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Guardianship in Athenian Law: New Evidence (Dem. 27-29, Lys. 32, Hyperid. Against Timandros)

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GRAECA TERGESTINA
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GRAECA TERGESTINA

STORIA E CIVILTÀ

Studi di Storia greca coordinati da Michele Faraguna

LEGAL DOCUMENTS IN ANCIENT SOCIETIES

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Legal Documents in Ancient Societies VI

Ancient Guardianship: Legal Incapacities in the Ancient World

Jerusalem, 3-5.11.2013

edited by
Uri Yiftach
Michele Faraguna

EUT EDIZIONI UNIVERSITÀ DI TRIESTE

In Memoriam Dieter Nörr
(1931-2017)

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URI YIFTACH is an associate Professor of Classics at Tel Aviv University. His research focuses on the study of legal and administrative papyri from Ptolemaic, Roman and Byzantine Egypt, economic history, the history of the state, literacy, circulation of information in the ancient world, and others. Uri Yiftach is the founder of the research group *Legal Documents in Ancient Societies,* founded in 2007.

List of Abbreviations

ANRW	*Aufstieg und Niedergang der römischen Welt*, ed. H. TEMPORINI, Berlin-New York 1972-.
RE	*Real-Encyclopädie der klassischen Altertumswissenschaft,* A. PAULY, G. WISSOWA & W. KROLL, eds., Stuttgart 1893-1980.
AC	*L'Antiquité Classique*
AncSoc	*Ancient Society*
APF	*Archiv für Papyrusforschung*
ASJ	*Acta Sumerologica. Bulletin of the Japanese Sumerological Society*
BASP	*Bulletin of the American Society of Papyrologists*
BCH	*Bulletin de Correspondance Hellénique*
BIAO	*Bulletin de l'Institut Français d'Archéologie Orientale*
BICS	*Bulletin of the Institute of Classical Studies*

BIDR	*Bollettino dell'Istituto di Diritto Romano*
C&M	*Classica & Mediaevalia*
CE	*Chronique d'Egypte*
JESHO	*Journal of the Economic and Social History of the Orient*
JEA	*Journal of Egyptian Archaeology*
JJP	*Journal of Juristic Papyrology*
JRS	*Journal of Roman Studies*
MH	*Museum Helveticum*
RA	*Révue Archéologique*
REG	*Revue des Études Grecques*
REL	*Revue des Études Latines*
RHD	*Revue d'Histoire du Droit*
RIDA	*Revue Internationale des Droits de l'Antiquité*
RIL	*Rendiconti dell'Istituto Lombardo*
SCO	*Studi Classici e Orientali*
TAPhA	*Transactions and Proceedings of the American Philological Association*
TR	*Tijdschrift voor Rechtsgeschiedenis*
UF	*Ugarit Forschungen*
ZPE	*Zeitschrift für Papyrologie und Epigraphik*
ZRG RA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*

Foreword

URI YIFTACH

The sixth meeting of the research group Legal Documents in Ancient Societies (LDAS)—held at and under the auspices of the *Israel Academy of Sciences and Humanities*, and generously sponsored by the *Israel Academy of Sciences and Humanities* and by the *Emil und Arthur Kießling Stiftung für Papyrusforschung*—was dedicated to the subject "Guardianship: Legal Incapacities in the Ancient World". The LDAS group was created in order to bridge disciplinary gaps, and promote intellectual exchange between scholars studying documentary sources in different ancient civilizations, primarily the Ancient Near East, Ancient Egypt, and the Greco-Roman world; this was the objective of the sixth meeting as well.

The papers delivered at the meeting—and subsequently published in this volume—do not offer complete coverage of the phenomenon under investigation: in particular, the conceptual formation of guardianship as a legal institution took place in the Archaic period—a period which is not represented at all in the following discussion. For other periods and regions, in particular the Ancient Near East, we offer only a cursory analysis focusing primarily on the documentation from Emar. However, with the inclusion of a paper on Jewish law, LDAS has now broadened its horizons taking into consideration most key literary and documentary sources stemming from the ancient world.

The term «legal incapacity» is somewhat equivocal, denoting either an incapacity whose origin is legal—an example from the Roman world would be the law prohibiting non-citizens from owning *res mancipi*—or the incapacity of an individual to undertake actions of legal import.[1] This volume focuses on the latter, much broader rendering.

What are the circumstances that render a person incapable of undertaking a legal act? Some are natural: in antiquity, due to the relatively low life-expectancy orphanhood was commonplace everywhere; children bereft of their parents needed protection and, if they owned property, their economic interests would also have needed to be served. The same applied to the elderly. Some impediments were social, particularly those relating to legal activity undertaken by women. Others were a matter of personal status: legal rights were *de iure* not permitted to slaves. Finally, some rights and acts were allowed only to a restricted, well established group of persons—e.g., citizens—and could not be undertaken by anyone not possessing that status.

Protecting underage orphans is a universal problem, and the solution in most cases is social rather than legal: in extended families, for example a domicile of two siblings and their children, the surviving sibling will automatically assume custody of the children of his brother in the event of the latter's death. Such an arrangement is especially unproblematic if the children do not become owners of extensive properties on the death of their father. Moreover, if the mother is capable of acting legally, she is the obvious candidate to assume custody over her children. There is little need to define more closely the duties of the «guardian», or to put him under close scrutiny. However, even under these circumstances, some terminology may evolve, especially if one wishes to depart from the default practice: such is the state of affairs in Emar during the second millennium BCE, as well as in pre-Ptolemaic Egypt.[2]

Yet there is one sphere of activity where guardianship *stricto sensu*—i.e., in the sense discussed in this book—does seem to be universal or at least common outside the Greco-Roman world. Wherever the dynastic principle prevails, a child may become king if his father dies prematurely. The actual administration is then entrusted to a person of confidence who could accumulate considerable influence and, in extreme instances, even become king himself. This is the case both in Roman Armenia, as well as in Macedonia and Ptolemaic Egypt. Sparta offers further examples of underage kings being supported by a guardian.[3]

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1 See in general KASER 1971 32-36, 275-289.

