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Lysias and a forgotten law on the administration of orphans' estates in classical Athens¹

Abstract

Una legge conservata in una citazione di Lisia, che stabilisce che le tenute degli orfani nell'Atene del quarto secolo a.C. devono essere trasformate in proprietà terriere, è stata scartata come falsa sulla base del suo essere in contraddizione con altre leggi. Malgrado queste contraddizioni siano state dimostrate essere più apparenti che vere, in anni recenti nessuno studioso ha rivalutato la validità della legge in questione. Il presente saggio sostiene la probabile esistenza di una tal legge, il cui scopo era compatibile con il modo in cui la giurisprudenza ateniese cercava di proteggere le tenute dei propri cittadini. Inoltre un'interpretazione che affermi la sua esistenza chiarifica l'importanza e il significato di brani riguardanti la gestione dei beni degli orfani nelle fonti oratorie ateniesi.

A law preserved in a quotation of Lysias, which states that the estates of orphans in fourth-century BCE Athens must be transformed into land, has been dismissed as spurious on the basis of contradictions with other laws. In recent years, however, although these contradictions have been shown to be more apparent than real, no scholar has reassessed the validity of the law in question. This paper argues that this law likely existed and that its intent was consistent with the way Athenian law tried to preserve the estates of its citizens. The interpretation that the law existed also brings additional clarity to the significance and meaning of passages regarding orphan estate management in Athenian oratorical sources.

The Athenians, like the Romans, passed a number of laws to protect the interests of orphans whose estates were entrusted to the protection of tutors (or guardians).² There was, of course, a *dikê epitropês*, which is attested in five

1 I would like to thank Sara Forsdyke, Mark Thatcher, and Gerhard Thür for their extremely helpful comments on earlier drafts of this paper.

2 For orphans' estates in Athenian law and economy, see Fine, 1951, 96-115 and Wolff, 1953, who cite earlier literature. See also Finley, 1985, 38-44; Osborne, 1988, 306-310; Thür, 2008a & b, 2010; Cudjoe, 2010.

cases from classical Athens.³ But just how much protection did the Athenians offer to orphans? Did they also require their assets to be converted into secure, landed form? A law that seems to indicate that this was the case exists in a fragment of Lysias, but has been rejected as spurious based on various external factors and putative contradictions with other laws. In recent years, however, while both the external grounds and the conflicts with other laws have been overturned or questioned, the law itself has not been reexamined in light of these developments. In this paper, I will argue that the evidence that is extant concerning orphans' estates is consistent with the spirit of the law, and that the law in Athens served two purposes: first that transforming orphans' property into land prevented it from being lost in risky loans, and second that landed assets would be less susceptible to embezzlement by unscrupulous tutors. But although my reexamination of the law suggests that it may have actually existed, its force was limited to situations in which tutors' actions were brought to the attention of *polis* authorities, which depended on the initiative of private citizens. In practice it was sometimes not obeyed, and it could be avoided by self-serving estate guardians seeking personal profit. The law provided protection against risk, mismanagement, and the opportunism of guardians seeking their own profits to the detriment of the orphans. Protecting the orphans' estates was of the utmost importance because the *dêmos* needed the estates of its wealthy citizens to fund the liturgy system. Therefore, with this law the Athenian *polis* sought to protect its most vital national security interests, which was consistent with other laws protecting citizens' estates from neglect and dissipation.

There has been a great deal of confusion and disagreement since antiquity about the precise regulations that governed the management of orphans' estates in Athens. Scholars today, however, are generally in agreement that when an estate owner died with heirs who had yet to reach the age of majority, he could either arrange to have private guardians administer his estate (often with a financial benefit and a marriage to surviving female members of the household), or his estate could be registered with the Archon, who then oversaw an auction to allow the highest bidder to lease the estate (and profit from it), which provided state protection for the heirs and their property.⁴ The leases under the Archon seem to have been voluntary, so Athenians could apparently choose to avail themselves of his protection or not. Orphans' estates were considered to

³ See Osborne, 1985, 49, 57.

⁴ The Archon's jurisdiction on this matter is stated in Aristotle, *Ath. Pol.* 56.6-7, for which see Rhodes, 1981, 629-36. The procedure for approaching the archon is outlined in detail at Isaeus 6.36-7, as well as in the new Hypereides fragments from the speech *Against Timandros* discovered in the Archimedes palimpsest (Tchernetska, 2005; Tchernetska et al., 2007). For landed securities in the form of *apotimêma*, see Harpokration s.v. *apotimêma*. For guardianship in general, see Harrison, 1968 (vol. 1), 99-105. For an excellent description of the entire leasing procedure, see Finley, 1985, 38-43.

be opportunities to make profit,⁵ and many seem to have jumped at the chance to lease them, quickly hypothecating (in *apotimēmata*) their property for the chance to administer an already functioning estate. There were a number of laws that governed the leases of such estates, and there were also laws that applied to guardianship in general, so that in case an estate were not afforded the protection of the Archon, the lawcourts would be available to the heirs to recover their property if their guardian mismanaged or embezzled from the estate.⁶ But because of the sparseness of evidence, the exact relationship of these laws to each other is unclear, the precise regulations governing estate guardianship are obscure, and some laws even appear to be contradictory.

