YESHIVAT HAR ETZION

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**TALMUDIC METHODOLOGY**

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**Shiur #09: When Does a *Bekhor* Acquire His Double Portion of Inheritance?**

The listing of inheritors in *Parashat Pinchas* does not mention the extra portion awarded to the *bekhor.* Instead, that halakha is embedded in the discussion in *Parashat Ki Tetzei* of a man who has two wives, one beloved and one detested. This dislocation of the *bekhor* inheritance from the section of typical inheritance reflects its distinction from other cases; many unique rules govern this double portion of a *bekhor*.

One interesting question surrounds the point at which the *bekhor* acquires rights to his “second” portion. Typically, the inheritors acquire shared rights at the point of death. However, although they at that point acquire general rights to their respective percentages in the overall estate, they only take full control of actual property when the various parcels are distributed (*chaluka*). Does the double portion of a *bekhor* follow a similar pattern? Does he acquire rights to his second share of ownership at the point of death and then choose which extra parcel to receive based upon that ownership? Or does his extra portion evolve differently from the standard inheritance patterns of ordinary inheritors?

The question first emerges as a result of an interesting *derasha* in the *gemara* in *Bava Batra* (134a). The *gemara* interprets the phrase “*latet lo*” (to DELIVER to him), appearing in *Ki Tetzei*, as qualifying that this double portion is categorized as a *matana*, agift. This portion is similar to a gift, which has no “meaning” until the recipient actually acquires it. Many *Rishonim* comment that this implies that the *bekhor* does not OWN his portion prior to the actual distribution.

In fact, the *gemara* applies this *derasha* to explain the position of the *Chakhamim* that a *bekhor* does not receive a double portion of the capital gains which accrue to the estate between death and *chaluka*. If the *bekhor* truly owned a double share of the estate, he would naturally receive the proportionate amount of the accumulated profits. For example, if he owns 66% of the estate (and by extension, before *chaluka* he owns 66% of each item), while the other brother owns merely 33%, any particular item’s increment should be apportioned 66% to the *bekhor*. Indeed, Rebbi rules this way, but the dominant position of the *Rabbanan* is that the *bekhor* does not receive double of the accrued gains. As the *gemara* asserts, his double portion is considered a *matana*; just as a *matana* is not owned until the recipient actually performs a *kinyan* upon it, the double portion of the *bekhor* is similarly not owned until *chaluka*. Until that stage, each brother jointly owns 50% of the estate and any gains are distributed equally.

The view that a *bekhor* does not acquire his second portion until *chaluka* is called into question by a subsequent *gemara* (136), which cites a debate between R. Pappi and R. Pappa regarding a *bekhor* who waives his double rights when an item is divided. R. Pappa maintains that although he has waived his extra portion in THIS specific item, he has not waived his double rights to the other holdings. R. Pappi disagrees and claims that just as the *bekhor* has disclaimed his double portion in the present item, he has also forfeited his double portion in the remaining holdings. R. Pappi's logic is based on the notion of "*yesh bekhor kodem nachala"* – a *bekhor* OWNS his second portion prior to parceling, and hence he is empowered to waive whatever he owns. Had he not owned anything prior to distribution, there would be nothing to forfeit, and waiving rights to a double portion during the parceling of one item would not impact other items. Effectively, R. Pappi's statement claiming that a *bekhor* DOES own the double portion contradicts the earlier *gemara* that a *bekhor* DOES NOT and therefore does not merit extra profits.

The *Rishonim* took three vastly different approaches toward solving this contradiction and better defining the nature of the double portion.

The most balanced approach is suggested by the Yad Rama in his comments to *Bava Batra* 136. He claims that a *bekhor* IMMEDIATELY inherits the *ZEKHUT* to collect a double portion, but he does not acquire actual ownership of his extra percentages in each item until distribution. A *zekhut* to collect something is not equivalent to actual ownership and does not yield comparable amounts of *shevach*, profits. Yet a *zekhut* can be waived, as evidenced by the dynamics of the most well-known *zekhut* – the right to collect a debt. Although the right or *zekhut* exists from the point of the loan, it does not confer any real ownership on any items of the borrower until actual collection. Yet the *zekhut* can be waived through the mechanism of *mechila*. The Yad Rama reconciles the two conflicting *gemarot* by arguing that a *bekhor* has a *zekhut*, and his rights to a double portion of all items can therefore be waived. At the same time, however, the *bekhor* does not merit a double share of the profits because he does not truly OWN his double share.

There are two problems with this approach. First, the *gemara* (136a) that describes the broad rights of a *bekhor* to renounce his double portion does not apply the term “*mechila*,” but instead speaks of “*vittur*.” If the *bekhor* DID achieve an early *zekhut* to his double portion, he would be compelled to perform an actual *mechila*, INCLUDING AN ACT OF *KINYAN* – all of which is missing from the *gemara*'s description of the proceedings and the employment of the “lighter” term of *vittur*.