2 Depauw, pp. 52-54; Fijałkowska, pp. 34-38.

3 Cf,. e.g., Plut. *Lyc*. 3.

Let us now consider a further piece of evidence: *Odyssey* 2.226-227. Before Odysseus had left Ithaca for Troy, he entrusted his *oikos* with his friend Mentor, "so that he, the elder, will be obeyed, and will keep everything intact".[4] At first sight, Odysseus would appear to be motivated by the same dynastic consideration: he is not dead but absent, and his son Telemachos is just an infant. Mentor thus represents Telemachos in the assembly, where he formally demands the suitors' departure.[5] Naturally falling within the sphere of competences of a guardian are the activities that Athena assumes, taking Mentor's disguise: when Telemachos sets off to search for his missing father, Athena accompanies him instructing him on how to conduct himself in the meeting with Nestor in Pylos, the first station of Telemachos' journey.[6]

It may, however, be misleading to connect the Mentor episode with the dynastic principle in the sense mentioned above. Mentor is entrusted with the administration of the *oikos*, that is the private household of Telemachos, and it is in this capacity—i.e. the need to protect the *oikos* against financial ruin—that he moves with Telemachos against the suitors.[7] As the same problem would have to be addressed in the case of all *oikos* holders that set off to Troy, guardianship, I argue, must have been commonplace at all levels of the society narrated in the Homeric *epos*.

The appointment of Mentor as guardian thus underscores a fundamental trait of Greek family household: the Greek *oikos* consists of husband, wife and their offspring; the husband is the owner of the family estate and the wife is not, and in principle, has no capacity to undertake any significant activity in the public sphere. When the husband dies the property devolves upon the children who also become the heads of an/the *oikos* regardless of their age. However, in the example of the *Odyssey*, Telemachos is just a child and it becomes necessary to entrust the operation of the *oikos* to a third party. The concept of the guardian—the *epitropos*—embodies the institutionalization of this function. In a sense, what we have here is the dynastic principle applied to the individual household.[8]

With the formation of the city-state, the *polis* assumed responsibility for the preservation of the *oikos*. This responsibility, evident in all well-documented

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[4] Hom. *Od*. 226-227: οἱ ἰὼν ἐν νηυσὶν ἐπέτρεπεν οἶκον ἅπαντα, | πείθεσθαί τε γέροντι καὶ ἔμπεδα πάντα φυλάσσειν.

[5] Hom. *Od*. 2.224ff.

[6] Hom. *Od*. 2.267ff.; 2.401; 3.22ff; 3.240ff.; 4.654ff.

[7] E.g. Hom. *Od*. 1.245-250, 368-375, 397-398; 2.47-48.

[8] The link between royal and private guardianship is cautiously treated here by Noah Kaye. The subject needs further study.

poleis—both real and fictional—manifests itself in a wide array of institutions and procedures aimed at securing the well-being of the weaker members of the *oikos*, as well as its very existence.[9] With high mortality rates, orphanhood was a chronic problem requiring enduring care. In the case of Athens, one of the *archontes*, the *archon eponymos*, who had general responsibility for familial institutions, was also in charge of appointing guardians and maintaining close scrutiny of their activities; these activities culminated in a written account submitted by the guardian after the completion of his duty. Special scrutiny was also necessary if the guardian decided or was compelled to lease out his ward's estate to a third party.[10]

The intricate system present in fourth century Athens was predicated not only on the existence of a competent administrative apparatus, but also on advanced literacy and book-keeping habits. As demonstrated by Gerhard Thür, accounts connected to the activities of the guardian were key pieces of evidence whenever matters came to court, and could be subject to bias presentation due to the inability of the dicasts to study the contents of the account: such problems were symptomatic of a judicial system accustomed to relying on oral evidence (viz. witnesses) in an increasingly document-oriented world.[11]

Sources on Greek law from the Classical period are *polis*-oriented; but this was no longer entirely the case in the Hellenistic period. In Greek papyri from Egypt we find evidence for the legal practices of Greek immigrants settled outside of the *polis* environment. It has been argued repeatedly that there was no '*Oikalsystem'* outside the *polis*; there would thus have been little need for the institutions intended to secure the existence of the *oikos,* nor for the administrative and documentary mechanisms involved in their functioning. These changes account for the complete absence of references to the daughter heir, a pan-Hellenic institution in the world of the *polis*, or to the practice of *engyêsis*, well known particularly from Athens.[12] However, this is *not* the case with guardianship; both the guardian of women (*kyrios*) and that of orphaned children are well attested, and both are scrutinised as heavily as they would have been in the world of the *polis*.[13] This is not surprising. Many legal practices in Ptolemaic and Roman Egypt were, after all, based on concepts and institutions which had evolved in the world of the *polis*. The fact that not every institution found in the few well documented *poleis* was put into use in Egypt

[9] FERRUCCI 2006.

[10] See in particular Maffi's and Thür's papers in this volume.

[11] PRINGSHEIM 1955.

[12] Cf., e.g., WOLFF 1939, 164-171; MÉLÈZE-MODRZEJEWSKI 1983, 53-60.