One such law, preserved in a quotation of Lysias concerning the management of orphans' estates in Athens, has been deemed suspect based on apparent contradictions with other laws. The text of the fragmentary law in question reads: τοῦ νόμου κελεύοντος τοὺς ἐπιτρόπους τοῖς ὀρφανοῖς ἔγγειον τὴν οὐσίαν καθιστάναι οὗτος δὲ ναυτικούς ἡμᾶς ἀποφαίνει.⁷ The speaker here seems to be accusing the defendant, an orphans' estate guardian, of violating a law bidding tutors to turn their wards' estates into landed property; he has apparently been found to have kept their property in the form of maritime loans. This law was first dismissed as dubious based on the fact that it conflicts with the known facts regarding the official leasing of orphans' estates. Finley argued that the text was "misquoted, taken out of context, or wrong in some other respect," since the law which is quoted is contradictory with the voluntary nature of the leasing of orphans' estates with the Archon, which was not compelled by law.⁸ There is ample evidence which Finley cites to show correctly that the leasing of estates with the Archon was entirely voluntary. Strengthening his argument was the existence of another apparently spurious statement regarding the law of leasing orphans' estates in Demosthenes' third speech *Against Aphobus*, in which the text states τὸν οἶκον οὐκ ἐμίσθωσε τῶν νόμων κελεύόντων (29.29), also apparently in contradiction of the voluntary nature of orphan estate leasing.

At first glance Finley's interpretation of the law seems valid, but on closer inspection it seems that neither the law in question nor the statement in the third speech *Against Aphobus* are incompatible with the voluntary nature of orphan estate leasing. Indeed, recently the two grounds on which the statement in Demosthenes 29 was thought spurious by Finley have both been seriously questioned, viz. that the statement actually contradicts other laws and also that

5 Guardians are said at Isaeus 36.6 to have been able to profit from orphans' estates, and many seem to have made a great deal of money from them. See Thür, 2010, 14 & 2008a, 131-132.

6 It is a common complaint in the premodern world that guardians sometimes embezzled from their wards' estates, from ancient Greece to the Roman Empire and all the way up to early-modern Europe, for which see Grassby, 1970 and Saller, 1994, 193.

7 Suida s.v. *eggeios*, Lysias fragment 91 (Thalheim), fragment 428 (Carey).

8 Finley, 1985, 235 n. 10. Gernet and Bizos vol. II, 183, n. 3, agree, as does Harrison, 1968, vol. 1, 107.

the speech itself is inauthentic. First, the force of the speaker's words in Dem 29.29 has been plausibly shown by MacDowell not to refer to laws *requiring* the leasing of estates with the Archon, but rather to laws that merely outline the procedure for leasing. He concludes that the phrase τῶν νόμων κελεύοντων in Demosthenes 29 is not incompatible with the voluntary nature of orphan estate leasing since "it does not mean that the laws compel leasing, but merely that they permit it and lay down a procedure for it. A more accurate translation is 'the laws provide for it' or 'the laws authorize it'."⁹ This phrase is paralleled in two other passages which concern orphan estate leasing, each also referring to the types of procedures that are laid down by law: ταῦτα οἱ νόμοι κελεύουσιν (Isaeus 11.35), and κατὰ τουτούσι τοὺς νόμους (Dem. 27.58). In precisely the same sense, Lysias notes that there were many laws that were established concerning the administration of orphans' estates, in accordance with which Diogeiton might have acted in his *Against Diogeiton*: ἐξῆν αὐτῷ κατὰ τοὺς νόμους, οἱ κεῖνται περὶ τῶν ὀρφανῶν καὶ τοῖς ἀδυνάτοις τῶν ἐπιτρόπων (32.23). Therefore, a phrase referring to the general legal provisions which concern the leasing of orphans' estates is common in this type of context, none stating that the leasing of estates was required by law. Likewise, the words in the law quoted in the Suida do not say that guardians are required to lease estates, but rather outline the conditions that should be followed if an estate were leased through the Archon in the event that he were approached voluntarily. As for the third speech *Against Aphobus*, Calhoun argued that the speech was authentic, against earlier views, though Finley noted that he ignored passage 29.29.¹⁰ Burke advanced the case for authenticity further, arguing for what can plausibly be regarded as Isaeian influences on the speech's vocabulary, supporting Demosthenes' authorship.¹¹ Moreover, MacDowell has further advanced the case for the authenticity of Demosthenes 29 by demonstrating that the arguments for the speech's inauthenticity are not well-grounded.¹²

Since these scholars have questioned the various grounds for distrusting Lysias fragment 428, it is now possible to reassess the law on its own merits. But although previous scholars have connected this law to, and assessed it in light of, the public leasing of orphans' estates through the Archon, there is nothing in the text of the law itself that mentions anything about leases whatsoever. Leasing and *epitropeia* were seen to be two entirely different processes with different regulations and they must be clearly distinguished. Therefore, I will first explore the possibility that the law regulated the actions of privately appointed tutors (*epitropoi*), and afterwards I will try to determine if it also applied to those who leased estates in the public auction.

9 2009, 46-47; see also 1989b, 259-61.

10 Calhoun, 1934. This article summarizes earlier work on this issue.

11 Burke, 1974, also argues for verbal echoes with Demosthenes 30.

12 2009, 45-47; 1989b.

Estates that were administered by private guardians were not provided the same protections that were afforded to those leased under the auspices of the Archon. The latter process involved registration with the Archon, who then conducted an assessment of the value of the estate, which was then made publicly known, and the lessees were required to put up enough land as security (*apotimēmata*) to guarantee that the wards would receive as collateral the full value of the estate that was originally left to them. Estates governed by privately-appointed guardians were not protected by the same process, but rather had a different set of legal protections. Foremost among these was the *dikē epitropês*, as well as the procedure of *phasis*. But these each required private initiative and a favorable ruling in court, so it is easy to see why the Athenians may have felt that these measures were not enough to protect adequately the estates of wards whose property did not consist mainly of land.

