

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Jamie Lichter,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 18 L 696
Kimberley Porter Carroll, as special	)	
representative of the estate of	)	
Donald Christopher,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

The Code of Civil Procedure requires that a personal representative serve as the placeholder for a defendant who died without the plaintiff's knowledge prior to filing suit. In this case, the plaintiff named instead a special representative, and the statute of limitations for naming a personal representative has expired. The plaintiff's error compels this court to grant the defendant's motion and dismiss the case with prejudice.

**Facts**

On February 27, 2016, a vehicle driven by Donald Christopher rear-ended another driven by Jamie Lichter. On ~~June 12, 2017, Christopher died. On January 19, 2018, Lichter,~~ unaware of Christopher's death, filed a single-count negligence suit against him. Lichter attempted service on Christopher in January and February 2018, to no avail. On April 3, 2018, Lichter filed a motion asking this court to appoint a special representative on Christopher's behalf. On April 30, 2018, this court granted the motion and issued an order stating: "Plaintiff granted leave to file amended complaint appointing special representative Kimberly Porter Carroll pursuant to 735 ILCS 5/2-1008(b)." Porter Carroll

is an employee of Lichter's attorney's law firm. On May 22, 2018, Lichter filed an amended complaint with Porter Carroll identified in the caption as "special representative." Lichter obtained service on Porter Carroll the next day.

On August 22, 2018, Lichter sent a copy of the complaint and a court order to State Farm Insurance, Christopher's insurer at the time of the collision. After the carrier failed to file an appearance, Lichter filed a motion for default. This court continued that motion on multiple occasions until January 4, 2019, when a State Farm attorney appeared on Christopher's behalf through Porter Carroll.

The case proceeded through written and oral discovery. The trial that had been scheduled for April 21, 2020 was continued indefinitely because of the court's closure. On March 3, 2020, Christopher, through Porter Carroll, filed a motion to dismiss the amended complaint with prejudice. The parties fully briefed the motion and attached various exhibits to their pleadings.

### Analysis

Porter Carroll brings her motion to dismiss pursuant to Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Porter Carroll argues that two of the enumerated grounds for a section 2-619 motion authorize the dismissal of Lichter's complaint: (1) "the court does not have jurisdiction of the subject matter of the action," 735 ILCS 5/2-619(a)(1); and (2) "the action was not commenced within the time limited by law," 735 ILCS 5/2-619(a)(5). Porter Carroll's argument derives from the statute of limitations governing the filing of suits when one or more of the parties is deceased. *See* 735 ILCS 5/13-209. Lichter agrees that section 13-209 is the lynchpin to this case, but argues that a different subsection controls. The dueling subparagraphs state as follows:

(b) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred:

(1) an action may be commenced against his or her personal representative after the expiration of the time limited for the commencement of the action, and within 6 months after the person's death;

(2) if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.

(c) If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against

the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

735 ILCS 5/13-209(b) & (c).

Porter Carroll's motion is grounded in subsection (c). She argues first that Lichter failed to name a personal representative to represent Christopher within the two-year statute of limitations provided in section 13-209(c)(4). According to Porter Carroll, absent a timely identified personal representative, Lichter's case is proceeding against a decedent who, under the common law, cannot be named in a lawsuit. *See Relf v. Shatayeva*, 2013 IL 114925, ¶ 22 (citing *Volkmar v. State Farm Mut. Auto. Ins. Co.*, 104 Ill. App. 3d 149, 151 (5th Dist. 1982)). A case in which a named party is deceased cannot invoke a circuit court's jurisdiction; consequently, any judgment entered in the case would be a nullity. *See Relf*, 2013 IL 114925, ¶ 22 (citing *Danforth v. Danforth*, 111 Ill. 236, 240 (1884); *Bricker v. Borah*, 127 Ill. App. 3d 722, 724 (5th Dist. 1984)).

Lichter argues that Porter Carroll is focusing on the wrong subsection. According to Lichter, subsection (b)(2) controls because no one obtained letters of office to open an estate for

Christopher after his death. Lichter argues that since Christopher had and has no estate, the statute requires the appointment not of a personal representative, but a special representative. That moniker is reflected in this court's May 22, 2018 order appointing Porter Carroll as special representative.