[13] See, in particular, Kaltsas' and Kruse's papers in this volume.

should not suggest a complete, across-the-board rift. It would undoubtedly have been possible for the Macedonian rulers and Greek settlers to introduce certain elements of the *polis* matrix while discarding others.

The reception of guardianship in the Hellenistic world is extremely well documented, both on papyrus and in literary sources;[14] indeed in the case of Egypt, there were few, if any private legal institutions under such a close scrutiny by the state. Once the system of liturgies—i.e. compulsory public service by private individuals—had started to evolve in the first century CE, the mechanisms relating to the appointment, supervision, and exemption from service of guardians are assimilated with those employed in the case of public liturgies. This is hardly accidental: guardianship was viewed as a sort of liturgy, or *munus*, and quite possibly the only one that did not affect state interests directly.[15]

Why did the state maintain interest in preserving the institution of guardianship? During the course of the Classical period, the role of the guardian had come about as a result of several factors: small families in which the father was the sole owner of the estate; the devolution of the estate upon the children after the father's death; the mother's incapacity to take care of her children in the public sphere; the interest of the *polis* in the preservation of the individual households, the *oikoi*. We do not find evidence for an '*Oikalsystem*' in Egypt, but the other three elements—nuclear family households,[16] the father's right of ownership, and the devolution of the estate upon the children[17]—are present. Furthermore, in both the Hellenistic and Roman periods, one may note an ongoing effort to protect and define property rights;[18] the process of securing the children's inheritance through the appointment of a guardian would certainly fit well with such policies.

Throughout the Hellenistic period we notice two tendencies which move perhaps in opposite directions. On the one hand, there is an attempt on the part

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[14] For the latter here in particular Buraselis, pp. 69-72.

[15] Chevreau, p. 191; Kruse, p. 75.

[16] According to BAGNALL-FRIER 1994, 58-64, 54.8 % of the census declarations that came down to us from Roman Egypt exhibit a conjugal family, consisting of parents and their offspring. Very frequently, children stay with their parents after marriage, thus creating a complex residential pattern with parents, children, and multiple grandchildren. The existence of this complex pattern may explain why in many cases the appointment of an official guardian is avoided, and why, in others, the guardian is appointed from among the closest next-of-kin. Cf., e.g., *BGU* I 115 I = *WChr* 203 (189 CE, Ptolemais Euergetis).

[17] KRELLER 1919, 141.

[18] E.g., WOLFF 1978, 216. This policy culminates in the Roman period in the creation of the acquisition archive, the *bibliothêkê enktêseôn*, in the mid first century CE. Compare, e.g., JÖRDENS 2010, 288-289.

of the state to reinforce its control over guardians through the introduction of ever stricter measures regarding their appointment: thus, for example, in the third century CE—that is after the introduction of the *constitutio Antoniniana,* which bestowed citizenship on all inhabitants of the Roman empire—the *tutores legitimi* and *testamentarii*, increasingly tended to make a formal appeal for appointment as guardians, an appeal that was unnecessary under the precepts of Roman law;[19] we may also note how the factors which might render an individual ineligible to assume the guardianship become more clearly defined.[20]

But there is another side to the coin. As we have stated earlier, some of the incapacities that required guardianship were natural: no infant would be qualified to manage his own affairs until he had grown up. However, no mental incapacity would debar a woman, or a slave from successfully managing their own affairs. There were, accordingly, challenges against formal restrictions as both slaves and women sought various means—in particular informal representation by others—that would allow them to undertake economic and legal activity.[21] In the case of women guardians, it was natural that they would wish to take an active part in the upbringing of their own orphaned children, and would thus manage the affairs of these orphans alongside, or instead of an external male guardian. In cases involving extended families, the family members tended to find informal protection adequate, and wished to avoid the time-consuming and costly process of applying for formal appointment as guardian for as long as they could, even at the risk of breaking the law.[22] As we discover from court verdicts, responses, and imperial constitutions, the state occasionally tried to suppress such conduct but would occasionally tolerate some form of alternative solutions, and occasionally even give way completely.[23]

In geographic terms, this volume begins with a discussion of Near Eastern legal practice, specifically that of Emar. It concludes, centuries later, with Radzyner's discussion of Jewish law in the Roman and Byzantine period in roughly the same region. And what a remarkable change! The Halachic term אפוטרופס is no more than an Aramaic transliteration of the Greek *epitropos*, and the mechanisms connected with this institution leave no room for doubt:

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[19] *P.Diog*. 18, with *P.Harr.* I 68 (225 CE, Philadelphia); *P.Tebt*. II 326 = *MChr* 325 (266/7 CE, Tebtynis) and Kruse, pp. 181-182.

[20] Chevreau, pp. 197-201.

[21] On the former see E. Cohen, pp. 132-136, on the latter E. Jakab, pp. 209-210.

[22] Kruse, pp. 179-180; Radzyner, pp. 254-256.

[23] Gagliardi, *passim*.

Greek guardianship, conceived under unique circumstances in the world of the *polis*, was absorbed into Hellenistic legal practice, whence it found its way into the decidedly non-Greek system of Jewish law. One need only compare Radzyner's discussion with those of Maffi, Kruse and Chevreau to witness how great the affinity is. One could, of course, also study guardianship in other Near Eastern contexts, notably that of Syro-Roman law book; this was one of the original objectives of our meeting.

The volume is introduced with a paper written by Nili Cohen, a specialist in Modern Law. The duties and obligations of parents towards their children generated at the very dawn of human existence, but were not conceptualized—certainly not in writing—either at that stage, nor even throughout Antiquity. The duties of the guardian, however, were quite clearly defined. When those who codified modern Israeli law wished to give a detailed account of parental duties, they drew upon the characteristics which had defined the nature of guardianship since earliest antiquity.