The exact situation mentioned in the text of the Lysias fragment in question, in which a guardian has not transformed an estate consisting mainly of maritime loans into landed property, is described in detail in Lysias' speech *Against Diogeiton*, who was acting as *epitropos* for the orphans of his brother and said to be using the property not for the benefit of the wards but to make profit for himself. The speaker defending the wards' interests mentions laws concerning orphans and their guardians in accordance with which Diogeiton may have acted (ἐξῆν αὐτῷ κατὰ τοὺς νόμους, οἱ κεῖνται περὶ τῶν ὀρφανῶν καὶ τοῖς ἀδυνάτοις τῶν ἐπιτρόπων καὶ τοῖς δυναμένοις), and presents two options as being available to the defendant for the management of his wards' estate: μισθῶσαι τὸν οἶκον ἀπηλλαγμένον πολλῶν πραγμάτων, ἢ γῆν πριάμενον ἐκ τῶν προσιόντων τοὺς παῖδας τρέφειν, "[either] to lease the estate [through the Archon] and to free himself of many troubles, or to purchase land with the orphans' property and nourish them from the proceeds" (Lysias 32.23). The first option clearly refers to leasing the estate with the Archon, which Diogeiton did not do; the second alternative, which Lysias says would also accord with the laws, is that he purchase land for the orphans, which is likely a direct reference to the law in question. Moreover, the speaker states that he preferred not to transform the orphans' wealth into visible form "ὡς φανεράν καταστήσω τὴν οὐσίαν," but to keep their property in *aphanês* form. Therefore, the speaker of Lysias 32 here seems to be referring to the option of administering the property himself and transforming the property into landed form, which would have, in the speaker's opinion, allowed Diogeiton to act in accordance with the laws which holding the children's property in *aphanês* form seems to violate. In addition, the verb Lysias uses in this case, καθίστημι, is precisely the same as that in fragment 428, which reads "ἐγγειον τὴν οὐσίαν καθιστάναι." This further emphasis on his refusal to make the property visible seems to be an elaboration on the intent of the law, and the verbal echo with the use of καθίστημι may reflect the exact wording of the law, which Lysias reproduced in both cases. The speaker's words in this passage become

much stronger and more clearly relevant to the overall argument if the law from fragment 428 actually existed.

Another likely reference to this law, concerning an example in which it may have been followed at least ostensibly, appears in Demosthenes *Against Nausimachus*: εἰσπραχθέντων δὲ τῶν χρεῶν καὶ τινῶν σκευῶν πραθέντων, ἔτι δ' ἀνδραπόδων, καὶ τὰ χωρία καὶ τὰς συνοικίας ἐπρίανθ' οἱ ἐπίτροποι, ἃ παρέλαβον οὗτοι (38.7). After their father's death, the orphans' uncle, Xenopeithes, who was in the moneylending business with his brother (38.7), was challenged through the procedure of φάσις to lease the estate with the Archon, and he managed to convince the jurors to allow him to administer it himself (38.23).¹³ It was only after his own death that the loans were transformed into landed property. Rather, he preferred to continue to manage, and profit from, the moneylending business which he had shared with his brother. After Xenopeithes' death, his estate was also not leased through the Archon (38.23), but was instead transferred to the guardianship of private tutors, who collected many of the outstanding debts (38.9), invested some of the property in land, and apparently embezzled a large amount, perhaps up to eighty talents of recovered loans.¹⁴ These *epitropoi* transformed some of the property of these orphans into land, which their uncle had been unwilling to do.

The fact that these later tutors transformed some of the loans into landed property suggests that they may have been adhering to the law in Lysias fragment 428, or at least were trying to appear as if they were. The purchase of landed property with some of the orphans' wealth allowed the guardians to seem to be acting in their wards' best interest publicly, which turned out to be the perfect cover for their massive embezzlements, some of which they themselves acknowledged in a settlement with the orphans.¹⁵ Since Xenopeithes had been challenged by another individual by means of φάσις to lease the estate, the estate was clearly already under public scrutiny; it may be that these guardians were trying to anticipate a similar move against themselves and transformed some of the property into landed form. Therefore, this may be a case of guardians who acted in such a way that they *appeared* to be following the law, but in fact only superficially adhered to its requirements, and plundered the estate behind the scenes. On the surface, the guardians of the estate after Xenopeithes' death appeared to be acting in good faith according to the law by purchasing some landed property for the wards, but this seems to have been a way to mask

13 For φάσις, see Harpocration, s.v. φάσις and for a more detailed description, see Pollux 8.47-48. See also the discussions by Thür, 2008a & b, 2010; Osborne, 1985, 47-48; Harrison 1968, vol. 1, 115-117; Cohen, 1973, 88; MacDowell, 1978, 158-159; Todd, 1993, 119.

14 Dem. 38.20. Aristaechnus is said to have administered the property for sixteen years (38.8, 10, 12); the other guardians are unknown.

15 A settlement was reached with the orphans in which Aristaechnus acknowledged some of his embezzlements, twelve talents' worth, but the orphans claim that an additional eighty talents had also been stolen.

their depredations. These tutors took advantage of the spirit of the law to seem to be acting in the orphans' interests publicly, which allowed them to embezzle (or lose) the majority of the estate in private.