Second, the *gemara* claims that if a *bekhor* intercedes and lodges a request for his double share of profits, he would receive them (*bekhor she-micha, micha*). If he only has a *zekhut* but does not achieve ownership until the *chaluka*, it would be difficult to envision his receiving profits prior to that stage.

Based on these concerns, the Ran develops an intriguing concept. In addition to a *zekhut*, there is a second model of someone who has "rights to" but not "ownership of." For example, an engaged husband has the ability to advance his relationship to the *nesuin* stage and thereby receive various financial benefits from his wife. However, those benefits are purely theoretical and potential rather than actual. The husband does not even possess a *zekhut*, and hence no ACTUAL *mechila* is necessary. By simply declaring that he does not want those rights to evolve, a husband can cancel them before they even emerge as a *zekhut*. This model is discussed (at least according to the Ran's view) by the *gemara* in *Ketuvot* (83a), which describes the husband’s right to announce “*siluk*” (cancellation), which does not require the *kinyan* execution of *mechila*.

The *bekhor* possesses a similar “ability” to ultimately assert his role as *bekhor* and acquire the land. However, prior to his assertion, he does not possess any ownership, nor does he possess any rights to the double portion. Since he is only someone who can assert his “rights,” he can nullify that potential WITHOUT a formal *mechila* process. Similarly, since he possesses no ownership or *zekhuyot*, he does not merit a double portion of the profits. However, if and when he decides to demand his double portion (*bekhor she-micha*) or to sell his double portion (an implicit demanding of rights), he receives ownership of the double portion and correspondent percentages of the accrued profits. This is an extremely novel definition of the *bekhor* portion and a very rare dynamic, but one which reconciles the conflicting *halakhot* of the *bekhor*’s second portion.

Of course, many *Rishonim* take the *gemara*'s assertion that a *bekhor* enjoys ownership prior to distribution quite literally. They are forced to reinterpret the *gemara* which denies double profits to a *bekhor* because his acquisition is delayed until the stage of *chaluka*. Even though he acquires ownership over a double percentage of the estate, he will not merit double profits.

A second question that this position invites concerns the ability of a *bekhor* to cancel that ownership without an act of *kinyan* or EVEN a lesser but unmentioned act of *mechila*. Although the *gemara* discusses whether renunciation of one double portion constitutes overarching renunciation, it is clear that a *bekhor* can renounce without a formal act of *kinyan*. In fact, the *gemara* describes this renunciation as being a product of the term “*matana*” used to describe a *bekhor*. Even those who dissent and award a *bekhor* prior ownership of his double portion agree that he can unilaterally erase this double portion without an act of *kinyan*. Evidently, the Torah (by phrasing his double portion as a *matana*) grants him unique halakhic empowerment. Unlike other owned items, which must be rerouted through *kinyan*, this actual ownership can be arbitrarily cancelled. If this cancellation is unique and can occur even AFTER OWNERSHIP has been acquired, perhaps it can also be performed PRIOR to the development of any rights or potentials – at stages under which normal *mechila* or *siluk* (the cancellation described earlier) would be inoperative.

This is precisely the position of the *Ketzot Ha-Choshen* (278:3), who claims that the *bekhor* can renounce his *bekhor* rights during his father’s lifetime. At this early stage, he possesses absolutely NO rights and no potential to acquire rights (unlike a husband who can advance the relationship to the stage of receiving rights). The *bekhor* does not possess the ability to (legally) dispose of his parent and merit his double portion. He doesn’t even possess the potential. Yet the *Ketzot* claims that his renunciation would be successful. After all, if he can cancel erstwhile ownership without classic acts of *kinyan*, he can similarly cancel BEFORE any rights or abilities have materialized. The *Ketzot* does not describe the MECHANISM of this process, but he does draw attention to its unique and unprecedented dynamic.

Perhaps the *bekhor*’s status does not have to do with rights that have emerged or ownership which has fully developed, but rather his PERSONAL status as a *BEKHOR*. Indeed, if he were to address the ownership, he would require acts of *kinyan* or *mechila* and could only initiate the process after his father's death and the first emergence of those rights. However, as he is renouncing his status, he may be able to disclaim his identity at various stages in which operating upon financial holdings may be impossible. Of course, the language of the *pasuk* DOES suggest that he is disclaiming ownership; by designating the double portion as a *matana*, the Torah grants him right of refusal of lands. It appears as if the mechanics of acquiring the land are roughly similar to those of acquiring a *matana* – granting conventional refusal of rights through the normal apparatus of *kinyan* and *mechila*. However, the *gemara* that claims that he can disown EVEN AFTER OWNERSHIP HAS BEEN ACHIEVED suggests that a different mechanism is responsible for his ability to nullify his double portion, one which does not conform to standard patterns.