I would like to thank all those friends without whom the meeting—and this volume —would have never been realized: Professor Benjamin Isaac and Professor Hans-Albert Rupprecht, without whose help this project would never have materialized; Ms. Galia Finzi, whose hospitality and kindness was highly appreciated by all the participants in our meeting; Dr. Nicola Reggiani, who carefully read, and assisted us in the edition of this volume; Professor Eva Jakab, Mark Depauw and Sophie Démare Lafont who, as co-members of the steering committee of LDAS, helped bring together the wonderful group of scholars whose contributions make this volume. Last but certainly not least, I would like to thank Michele Faraguna, who, in addition to being a member of LDAS, joined as co-editor of this volume and assisted me in bringing this project to competion. I thank of course all the participants in our meeting; the sixth meeting of LDAS was both a pleasant and extremely enriching experience.

Guardianship in Athenian Law: New Evidence

(Dem. 27–29, Lys. 32, Hyperid. Against Timandros)

GERHARD THÜR

ABSTRACT

The paper focuses on three guardianship cases from 4th century Athens: the well known one of young Demosthenes (or. 27–29), and those presented in Lysias or. 32 and in the recently published fragment of Hyperides' speech Against Timandros held for a former ward Akadēmos. In all of them former guardians are called to account through dikē epitropēs. *They are liable for "holding in their hands" (*echein*) the value of the wards' assets. From Hyperides one gets new information about* misthōsis oikou, *leasing out the ward's estate, whereby the guardian can avoid rendering account. In all three speeches the wards' mothers are players in the background, and the speechwriters use the rhetorical technique of 'isolating the facts.'*

I will focus on two topics: first on the administration of the wards' inherited properties and the methods to safeguard them;[1] second on the rhetorical techniques the wards used in their court speeches when calling their former guardians to account. Both I will do in three case studies: (I) the case of young Demosthenes, his speeches no. 27–29; (II) that of the young plaintiff in Lysias 32, and finally (III) the case Akadēmos *vs*. Timandros preserved in a quite recently published fragment of Hyperides.

I.

My first example is the young Demosthenes' lawsuit against one of his former guardians, Aphobos (from 364/3 B.C.), well preserved since antiquity and discussed in scholarship for centuries. The claim was a *dikē epitropēs* for the value of Demosthenes' father's assets, of which Aphobos had assumed liability for one-third. Despite his youth, Demosthenes addressed the court in person. As his bill of complaint and a statute demonstrate, in Athenian law the guardian is presumed to "have in his hands" (ἔχειν)[2] the value of the assets he took over at the beginning of his function less expenditures and losses.[3] By his will Demosthenes' father, also named Demosthenes, appointed three guardians: his sister's son Aphobos, his brother's son Demophon and an old friend of him, Therippides; and he left behind two workshops with over 30 slaves, money lent at interest and considerable movable goods to a total value of about 14 talents. After ten years of guardianship Demosthenes numbered the value "in the guardians' hands" including accumulated income 30 talents whereof he charged Aphobos ten. Demosthenes won his case; I think, not because of his exact calculation, but rather due to his excellent speeches. It was quite impossible for the 401 Athenian citizens sitting at court to check all the figures of the account without inspection of a written record; they had to rely on the speaker's words and on witness depositions. Furthermore, even if some of the judges doubted about one or the other figure they only could choose between

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[1] Generally on guardianship see, e.g., HARRISON 1968, 99–121.

[2] Dem. 29.31: ἔστιν οὖν τοῦ μὲν ἐγκλήματος ἀρχή 'τάδ' ἐγκαλεῖ Δημοσθένης Ἀφόβῳ· ἔχει μου χρήματ' Ἄφοβος ἀπ' ἐπιτροπῆς ἐχόμενα, ὀγδοήκοντα μὲν μνᾶς, ἣν ἔλαβεν προῖκα τῆς μητρὸς κατὰ τὴν διαθήκην τοῦ πατρός.' ("So this is the beginning of the charges: 'Demosthenes makes the following charges against Aphobos. Aphobos has money of mine which he held as a guardian: 80 minas, which he received as a dowry for my mother in accordance with my father's will.'")
Dem. 29.36: περὶ μὲν γὰρ ὧν καθυφεῖκας, νόμος ἔστιν, διαρρήδην ὃς κελεύει σ' ὁμοίως ὀφλισκάνειν ὥσπερ ἂν αὐτὸς ἔχῃς· ("With regard to what you allowed to be misappropriated, there is a law which explicitly states that you owe it just as if you had kept it yourself.").
All Demosthenes translations from MACDOWELL 2004)

[3] BECKER 1968, 68–78.

either party's estimate: the plaintiff, Demosthenes, successfully estimated ten talents and the defendant, Aphobos, counter-estimated only one talent. So it makes no sense re-calculating the items listed in the speech 27.18–39, carefully tabulated by MacDowell (2004: 20) in his Austin translation.

The model chosen by the guardians, administering young Demosthenes' estate by themselves, held both chances and risks for the ward. On the one hand all returns produced by the guardians would have devolved on the ward; on the other hand—and this was Aphobos' argument—also the loss fell on the ward; and we do not know how the economic situation of the business had developed during the ten years, especially wanting its efficient boss. Therefore, when guardians administered the estate by themselves disputes concerning their accounts frequently followed.