A glance at the cases in which estates were not leased is sufficient to determine why their guardians made the choices they did. Xenopeithes and his brother had acquired a massive fortune through moneylending, more than eighty talents (38.20). His eagerness to avoid leasing his wards' estate with the Archon when challenged by *φάσις* is thus easily understood: he was able to profit personally from maintaining his lending business, which was the source of his fortune. Managing this fortune himself would have been much easier and more profitable than bidding to lease the estate at a public auction, an estate which he already controlled. Moreover, if the estate were transformed into land, Xenopeithes would have been voluntarily giving up his profitable business in moneylending to enter agriculture, a field with which he doubtless had less expertise and which was also less profitable than moneylending. Likewise, Diogeiton preferred not to lease out the estate of his wards, and certainly enjoyed the benefits of keeping their money in bottomry loans and high-risk, high-profit trade ventures (32.23-25), placing the risk upon the orphans (Lysias explicitly says *kindynos* at 32.25), contrary to the intention of orphans' estate leasing which placed the risk upon the lessees.¹⁶ Keeping the property in highly profitable *nautika* allowed Diogeiton to profit immensely from his wards' wealth while hiding his depredations from the public, which leasing with the Archon or investing his wards' property in land would not permit. Diogeiton's actions reveal the purpose of the law, to protect orphans' estates by transforming property into landed assets when a guardian could so easily appropriate the profits and the principal of the wards' property if its full value were not publicly revealed to the state. The exploitation of the orphans' estate in this case was made possible by the heavy investment in *nautika*, which is precisely what the statement in Lysias fragment 428 rails against, where it also seems that the *epitropos* in question chose to evade the polis' requirements to profit from *nautika* himself. From this perspective, it is clear why so many guardians would have avoided this law. The peculiar nature of *aphanês* wealth permitted a type of profit that was illegal but nonetheless too tempting for many guardians to pass up. Transforming such wealth into land would have deprived these guardians of a major money-making opportunity that carried little short-term risk for themselves.

The *dêmos* knew how risky *aphanês* fortunes could be and therefore intervened to protect the orphans' interests with the law requiring guardians to transform the wards' wealth into land. Demosthenes' tutors demonstrate how thoroughly and quickly an estate not consisting of landed property could be embezzled. Together, they liquidated and dispersed a large *machaira* workshop, as well as large amounts of money and outstanding debts, which was easy to do

16 Thür, 2010, 14-15.

since the estate was almost entirely in *aphanês* form.¹⁷ Even when they were promised financial rewards for properly administering his property, they still could not resist the opportunity to make money for themselves. But it was not only unscrupulous guardians that were worrisome. As the Roman jurists recognized, even well-meaning tutors could lose money through incompetence.¹⁸ Loans, and especially maritime loans, were likely seen to be too risky. As Christesen argues, the Athenians seem to have recognized the higher risks involved in moneylending, which is reflected in the progressively higher and higher interest rates that were attached to loans as they moved from landed property to maritime trade.¹⁹ But with these risks came increased profits, and the temptation to use an estate in liquid form, especially in *nautika*, would have been too great to trust tutors to respect the orphans' best interests and reinvest such profitable capital into land. To further emphasize the ease with which *aphanês* wealth could be liquidated, out of Nausicrates and Xenopeithes' enormous fortune, all of the known *phanera ousia* was successfully transmitted to their heirs, whereas the vast majority of their *aphanês ousia* was irretrievably lost.²⁰

An objection could be immediately raised to the law's existence, however – one could argue that the law could not apply to estates administered by private guardians but only to those leased through the Archon, because Xenopeithes did not transform his nephews' property into land after he successfully convinced the court to allow him to continue to administer their estate after the *phasis*. This fact does not overturn the evidence supporting the law in question, however, but rather illustrates the fuller context of the procedures for the protection of orphans' estates. Indeed, although the *dikê epitropês* was available for all orphans when they came of age, it was often too late once a guardian's term was over to try to protect the wards' property since the embezzlement could have already been complete by that point, as seen in the case of Aphobus and Demosthenes' other guardians. Therefore, the requirement to invest in land would have been impossible to enforce unless a transgressor was brought to the attention of the authorities during his *epitropeia* through the procedure of *φάσις*, which is attested on two occasions. This would explain the purpose of the *φάσις* procedure for orphans' estates, since so many tried to avoid public leasing in order to profit privately.²¹ Therefore, the law to invest in land may have been intended for private guardians, but would have had limited force without

17 For *aphanês* wealth, see Harpocration's definition of *phanera* and *aphanês ousia*: ἀφανῆς οὐσία καὶ φανερά: ἀφανῆς μὲν ἢ ἐν χρήμασι καὶ σώμασι καὶ σκεύεσι, φανερά δὲ ἢ ἐγγεῖος.

18 *Dig.* 26.10.3.18. For Athens see, e.g. Isaeus 2, in which Menecles took a big risk in his attempt to profit from the lease of an orphan's estate and the gamble failed.

19 Christesen, 2003, 49-53.

20 Problems with the transmission of *aphanês* wealth arise so frequently in the sources on orphans' estates that Paoli, 1930, 166-170, even argued that it was only the *aphanês* wealth of orphans that would be leased.