The answer to this dispute is found in two sources, the first of which is the rules of statutory construction. When faced with the job of interpreting competing statutes, courts invariably turn to the tools of statutory construction, the cardinal rule of which is to "ascertain and effectuate the legislature's intent. . . ." *McElwain v. Illinois Sec'y of State*, 2015 IL 117170, ¶ 12. The primary source from which to infer this intent is the statute's language. *See id.* "If the language of the statute is clear, the court should give effect to it and not look to extrinsic aids for construction." *Bogseth v. Emanuel*, 166 Ill. 2d 507, 513 (1995). That admonishment extends even to legislative history. *See O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 446 (2008) (if statute is unambiguous, resort to legislative history is inappropriate). It is also plain that a court may not, "depart from plain statutory language by reading into [a] statute exceptions, limitations, or conditions not expressed by the legislature." *McElwain*, 2015 IL 117170, ¶ 12.

The rules of statutory construction further provide that a statute is to be viewed as a whole, and that a court is to construe words and phrases in light of other relevant statutory provisions. *See Chicago Teachers Union v. Board of Ed.*, 2012 IL 112566, ¶ 15 (citing cases). Words, clauses, and sentences are to be given a reasonable meaning and not rendered superfluous. *See id.* (citing cases). In construing a statute, a court may consider, "the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Id.* A court should attempt to construe potentially conflicting provisions together, *in pari materia*, if it is reasonable to do so, *see id.*, keeping in mind that a court is to presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *See Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 30.

The second source of assistance is the Supreme Court's decision in *Relf*. There, the plaintiff filed a personal injury action against a driver who died two months after the vehicle collision and 22 months before the filing of the complaint. 2013 IL 114925, ¶¶ 4-6. At the time of Relf's filing, the defendant-decedent's death notice had been published, his will admitted to probate, and letters of office issued to his son to serve as the estate's independent administrator. *Id.* These publications had been made one-and-a-half years before Relf filed her complaint. *Id.* at ¶¶ 1 & 6. Despite the defendant-decedent's son's status as the independent administrator of his father's estate, Relf later sought, and the court entered, an order appointing a secretary in Relf's attorney's office to serve as the defendant-decedent's "special administrator," a position not defined in any statute. *Id.* at ¶¶ 9-10.

Based on those facts, the *Relf* court addressed the parties' arguments, which are similar to those presented here. The court first explained the distinction between the two section 13-209 subsections:

Where the deceased party is the defendant, subsections (b) . . . or (c) . . . come into play.

Subsection (b) sets forth the basic procedures and time requirements that must be followed in situations where a person against whom an action may be filed dies before the limitations period runs out, the action survives the person's death, and it is not otherwise barred. If no petition has been filed for letters of office for the decedent's estate, the court may appoint a "special representative" for the deceased party for the purposes of defending the action. 735 ILCS 5/13-209(b)(2). Otherwise, *i.e.*, if a petition has been filed for letters of office for the decedent's estate, an action may be commenced against the "personal representative" appointed by the court. 735 ILCS 5/13-209(b)(1).

*Id.* at ¶¶ 25-26 (some citations omitted).

*Relf* also provides a useful explanation distinguishing a personal representative from a special representative. A personal representative includes, “executors, who are named in the defendant’s will, and administrators, who are appointed where the decedent is intestate or else left a will but has no executor.” 2013 IL 114925, ¶ 32. “[E]xecutors and administrators share a common trait. They are both officers of the court to whom letters of office are issued.” *Id.* at ¶ 33. In contrast, “[s]pecial representatives’ are referenced only with respect to situations where ‘no petition for letters of office for the decedent’s estate has been filed.’” *Id.* (citing 735 ILCS 5/13-209(a)(2) & (b)(2)). Given that distinction, Shatayeva’s appointment as “special administrator” was all the more confusing considering that such a designation is not authorized by any statute. *Id.* at ¶ 42. She also had not received letters of office and had no authority to distribute assets of the decedent’s estate. *Id.* at ¶ 44. “Accordingly, appointment of a ‘special administrator’ would not operate to trigger the provisions of section 13-209. . . .” *Id.*