To avoid this situation, Demosthenes senior—unavailingly—had ordered another model shortly mentioned in Dem. 27.58: leasing out the business.[4] In this case the leaseholder had to pay annual interest to sustain the wards and, after their coming of age, deliver the capital he had taken over. The consequences of this option were: with the value of the enterprise fixed, on the one hand the ward had the guarantee to get his money—not the objects—when coming of age. (Demosthenes only speaks of paying money, not of returning the enterprises.) On the other hand, the leaseholder had the chance to make much more profit than the modest interest he had to pay to sustain the ward. But the leaseholder also took the full risk of any loss, with his property encumbered to the ward. After leasing the estate out to a third person—sometimes the guardian was allowed to be leaseholder himself—, the guardian did not have any problems of being called to account. In Athens the general view was that letting an enterprise was the safer option for the wards. Later I will return to the questions how the leasing took place and how—according to Demosthenes 27.59—the capital could have been doubled in six years.

In addition to the few words generally spoken about the two models of administering the wards' estate the speeches *Against Aphobos* also give some information about guardianship in the broader sense, about three more persons legally depending from other ones: the slave—or freedman—Milyas, Demosthenes' mother Kleoboule, and his sister, two years younger than him. Dealing with these three persons I will examine the—successful—rhetorical tactics used by young Demosthenes.

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[4] Dem. 27.58: τούτῳ γὰρ ἐξῆν μηδὲν ἔχειν τούτων τῶν πραγμάτων, μισθώσαντι τὸν οἶκον κατὰ τουτουσὶ τοὺς νόμους. ("He could have avoided all this trouble if he'd leased the estate in accordance with these laws.")

I will start with the dispute about Milyas, the foreman of the knife-workshop, inherited from Demosthenes senior.[5] Previous to the lawsuit, through a challenge (*proklēsis*) Aphobos, the defendant, had demanded this man from Demosthenes junior to be questioned under torture first about the income of the workshop of 30 minas (27.19–23, 28.12, 29.50), and then about the assertion that Demosthenes had already obtained ten talents, the whole amount he was claiming (27.50–52, in 29.30 only indirectly referred to). Milyas was requested to confirm or deny that Demosthenes had received all the money. Such challenges for torturing slaves by *basanos* were, as far as we know, tactic maneuvers.[6] In no way Demosthenes would have agreed to torturing, mainly with uncertain outcome, the man faithfully serving the family for years. However, declining the challenge gave the opponent a strong argument that his statement was true. So Demosthenes replied that Milyas was no more a slave but rather a free man and therefore no more subjected to torture. And he produced a witness deposition that Aphobos himself by *homologia* "had acknowledged that Milyas was a free man set free by Demosthenes' father" (quoted in Dem. 29.31;[7] most probably Demosthenes had produced this witness deposition in 27.22). However, in Athens testamentary manumissions were not valid unless an act of publicity occurred, which apparently had not yet happened.

How did Demosthenes handle this delicate situation? By «isolating the facts». Through this rhetorical technique speechwriters disjoined facts that belonged together and, by using psychological links, combined individual aspects of an issue that were true *per se*. Thereby, out of a set of true facts the logographers shaped an overall impression that was falsified, but met the needs of their clients' cases.[8] In his first speech *Against Aphobos* young Demosthenes did so in the following way: in section 9 he seems to be uncertain about the figure of 32 or 33 knife-maker (slaves)—a feigned uncertainty regarding Milyas. In 19 he first introduces Milyas by name and as "our freedman" and depicted him as manager with full authority. In 22, eventually, without saying a single word about Aphobos' *proklēsis*, he most probably produces the witness testimony about Aphobos' *homologia*. Independently, in section 50 he refers to an "unreliable" *proklēsis*, this time without mentioning the name of Milyas. In this way the plaintiff undermined foreseeable conclusions from the *proklēsis* he had rejected, without saying a single word about the *basanos*,

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5 For details see THÜR 1972 = 1987.

6 THÜR 1977, 233–261.

7 Dem. 29.31: μαρτυροῦσιν παραγενέσθαι … ὅτε Ἄφοβος ὡμολόγει Μιλύαν ἐλεύθερον εἶναι ἀφεθέντα ὑπὸ τοῦ Δημοσθένους πατρός.

8 THÜR 1977, 256.

which the defendant had demanded. From Demosthenes' first speech on, over the whole *dikē epitropēs* the judges would have remembered Milyas as a free man, not to be subjected to torture.

Another topic of this speech is the case of Kleoboule, Demosthenes' mother; as usual when publicly alluding to honest ladies, in none of the five speeches concerning guardianship she is called by her name. On his deadbed her husband, Demosthenes senior, gave her in marriage to Aphobos—in Athens a usual provision in wills—with a dowry of 80 minas and granted his post mortem son-in-law the house for residence (27.4). Aphobos took up residence and, allegedly, received the full dowry (27.16) but "refused" to marry Kleoboule. In this sense the audience must have understood the words: μὴ γήμαντος δ᾽αὐτοῦ τὴν μητέρα τὴν ἐμήν (27.17). Since Demochares, the husband of Kleoboule's sister Philia, was involved in the case we might come to the contrary result. As MacDowell in his Austin translation correctly notes,[9] Kleoboule left her marital home and moved—with her children—to the house of her sister. Did she, Kleoboule, refuse to marry Aphobos? We should think so. Anyway, in court Demosthenes concedes that "a little disagreement" had taken place between Aphobos and Kleoboule (27.15). Due to the fact that Demochares, being only Kleoboule's brother-in-law, was not her *kyrios* and her son Demosthenes was underage, there was no close relative to administer her legal interests. Therefore Aphobos, constantly pretending that he was willing to marry the widow, had good arguments for living in Demosthenes' house keeping Kleoboule's dowry and not providing her with maintenance, at least until he finally had married another woman (27.15). So we may ask: did Kleoboule incite her son to bring Aphobos to trial first, before trying the other two guardians? Most probably she did. Foxhall, for example, calls Kleoboule the «real heroine of this social drama».[10] Surprisingly, in his *dikē epitropēs* against Aphobos, the speeches 27 and 28, Demosthenes does not dare praising his mother that "she passed her life in widowhood for her children." He does not do so until his speech held in defense of his witness Phanos (Dem. 29) charged for perjury in a following trial, the *dikē pseudomartyriōn*.[11] Here he addressed another law court, whose judges were not aware of the speeches held in the prior trial. Assumingly, Aphobos might have violently slandered Kleobule in his defense against Demosthenes' *dikē epitropēs*—in vain as it turned out.