21 This is not to say that the standard leasing of orphans' estates was not profitable, but rather, as in the discussion of Xenopeithes above, that it made little sense for privately appointed

a successful φάσις and *dikê epitropês*. Diogeiton and Xenopeithes possessed their wards' property in *aphanês* form, including high-risk bottomry loans, which may have violated the law in Lysias fragment 428. However, without a φάσις, there would have been no way for the authorities to know that a guardian was violating the law, and in the case of Xenopeithes, he was able to convince the jury to allow him to keep control over his wards' property in *aphanês* form. Here an exception to the law on transforming orphans' property into land can be seen – as stated in Hypereides *Against Timandros*, the Athenian law courts could respond to a φάσις in whatever way “seemed best for the child,” and could overrule the law itself if it seemed to be in the child's best interests.²² As in other matters, the Athenian courts had great leeway in determining how the law should be applied, and could make exceptions if it seemed best for the orphans, for which reason Xenopeithes was allowed to keep his wards' property in loans.

In any case, these guardians all behave in a manner consistent with avoiding the requirements of this law. They did not want to transform their wards' property into land because they wanted to keep their money in the form of the loans already under their control. Moneylending was extremely profitable, and their financial and commercial fortunes would have been devastated if they were reinvested into land. The example of Diogeiton perfectly demonstrates the purpose of such a law, and the very close verbal parallels between the words of Lysias in this case and the words of the law in fragment 428 suggest that the law was precisely what Lysias had in mind when he wrote these sections of *Against Diogeiton*. In both statements he says that the guardian could have transformed (καθίστημι) the property into landed form, but instead has the wards' property in nautical investments, and it is entirely possible that Lysias was directly referring to the language of the law from fragment 428 in this passage of *Against Diogeiton*.

To the Athenians, land was the best way to ensure a steady return while also protecting the financial safety and security of estates, the continuity of citizen wealth, and especially the tax base of the liturgical class, which was so vital for the *polis*. Because of liturgy avoidance and the general pattern of attrition for liturgical estates in classical Athens, the *polis* needed to guarantee the survival of as many liturgical class estates as possible. As Richard Saller argues for Rome, because of high mortality rates and the higher age of males at the time of marriage, about one-third of all estates would have been in the hands of tutors (or guardians).²³ Osborne argues that because of plausibly similar demographic patterns the same was likely true for Athens, so a large percentage

guardians to voluntarily lease estates when they would merely be forced to pay money for property over which they already had control.

22 Thür, 2008b, 658; 2010, 17.

23 Saller, 1994, 190.

of estates would have been in the hands of tutors, a problem with significant consequences for the economy and the preservation of the propertied citizen body.²⁴ But the Athenians seem to have been more risk-averse in their laws governing orphan estate guardianship than the Romans. Although Kehoe is right to argue that there are signs in the *Codex* and the *Digest* that the Romans also considered land to be less risky than loans, both the jurists and the emperors allowed tutors to lend out their wards' money in interest-bearing loans.²⁵ So the law in question demonstrates that the Athenians were even stricter than the Romans in their protections for orphan estates, since loans were not permitted without a successful appeal to the jury courts following a *phasis* and a successful argument that an investment in loans was in the best interests of the wards.

Therefore, the law served important political and social purposes, and is consistent with the Athenian *polis*' overall concern for the maintenance of those without power (heiresses, etc.), and the long-term preservation of its citizens' capital by preventing the dissipation of estates (*argia*). This measure would be among those aimed at reducing the overall risk to orphans' property to protect it and guarantee the continuity of family assets and liturgical fortunes.

The purpose of this law therefore also reveals important details about Athenians' attitudes towards the ownership of land. Since land was seen to be much less risky than property that was *aphanês*, it seems that Athenians did not only value it for the social prestige it brought to its owner and its ability to create a strong base of hoplite citizen soldiers to protect the city. It also seems to have been considered to be much less susceptible to dissolution and embezzlement, and therefore much more certain to transmit across generations than movable property. For Athenians who were eager to see their heirs inherit the full extent of their patrimony, land would have been the form in which best to guarantee its successful transmission. The *dêmos* did not care about destroying commercial and financial fortunes and instead favored stability of estates over the business interests of guardians, but does not seem to have considered in depth the difficulties of transforming an entire estate into land – collecting loans was often not easy and good land might not always be immediately available.

There are enough references to the law's content in the speeches that the Attic orators seem to have believed it carried some force in the minds of the audience, so there is certainly enough evidence to conclude that the law in question did actually exist. But it needed to be supplemented by other measures – *phasis* and the *dikê epitropês* – in order to achieve effective en-

24 Osborne, 1988, 309. See Cudjoe, 2010, 223, for the various estimates scholars have proposed for the percentage of estates that would be in the hands of guardians at any one time in classical Athens, which range from 20-33% of all citizen estates.

25 Kehoe, 1997, 38-45; forthcoming, 124-127. The requirement for investment in land seems to be especially the case with cash deposits, for which see, e.g. *D.* 26.7.3.2; 26.7.5 pr.; 26.7.7.3; 26.7.7.7; *CJ* 5.37.4, 5.51.3. For moneylending being allowed by the jurists and emperors, see, e.g. *D.* 26.7.7.6; 26.7.8 pr.; 26.7.9 pr.; 26.7.12.4; *CJ* 5.56.3.

forceability. The obligation to invest in land in turn would have served to strengthen the institution of the *dikê epitropês* by giving the orphans (or their defenders) a clear, unambiguous, basis for their claims against guardians, as well as the members of the jury courts an objective and easily observable criterion on which to make their decisions. Therefore the law in question, like *phasis*, would have had the effect of propping up the *dikê epitropês* and making it a more effective institution.

