless." The Interpreters Dictionary of the Bible.
Vol. II. New York, Abingdon Press, 1962.

Brown, Driver, and Briggs. Hebrew and English Lexicon of the Old Testament. Oxford, The Clarendon Press, 1907.

Danby, Herbert. The Mishnah. London, Oxford University Press, 1958.

Hastings, James. "Orphan." Dictionary of the Bible. New York,
Charles Scribner's Sons, 1963.

Lebendiger, Israel. "The Minor in Jewish Law." Jewish Quarterly Review, Vol. VI and VII. 1915-17.

Schwartz, Adolph. מורה נבוכים 1907 הוצאת מוסד הרב קוק
5650 תש"ו

Zuckerman, M.S. Tosephta. Jerusalem, Wahrmann Books, 1963.

1000 מורה נבוכים הוצאת מוסד הרב קוק תש"ו
5650 תש"ו

2000 מורה נבוכים הוצאת מוסד הרב קוק תש"ו