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9 MacDowell 2004, 25 n. 24, concerning 27.14.

10 Foxhall 1996, 144.

11 Dem. 29.26: ... οἳ μόνοι παῖδές ἐσμεν αὐτῇ, δι᾽ οὓς κατεχήρευσε τὸν βίον ("... being her only children, for whom she passed her life in widowhood").

In the first speech against Aphobos there is also another instance of «isolating the facts»: emotionally the whole speech is structured around Kleoboule's dowry of 80 minas. From this point Demosthenes started his account of Aphobos' misdeeds (27.13–18), and about this dowry the last words were spoken (27.69). Imploring the judges for pity, Demosthenes complained about another dowry too: if Aphobos was not condemned in this trial he, Demosthenes, would never be able to spend the 120 minas his father had bequeathed as dowry (*proix*) to his, the younger Demosthenes', sister (27.65, 29.43). Eventually the judges must have forgotten that the co-guardian Demophon, who was provided to marry the girl when she came of age, had cashed the sum in advance (mentioned just at the beginning of the speech, 27.5). Nevertheless Demophon refused to marry her. However, does this item concern Aphobos? If the sister's dowry really was thus important, why did Demosthenes not bring Demophon to trial first? Demosthenes may have trapped the judges by the fact that usually the mother's *proix* passed to her daughter.[12] *Proix* was an ideal emotional topic to frame sober business accounts. And Demosthenes' teacher Isaios knew how to deal with inheritance cases.

II.

My second case is the *dikē epitropēs* of another young man against his former guardian, Lysias 32, *Against Diogeiton* (a bit earlier, from 400/399 B.C., but only partly preserved). Being called up to serve as a hoplite Diodotos appointed his brother Diogeiton by will to be guardian of his three children, two sons and one daughter. Diodotos died in battle and eight years after the elder son came of age. The young man charged Diogeiton six talents and 20 minas. Because of his own inexperience his brother-in-law spoke for him as *synēgoros* (supporter); their names are not preserved. Again, I will omit recalculating the items listed in the speech. One may check the table inserted by Todd in his Austin translation.[13] Also this claim is based on the allegation that the former guardian "has in his hands" the wards' property (ἔχειν, Lys. 32.2, 20 and 28).[14] Diogeiton had agreed (*hōmologēsen*) having taken over the value but he deducted huge expenses on the children and probably also financial losses.

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[12] THÜR 1992, 127.

[13] TODD 2000, 320.

[14] Lys. 32.2: Διογείτων ἃ φανερῶς ἔχων ἐξηλέγχετο; 20: τὰ δὲ τελευτῶν ὁμολογήσας ἔχειν, and 28: ὅσα τελευτῶν ὡμολόγησεν ἔχειν αὐτὸς χρήματα.

Parallel to Dem. 27.58[15] we find the suggestion that the guardian should have rented out the property, thereby ridding himself of many troubles.[16] The speaker continues advising the alternative purchase of land in order to get steady income for bringing up the orphans; thereby the guardian might also maintain the value of the estate. From this text one can infer that *misthōsis oikou* does not mean renting out the "dwelling house" or agricultural land or the whole estate, but rather a commercial enterprise with all its chances and risks. In Demosthenes' case the two factories were meant. Therefore his calculating the profit at a fixed rate per annum seems to be economically inadequate.

Diodotos' ran the highly risky business of maritime trade (*emporia*, 32.4) and like Aphobos and his co-guardians also Diogeiton administered the children's estate by himself. However, in this case the plaintiff calculated the value of the property in a different way, claiming nothing in interest payments. The speaker relies on an account book (*biblion*, 32.14) the children's mother allegedly came across by chance. And out of the statement the speaker arbitrarily picks up the guardian's debits and credits fitting best his arguments. Like Demosthenes later on, the speaker had to prove every debit and refute every credit by witness depositions. This was the consequence of the Athenian administration of justice. A panel of several hundreds of lay judges was not able to scrutinize documents. So the result of a case lastly depended on rhetorical devices; for the debits Diogeiton's very own acknowledgment (*homologia*, 32.20, 28)[17] was essential, only the expenses and losses, the guardian's credits, were in dispute.

I think the plaintiff used the method of picking up isolated facts also for accounts kept by third persons. In his defense Diogeiton claimed to have contributed 48 minas in a joint trierarchy with a certain Alexis, whereof he charged half of the sum, 24 minas, to the boys (32.24). After continuing with a different story the speaker returns to the trierarchy in 32.26: in the records of the *syntriērarchos* Alexis he found an entry that Diogeiton contributed only 24 minas and, therefore he inferred, Diogeiton has charged the costs of his whole trierarchy to the boys. Could there not have been two different entries at different positions, each of 24 minas, one concerning the boys and the other one the guardian? Bearing testimony to only one of them (32.27) was not perjury, and nobody was allowed to question or cross-examine the witnesses. Only the defendant could object to them within his speech, but he must have penetrated the trick before.