Of course not all guardians who kept their wards' property in liquid form would have been prosecuted, so the law to invest in land would have acted as a safeguard only in case the estate faced a loss. In practice, many *epitropoi* could have avoided the law's requirements and allowed both guardian and ward to profit handsomely. So it would have been a gamble not to reinvest the orphans' property, but one that some tutors seem to have been willing to risk since the potential rewards were so great. *Phasis* therefore, could expose such hidden estates and bring them to the attention of the Archon who could then intervene to protect the orphans' interests, and if Thür is correct that the individual who performs the *phasis* could then lease the estate himself, there would have been a strong financial incentive for citizens to take the initiative to bring these estates to light.²⁶

The cases that are preserved in the Attic orators are those in which guardians gambled and lost their wards' property, those who were withholding orphans' property in liquid form, and those whose avoidance of the obligation to reinvest orphans' *aphanês ousia* led to the *phasis* procedure being used against them. All the statements about converting orphans' *aphanês* property to land in the orators certainly seem to be in reference to some widely shared real concern, and it is likely that they are specifically referring to the law in question.

Leasing estates with the Archon, which was entirely voluntary, would have forced these guardians' actions into the public eye, and would have inhibited the freedom they had to profit from their wards' estates by managing them privately. But would leasing with the Archon also require the obligation to reinvest orphans' property in land? As mentioned above in Lysias 32.23, the speaker presents leasing the estate and the obligation of purchasing land as the two alternatives that Diogeiton, as guardian, could have chosen in order to behave in accordance with the laws. If one follows Lysias' wording closely, it could be interpreted that the two options are mutually exclusive, and that whereas *epitropoi* were obligated to invest their wards' property in land, lessees were not. Nonetheless, as Osborne states, although the purchase of land and the leasing of the estate are presented as alternatives, it is possible that the law still required estates that were leased to be transformed into landed form.²⁷

26 Thür, 2008a, 133-137.

27 1988, 306.

But there are some problems with this view, including the fact that some estates that were leased seem to have comprised entirely or partly liquid assets. Meneclēs, for example, leased the property of Nicias, which seems to have consisted of largely *aphanês ousia*.²⁸ Indeed, when he repaid the orphan, he is said to have done so in the form of *argurion* and *chrēmata* (Is. 2. 27-28), which seems to indicate cash and movables. But even more revealing is the fact that when the time came to repay the orphan, Meneclēs was unable to do so. Why would he not be able to restore his ward's property if he had been required to invest it in land when he was awarded the lease? Such a measure would have guaranteed that the orphan could be repaid without any trouble or delay, because Meneclēs would have just transferred control over the land. Therefore, because Meneclēs did not simply hand over his ward's estate as plots of land that he had purchased with its value, he must have used the property in its non-landed form for the duration of the lease, and then was forced to sell his own land to repay the orphan his due portion. A second example is recounted by Demosthenes, who describes an *epitropos* counting out the property owed to his wards in the agora after they reached age of majority: ὁ μισθωσάμενος αὐτοῦ τὸν οἶκον, ἐν τῇ ἀγορᾷ ταῦτα τὰ χρήματ' ἐξηρίθμησεν. (Dem. 27.58). This statement is consistent with the interpretation that the law did not bid lessees to transform their wards' wealth into landed form. It is true that τὰ χρήματ' need not mean only cash in this instance, since the same term is used to refer to an estate consisting of primarily landed property in a discussion of orphans' estates in Isaeus *On the Estate of Hagnias*.²⁹ Also, ἐξηρίθμησεν need not refer to physically counting out coin, but rather to sums on paper; to count out several talents of coin in public drachma-by-drachma would be preposterous. But as Thür argues, the total monetary value of the property was what needed to be returned to the orphans.³⁰ Therefore, whatever the form in which it were returned, the total value would have been enumerated, hence ἐξηρίθμησεν. The enumeration expressed by the term ἐξηρίθμησεν suggests that the value of the estate was counted out and returned to the orphan, which would be a strange term to describe a simple list of plots of land. Therefore, there are strong indications that *misthōsis* did not include the obligation to reinvest the orphans' property in landed form.

How exactly would one have leased an estate that was mainly cash and loans? By what process would a lease of such property be effected? Cudjoe is probably right that an assessment was taken of the entire property's value, which agrees with Thür's arguments that the total sum of the estate is what was assessed by the Archon.³¹ First, it seems that the Archon would have

28 Cudjoe, 2010, 228.

29 Isaeus 11.34. See Finley, 1985, 236, n. 14. Isaeus 11.41-43 lists the composition of this estate in detail.

30 Thür, 2010, 15; 2008a, 132-133.

31 Cudjoe, 2010, 227-228.

needed to assess its value, carry out the *apotimēmata* in proportion to its worth, and then auction the overall sum principal amount to the highest bidder.

Some scholars have even proposed that it was only *aphanês ousia*, and not landed property, that was typically leased in a *misthōsis oikou*;³² Thür has said “Als οἶκος ὀρφανικός werden nur Geld- und Betriebskapital, οὐσία ἀφανῆς verpachtet.”³³ But as Fine demonstrates, Isaeus *On the Estate of Hagnias* provides conclusive evidence to the contrary: in this speech, the property of the orphan who inherited his estate from Stratokles is listed in detail and consisted of mainly plots of land (11.42-43), and the entire estate is described as being the object of a *misthōsis oikou* at 11.34.³⁴

It would make sense that lessees were not required by law to transform their wards' property into landed form, because the *misthōsis* process already included extensive protections, especially the requirement to put up land as security (*apotimēmata*). It would be redundant also to require lessees to reinvest orphans' estates into land since the Archon already possessed the most effective means of exacting repayment in the form of landed securities. The *dēmos* would also be depriving lessees of a powerful incentive if they were forced to transform the wards' property into land – for many lessees, the *misthōsis* of a liquid estate would have amounted to a substantial loan, the chance to use land put up as *apotimēmata* to acquire instant liquidity. Some lessees would have seen the chance to get cash quickly as an attractive economic opportunity; for these lessees the necessity of going through the process of turning *aphanês ousia* into land would have not been desirable.