*Relf* is, however, unsatisfying in at least one respect as to distinguishing between subsections (b) and (c). The court writes that: “The provisions of section 13-209(b) presuppose that the plaintiff is aware of the defendant’s death at the time he or she commences the action.” *Id.* at ¶ 27. Unfortunately, the court does not explain the basis of this statement or cite to any other decision in support. It may be that the *Relf* court made that presumption because subsection (c) explicitly applies if the plaintiff does not know of the defendant-decedent’s death, while subsection (b) is silent as to a plaintiff’s knowledge. *See id.* If true, the court’s presumption would appear to violate the rules of statutory construction by inferring language the legislature did not include. *See McElwain*, 2015 IL 117170, ¶ 12.

Despite *Relf*’s questionable reading of subsection (b), the opinion correctly concludes that subsection (c) is a savings clause.

Subsection (c) applies in those instances in which a lawsuit is filed without the plaintiff knowing of the defendant's death and learns of the death after the statute of limitations has expired. Under those circumstances, an action may be commenced against the defendant-decedent's personal representative if four terms and conditions are met, including: "In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." 735 ILCS 13-209(c)(4).

Since *Relf* forecloses subsection (b)(2) to a plaintiff who does not know of a defendant's death, it is worth identifying two procedural alternatives that were available to Lichter, both of which derive from the Probate Act. That statute provides an order of preference for various persons to obtain letters of administration on an estate's behalf. See 755 ILCS 5/9-2 & 5/9-3. The statute unquestionably favors the appointment of a decedent's surviving spouse or other relatives, see 755 ILCS 5/9-3(a)-(g), but, importantly, also authorizes the appointment of a decedent's creditor as administrator, see 755 ILCS 5/9-3(j). Under that provision, Lichter could have filed a petition before the probate court to have Porter Carroll named as administrator. Such an appointment would likely have created, at least temporarily, a conflict of interest between the plaintiff and the personal representative and required a probate court's intervention.

A second option available to Lichter under the Probate Act was to have the public administrator appointed as the personal representative of Christopher's estate. See 755 ILCS 5/9-3(i). Each county in Illinois has a public administrator whose job it is to "protect and secure the estate from waste, loss or embezzlement until letters of office on the estate are issued to the person entitled . . . or when no relative or creditor is available." 755 ILCS 5/13-1, 13-3(a) & 13-4; *In re Richter's Estate*, 341 Ill. App. 334, 337 (1st Dist. 1950) ("The purpose of creating the office of public administrator was to give authority to someone to administer on intestate estates where no relative or creditor would administer.").



The public administrator would have been a proper placeholder, able to protect Christopher's estate and represent it in these proceedings.

While the procedures outlined above are not patently obvious, Lichter should have recognized them. After all, the Supreme Court handed down *Relf* in 2013, three years before Lichter's accident and five years before she filed suit. Based on *Relf*, Lichter should have known that she needed to appoint a personal representative, not a special representative. At the same time, State Farm is not an entirely innocent party in this controversy. It is not lost on this court that State Farm took the appellate court's adverse opinion in *Relf* to the Supreme Court and obtained a reversal. Armed with its knowledge of section 13-209, State Farm's attorney could have telephoned the plaintiff's attorney within the two-year window afforded by section 13-209(c)(4), cleared up the error, and gotten this case onto the proper procedural track. While that would have been the optimal resolution, the statute does not require such a professional courtesy.

In sum, the statute of limitations has long passed under section 13-209(c)(4) for Lichter to name a personal representative for Christopher's estate and file an amended complaint. To permit Lichter to correct her errors at this point would read *Relf* out of existence. That is a result this court cannot order.

### Conclusion

For the reasons presented above, it is ordered that:

1. Porter Carroll's motion is granted; and
2. This case is dismissed with prejudice.

Judge John H. Ehrlich

JUN 04 2020

Circuit Court 2075

  
John H. Ehrlich, Circuit Court Judge