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[15] See above, n. 4.

[16] Lys. 32.23: … μισθῶσαι τὸν οἶκον ἀπηλλαγμένον πολλῶν πραγμάτων.

[17] See above, n. 14.

As indirect contribution to Legal Document Studies the speech allows some insight into the practice of record keeping of an Athenian businessman. When dealing with Diogeiton's accounts the speaker referred to a sophisticated way of defrauding the wards (32.25): Diogeiton invested two talents in cargo to be shipped to the notoriously dangerous Adriatic. When it was leaving he told the boys' mother that the risk (*kindynos*) was theirs. But the goods purchased in return got to Athens safely and doubled in value; so immediately he declared the cargo was his own.[18] From the high profit rate one can infer that Diogeiton invested the children's or his own assets directly in return sea trading and not in granting a sea loan[19]—even the high interest of such a loan would not have doubled the principal. Technically Diogeiton kept at least two accounts, one for his own business and another one for that of the wards. He waited for entering the expense until the outcome of the risky job was clear.[20] In this way he easily could shift the profit to his own account and the loss to that of the wards.

Up to now the children's mother, Diodotos' widow—as usual never called by her name—has been mentioned sometimes. Like Kleoboule in Demosthenes' case she played a central role in the story.[21] Diodotos had married his niece, the daughter of his brother Diogeiton. So Diogeiton, the guardian, in one person was the children's uncle from their father's side and their maternal grandfather; and Diodotos' widow in one person was the children's mother and the guardian's daughter. Since her father, Diogeiton, had married a second time she—daughter out of his first marriage and Diodotos' widow (also remarried now)—could not bear that her (probably young) stepmother's children in the new family of her wealthy father were much better off than her own ones (32.17). By isolating the facts Lysias concealed the central role of the children's mother: on the one hand, he most effectively placed the part of the speech slandering the unfaithful guardian Diogeiton in the mouth of Diogeiton's own daughter (32.12–17); on the other hand, he excused her for not being accustomed to speak in front of men (32.11); so her appearance seemed to be an exceptional one. Later, in 32.14, we hear the implausible sto-

[18] Lys. 32.25: καὶ ἀποπέμψας εἰς τὸν Ἀδρίαν ὁλκάδα δυοῖν ταλάντοιν, ὅτε μὲν ἀπέστελλεν, ἔλεγε πρὸς τὴν μητέρα αὐτῶν ὅτι τῶν παίδων ὁ κίνδυνος εἴη, ἐπεὶ δὲ ἐσώθη καὶ ἐδιπλασίασεν, αὑτοῦ τὴν ἐμπορίαν ἔφασκεν εἶναι. ("He also sent to the Adriatic a merchant ship with cargo valued at two talents. When it was leaving, he told their mother that the ride was the boys' responsibility, but when it arrived and doubled in value, he claimed that the cargo was his own." — Translation TODD 2000).

[19] So ISAGER & HANSEN 1975, 27.

[20] JAKAB 2007, 113.

[21] TODD 1993, 202–206.

ry that the children by chance came across the account book allegedly thrown away. Eventually, in 32.25, the audience is told that Diogeiton did inform his daughter about the risky Adriatic business. Putting all these facts together one can infer that the children's mother, maybe differently from Kleoboule, all the time over kept an eye on the administration of the property.

III.

The third case, finally, is a *dikē epitropēs* of a young man Akadēmos against his former guardian Timandros, Hyperides *against Timandros* (second half of 4th century B.C.). Recently a fragment of 64 lines of this speech otherwise lost has been deciphered in the famous Archimedes Palimpsest.[22] From this speech we get some new evidence, foremost on leasing out the wards' property and how to control the guardian's administration.[23] The facts are: an Athenian couple died and left behind four orphans, two boys and two girls. Surprisingly a guardian living in Lemnos was appointed, Timandros. He was an Athenian citizen and most probably *klērouchos*, in possession of public land there. Timandros took the younger of the two girls with him, allegedly by "dragging her away" (l. 25). I think for the other three children who stayed in Athens a co-guardian was appointed, as usual by their father's will like the three guardians of Demosthenes and his sister. Maybe, in his will, the father also gave the younger daughter to the co-tutor Timandros in marriage.

After 13 years and coming of age, Akadēmos charged Timandros more than five talents; a probably elder *synēgoros* spoke for him. The kind of legal action is not clear: from the words "he did the same man's sister a wrong worthy of capital punishment" (ll. 19–20) Whitehead infers that it was an *eisangelia*, a public prosecution of an ex-orphan desiring for revenge.[24] However, in my opinion the *timēma* was not death penalty[25] but rather financial compensation through a private *dikē epitropēs*. To be specific, in line 62 we read the crucial word ἔχειν used in the same way as in the other guardianship speeches: "… while now *holding* assets from his estate worth more than five talents, as I shall demonstrate to you."[26] The following list of assets is lost.

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[22] Text now in HORVÁTH 2014, 184–188 (with a German translation by H. Maehler); for the new Hyperides fragments see also ENGELS 2014 (*Against Timandros*: 244–245).

[23] THÜR 2010 with further references.

[24] WHITEHEAD 2009, 142–145.

[25] WHITEHEAD 2009, 148.