There remain a number of problems that need to be resolved in the study of orphan estate leasing. One contentious issue is how much of an estate was leased in the *misthōsis oikou*. Some scholars have argued that only part of an estate could be leased and that not necessarily the entire *oikos* needed to be involved.³⁵ But although Wolff may be correct in saying that “Die μίσθωσις οἴκου war ... nicht notwendig eine Totalverpachtung,” the evidence upon which he bases this claim (Is. 6.36) cannot be used to support it.³⁶ In his view, the words ὅπως ἐπὶ τοῖς τούτων ὀνόμασι τὰ μὲν μισθωθεῖη τῆς οὐσίας, τὰ δὲ ἀποτιμήματα κατασταθεῖη demonstrate that a portion of an estate could be leased, laying emphasis on τὰ μὲν ... τῆς οὐσίας as parts of the estate that were leased, and the seemingly parallel τὰ δὲ referring to other parts of the estate that were used as ἀποτιμήματα. Harris and MacDowell, however, have argued convincingly that this passage does not support the theory that only part of an estate could be

32 E.g. Paoli, 1930, 166-170.

33 Thür, 2008a, 130-131.

34 Fine, 1951, 109-110.

35 Paoli, 1930, 166-170.

36 Wolff, 1953, 205, n. 23.

leased.³⁷ Indeed, using one part of an estate to secure the lease for the other part would be illegal, since it was not the property of the orphans that was put up as security for a lease, but rather the property of the lessees. Using the orphans' own property as security would be an egregious violation of the law governing ἀποτιμήματα, so this passage cannot be used to support such a theory. Nevertheless, it still may have been possible to lease only part of an estate - Meneclēs is stated to be a "sharer of the lease" of the estate of Nicias (Is. 2.9), so lessees could certainly split an estate at least. It is unknown, however, if this were possible at the time of leasing or only the result of a private arrangement made afterwards. So although it was probably typical that an estate was leased as a whole, it is conceivable to suppose that one could lease part of an estate. Until further definitive work is done on this issue, it is probably best to side with Fine: "the whole estate of the orphan – both movables and immovables – was usually leased, but it is reasonable to believe that on occasions only part of the property was let."³⁸

But if approaching the Archon were an entirely voluntary matter, why would guardians willingly register an estate with the Archon and then bid in an auction against other individuals to administer the estate (as was the case in Isaeus 36.6, for example) when they could more simply just start using the property as they saw fit and profit free from outside interference?³⁹ One explanation for why guardians would voluntarily register and lease an estate is that the process would have provided protection for the *epitropoi* themselves. Leasing

37 MacDowell, 1989a, 14-15, is suspicious of Wolff's argument for this passage and provides a number of alternate readings for the τὰ μὲν ... τὰ δὲ. Indeed, there are no conclusive grounds for believing this interpretation. The τὰ μὲν ... τὰ δὲ construction need not refer to "some parts ... other parts," because the parallel of the μὲν ... δὲ construction is introduced by ὅπως, which governs the two verbs μισθωθεῖν and κατασταθεῖν, each referring to different actions governing different direct objects. The first τὰ could refer to the estate itself being leased as a substantive pronoun and possessive genitive τὰ μὲν μισθωθεῖν τῆς οὐσίας "the things of the estate be leased;" the second τὰ would then be the article for ἀποτιμήματα, rather than "other parts of the estate." Therefore, the τὰ μὲν ... τὰ δὲ, while appearing to refer to "some parts ... other parts" (which it frequently means in Greek), could rather refer to entirely different objects, each restricted to the action of its governing verb in its own half of the μὲν ... δὲ clauses. Harris, 1993, 82-83, agrees and convincingly argues that the μὲν ... δὲ construction refers not to two pieces of the same property but rather to two entirely different actions regarding different pieces of property; he is rightly followed by Cudjoe, 2010, 229.

38 Fine, 1951, 114.

39 Indeed, the vast majority of orphans' estates that are known to us were *not* leased with the Archon (e.g. Isaeus 11.34), and most of these were embezzled to some extent by their guardians (Isaeus 5.10-11; 7.6-7; 8.41-2; Lys. 32.23; Dem. 27.15; 38.23; Hypereides, *Against Timandros* ll. 60-61). Even among the few estates known to have been leased, money is attested as being owed to the wards by the guardian (Isaeus 2.27-29). From this perspective, orphans' estates frequently were not leased with the Archon simply for the reason that the guardians expected to profit for themselves by controlling the property without state interference. See Osborne, 1988, 309, for estates that were not leased. I have only been able to find two examples in which orphans' estates were officially leased.

and registration would have given them clear criteria by which to demonstrate their responsible administration of the estate, after which they could count out the amount of property being returned to the orphans as described by Demosthenes (27.58).⁴⁰ The speaker of Lysias *Against Diogeiton* says that the defendant would have “released himself from many problems” if he had leased the estate: μισθῶσαι τὸν οἶκον ἀπηλλαγμένον πολλῶν πραγμάτων (32.23). Moreover, leasing an estate could still be highly profitable.⁴¹ As Osborne has shown, one of the main reasons for hypothecation in the Athenian epigraphical record was for the leasing of orphans’ estates, which were profitable opportunities.⁴² A mortgage to lease an orphan’s estate would have amounted to a productive loan, since, if Demosthenes is to be believed, it was possible sometimes even able to double or triple the amount of an estate during the period of its lease.⁴³

One final problem that remains to be resolved is whether or not registration with the Archon was also necessary without a lease.⁴⁴ It is true that the speaker of Hypereides *Against Timandros* makes it a point to mention that the defendant did not register his wards’ estate with the Archon during the term of his guardianship, with the implication that he might have violated the laws by failing to do so (ll. 10-11). But it is not certain that he did violate any of the laws cited by the speaker in this instance since the phrase concerning registration follows, and is therefore separate from, the phrase that sums up the actions that were in violation of the laws that were read aloud: “τούτων τοίνυν οὐτ(ος) οὐδὲν ἐποίησεν οὐδ’ ὅλως ἀπέγραψεν τὸν οἶκον πρὸς τὸν ἄρχον(τα).” The οὐδ’ could be interpreted as introducing an entirely new idea separate from the actions that violated the laws. Demosthenes does not reproach his own guardians with not registering his estate with the Archon, and the sole indication he makes that they revealed the amount of the estate to the *polis* was in the context of their registering him for taxation purposes (Dem. 27.7 & 9). Likewise, the speaker of Lysias 32 makes no mention of Diogeiton failing to register the estate with the Archon – only that he was embezzling the wards’ property. Therefore, registering an estate would have revealed its value to the *polis*, and the guardians

40 A similar emphasis on release from further liability, though for private guardians, can be seen at Dem 38.5, where the speaker places his trust in the strength of a publicly-made *aphesis* (a release from any further claim by the orphans in a *dikē epitropês*) in the presence of witnesses, which was the desirable outcome for an *epitropos*.

41 Thür, 2010, 14 & 2008a, 131-132.

42 Osborne, 2002, 121.

43 Dem. 27.64.

44 Cudjoe, 2010, 190, notes that it is uncertain if registration with the Archon was required by *epitropoi*, but believes it was probably required based on the evidence of Isaeus 4.8 and 6.36. These cases cannot be taken as representative of regular practice for guardians, however, since in the first instance Ameiniades appears before the Archon with a child in an attempt to strengthen his claim to the disputed estate by being officially acknowledged as his *epitropos*, and in the second case the tutors do, indeed, register themselves as guardians, but this is immediately followed by (and perhaps part of) their instituting procedures for leasing the estate with the Archon.

in these cases understandably did not do so, and it may be that registration with the Archon was only legally required for *misthōsis*, and not private guardianship. More research (and perhaps evidence) is needed before any definitive conclusions can be reached on these important matters.

Conclusions

In conclusion, the evidence against the law's existence is outweighed by the evidence supporting it; the counter evidence is much less certain than the positive evidence. The conflicts between the law and the statements in Demosthenes 29 are more apparent than real. The specific content is completely consistent with Athenian laws for the protection of orphans, for whom the polis wanted to minimize risk in order to guarantee the continuity and smooth transmission of estates across generations. The wording of the law matches perfectly the style of fourth-century forensic oratory, and for it to have such specific force that makes so much sense legally would be a curiously odd misquotation, and it seems more likely that this would reflect the substance of an actual law than that it is a mistake.

All the evidence that is known regarding this matter is compatible with the law's existence. While Finley is correct to note that the laws do not require the lease of orphans' estates, he seems to have been too quick to reject the authenticity of the statement of Lysias fragment 428. The situation is much more complicated than a series of contradictory statements, but rather there seem to have been a number of laws governing the administration of orphans' estates with different force in different situations. It seems most likely that the law would have applied not to examples of leasing, but rather to private guardians, who could benefit greatly from hiding the wealth of their wards, if it were already in *aphanês* form. Not every estate was brought to the Archon, and in some of these cases, the stipulation to make the orphans' property landed seems to have deterred the guardians from leasing it with the Archon, as they preferred to enjoy the *aphanês ousia* from which they were able to profit without official scrutiny. These were precisely the situations that were the target of the law in question, which, when effectively combined with the procedures of *phasis* and *dikê epitropês*, would have provided protections for estates that were similar to those of official leasing of an estate with the Archon (*misthōsis oikou*). The law would only be able to be enforced through the *φάσις* procedure, which referred the decision to lease or not to a jury, or with a successful *dikê epitropês* after the term of guardianship, so it does not seem to have had any effective binding force without these other two institutions.

The Athenians seem to have recognized that keeping orphans' wealth in *aphanês* form made it susceptible to loss through risky investments and embezzlement by unscrupulous guardians because of its very invisibility, and passed a

law that required such property to be transformed into land for the protection of the estate and its heirs. Land, because it was seen to be inherently less risky and less susceptible to embezzlement, was seen as the ideal medium to prevent the dissolution of orphans' estates. Transforming *aphanês* wealth into landed property was the best way to ensure the transmission of wealthy citizens' estates, upon which the Athenian *polis* depended for the funding of triremes, and therefore its national security, so this law's existence demonstrates yet another measure the *dêmos* took to protect its collective interests. The Athenians wanted to minimize risk for orphans, which also meant ruining profitable commercial and financial enterprises comprised of *aphanês* wealth, but this was a small price to pay for the long-term stability of the citizens' economic base.

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