[26] *Against Timandros*, ll. 61–62: … ἐκ τῶν τούτου πλέον ἢ πέντε ταλάντων οὐσίαν ἔχει, ὡς ὑμῖν ἐπιδείξω·

The main accusation against Timandros was that he conducted the guardianship completely contrary to the laws (ll. 10-17). In detail: 1) he did not register the guardianship with the *archōn*; 2) he did not have the property leased out, and 3) he prevented a denunciation (*phasis*) to let the property from being filed with the *archōn*. From Isae. 6.36 we know the duties of guardians on the one hand and the competence of the *archōn*, the magistrate responsible for family, inheritance and guardianship, on the other. The Isaeus text runs: "They registered these two boys with the *archōn* as being adopted by Euktemon's two sons who had passed away putting themselves down as their guardians, and they asked the *archōn* to lease out the estates as belonging to orphans…and that they themselves might become lessees and obtain the income".[27] After registration, a guardian may request that the magistrate assembles a law court for publicly leasing out the property in a kind of auction. Until now the question was: could the guardian himself apply for leasing the assets? Tchernetska, the first editor of the fragment, denied the question and translated αὐτοῖς[28] in l. 3 "to lease for their own profit".[29] With Wolff[30] I would take Isaeus seriously and translate αὐτοῖς "on their own authority", meaning: the laws forbid the guardian to lease by himself, without the *archōn* and the *dikastērion*. So the plaintiff Akadēmos argues that Timandros did not lease at all, the guardian Timandros replies that he did. Akadēmos claims the principal and all the returns Timandros had apparently made administering the estate for 13 years, the five talents mentioned in line 61; Timandros counters to be liable only up to the much lesser value of the estate at that time when he took it over as tenant.

Nevertheless, in line 12 the speaker produced witnesses for the fact that Timandros "did not lease" the estate. I believe that this is another instance of "isolating the facts". The witness deposition might have been correct for Athens. However, Timandros could reply that he fulfilled all his duties correctly with the magistrates of his *klērouchia* at Lemnos. There he might have registered the guardianship and obtained in lease a principal and slaves probably for trading with grain; the island of Lemnos is located on the main route from the Black Sea to Athens. But Timandros' reply could have got missed in face of the emotions Hyperides was able to excite.

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[27] Isae. 6.36: Ἀπογράφουσι τὼ παῖδε τούτω πρὸς τὸν ἄρχοντα ὡς εἰσποιήτω τοῖς τοῦ Εὐκτήμονος ὑέσι τοῖς τετελευτηκόσιν, ἐπιγράψαντες σφᾶς αὐτοὺς ἐπιτρόπους, καὶ μισθοῦν ἐκέλευον τὸν ἄρχοντα τοὺς οἴκους ὡς ὀρφανῶν ὄντων ... μισθωταὶ δὲ αὐτοὶ γενόμενοι τὰς προσόδους λαμβάνοιεν.

[28] *Against Timandros*, ll. 3–5: <u>αὐτοῖς</u> δὲ τοὺς ἐπιτρόπους ἀπαγορεύουσιν οἱ νόμοι μὴ ἐξεῖναι τὸν οἶκον μισθώσασθαι.

[29] TCHERNETSKA 2005, 3, following WYSE 1904, 526–527.

[30] WOLFF 1953, 202–205.

Leaving aside the emotional tendency of the fragment, its first twelve lines now make much clearer how leasing out a commercial enterprise, an *oikos*, did work. First, it was not the *archōn*, who concluded the contract, but rather the *dikastērion*, the law court, had the last word by casting votes (ll. 7–8). Second: if there was more than one person interested in leasing the enterprise a kind of auction took place. This, in general, has been well known before. However, it was not clear what the highest bid was. It was conjectured that the person who offered the highest rate of interest obtained acceptance.[31] But no source tells us about interest rates at all. Probably the rate was fixed by law or by custom. From a possible restoration of the first sentence of the fragment[32] one may infer that the auction was carried out to obtain the highest assessment of the capital, not the highest rate of interest on an unknown amount of capital. The person who offered the highest assessment of the substance received the enterprise to lease. The only reasonable way of securing a ward's property, which consists in a producing firm, is assessing its value. And now we can understand Demosthenes saying in 27.58–59 that the value of an *oikos* could be doubled and tripled during a guardianship: not by the principal's interest only, but rather by comparing the value when the auction had started with the highest bid and interest thereof.

Finally, the fragment throws new light on the *phasis oikou*, a "denunciation" to control the guardian administrating the enterprise. Formerly the *phasis* was thought to be a public action brought by a *boulomenos*, but not mentioned by Aristotle in his catalogue of remedies in *Ath. Pol.* 56.6. Wolff held that it was nothing other than a report to the *archōn* that there was an orphan's *oikos* to be let.[33] Now, from the word ἀμφισβητεῖν ("oppose", ll. 5–6) one can infer to opposing claims about a ward's enterprise: the claim of the denunciator that the enterprise should be leased to him, and the counter-claim of the guardian, who intends to carry on administering the business by himself. Thus the *phasis* resulted in a public auction, which had the character of a *diadikasia*, a competition between two or more parties.[34]

One may ask how Timandros could "prevent" such a *phasis*, which someone had brought forward in Athens (ll. 16–17). As said before about isolating the facts, if Timandros had correctly fulfilled his duties at Lemnos, the *archōn* in Athens evidently had had no reason to suspect that something was wrong with the guardianship.

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31 HARRISON 1968, 106.

32 THÜR 2010, 8 n. 4.

33 WOLFF 1953, 207.

34 THÜR 2010, 16–17.

In the fragment the role of the children's mother is only indirectly touched. Since the mother also had passed away she could not interfere with the administration. Nevertheless she is mentioned, strikingly only in connection with her daughters (l. 22): "When there were left these two brothers and two sisters, the girls being orphans without mother or father, and all of them small children…" This concerns only personal custody and meets the line of argumentation in this part of the speech. Only in special situations the speakers refer to economic activities of women also within the family.

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