**Docket No. 128468**

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## IN THE ILLINOIS SUPREME COURT

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| JAMIE LICHTER,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>KIMBERLY PORTER CARROLL, as special administrator of the Estate of DONALD CHRISTOPHER,<br><br>Defendant-Appellant. | On Acceptance of Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District<br><br>Docket No 1-20-0828<br><br>There Heard on Appeal from Circuit Court of Cook County, Illinois County Department, Law Division<br><br>No. 2018 L 000696<br><br>The Honorable John H. Ehrlich, Judge Presiding |

**REPLY BRIEF OF DEFENDANT-APPELLANT KIMBERLY PORTER CARROLL, as special administrator of the Estate of DONALD CHRISTOPHER**

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## ARGUMENT

### I. Because the Relevant Text of 13-209 is Unambiguous, The Legislative History is Irrelevant

Both Plaintiff's response brief and the *amicus curiae* brief focus extensively on the legislative history of 13-209 in support of their argument, specifically the amendment to the statute. An examination of the legislative history of the statute, however, is irrelevant and unnecessary. A statute's language is generally "[t]he most reliable indicator of the legislature's intent." *Policemen's Benevolent Labor Committee v. City of Sparta*, 2020 IL 125508, ¶ 15, Because of this fact, "legislative history may be considered only "[i]f the statutory language is ambiguous." *Dynak v. Bd. of Educ. of Wood Dale Sch. Dist. 7*, 2020 IL 125062, ¶ 16. This Court has made clear that "If the statutory language is clear and unambiguous, then there is no need to resort to other aids of construction." *Brucker v. Mercola*, 227 Ill. 2d 502, 513 (2007)

Although Plaintiff contends that the relevant statutory text is ambiguous and, therefore, it is necessary to conduct a review of the statute's legislative history, neither Plaintiff's response brief nor the *amicus curiae* brief specifically *identifies* any ambiguity in the language relevant to this litigation.

There is, in fact, no ambiguity, as this Court ruled in *Relf v. Shatayeva*, 2013 IL 114925 when it interpreted the statute. The Court stated that, "Subsection (c), on the other hand, "deals specifically and unambiguously with the situation" where "the defendant's death is *not* known to [the] plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff [sues] the deceased defendant directly." (Emphasis added.) *Id.* ¶¶ 27-28

The appellate court cannot simply choose to "re-interpret" a statute as the appellate court did in the present case; the Court made specific holdings in *Relf* regarding what it termed

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to be unambiguous text in the statute. *Id.* Illinois law makes clear that "When this court has interpreted a statute, that interpretation is considered as part of the statute itself unless and until the legislature amends it contrary to the interpretation." *Henrich v. Libertyville High School*, 186 Ill.2d 381 (1998), as modified on denial of rehearing (June 1, 1999), *Miller v. Lockett,* 98 Ill.2d 478, 483 (1983); see *People v. Woodard,* 175 Ill.2d 435, 443–44, 222 (1997).

Although Plaintiff's response brief and the amicus brief rely in large part of *Richards v. Vaca,* 2021 IL App (2d) 210270, this Court did not find any ambiguities in *Richards* that are relevant to the present dispute. The *Richards* plaintiff was aware that the defendant was deceased when she filed the complaint against him. *Id.* at ¶ 4. Because of this fact, it was undisputed that the plaintiff could proceed only under subsection (b). The question presented in *Richards* was merely whether plaintiff could do so by appointing a special representative after the original "statutory period ha[d] expired." *Id.* ¶ 9; see also *id.* ¶ 19 (answering in the affirmative and holding that the time limitation set forth in subsection (b)(1) also applies to (b)(2)). Subsection (c), which expressly applies to plaintiffs such who did *not* know of the defendant's death before the limitations period ran (as Lichter here) was not even discussed in *Richards.* As such, while *Richards* did hold that a portion of section 13-209 is ambiguous, that portion of the statute concerns *only* whether the filing period set forth in subsection (b)(1) also applies to subsection (b)(2). *Id* at ¶ 15. Any relationship between subsections (b) and (c) was never addressed by the appellate court in *Richards*.

The Court discussed the text of 13-209 at length in *Relf v. Shatayeva*, 2013 IL 114925 when it ruled that the lawsuit could not proceed based on the unambiguous language in 13-209. The Court explained that Section 13-209(b) applies when "the plaintiff is *aware* of the



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defendant's death" before the relevant limitations period runs out. (Emphasis added.) *Id.* ¶ 27. The Court stated that subsection (c), on the other hand, "deals *specifically and unambiguously* with the situation" where "the defendant's death is *not* known to [the] plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff [sues] the deceased defendant directly." (Emphases added.) *Id.* ¶¶ 27-28. This is the same factual situation found in the present case.

Despite Plaintiff's contention otherwise, based on the clear language in the statute and as *Relf* held, subsection 209(b) simply cannot apply to a plaintiff who incorrectly believes a defendant is alive at the time of filing the original complaint. The language of subsection (b) states that an action may be commenced against defendant's personal representative after the expiration of the time to do so, and within six months after the person's death. 735 ILCS 13/209(b) However, subsection (c) requires the original complaint be filed before the expiration of the statute of limitations for the original claim. Subsection (c) further states that a personal representative for the deceased may be served up to two years after the statute of limitations has run on the original claim so long as the plaintiff is timely in filing an amended complaint upon learning the defendant has died *after* the suit is filed.

The unambiguous language in subsections (b) and (c) are markedly different. One section - Subsection (c) - requires the original complaint to be timely filed *within* the statute of limitations for the original claim, but the other - Subsection (b) - *extends* the statute of limitation for filing the complaint. Subsection (b) cannot apply to a claim that has been filed before the plaintiff discovers the defendant has died; Subsection (c) states clearly that it applies to just such a situation. Subsection (b)(2) cannot be applied independently of the



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remainder of Subsection (b), where the plaintiff learned of the defendant's death only after filing the original action. This is, however, what the appellate court determined should be done in the present case, without support for such action in the text of the statute itself.

## II. Even if Legislative History is Considered, It Does Not Support Plaintiff's Argument

As noted above, extrinsic aids to statutory interpretation, such as legislative history, may be considered only if the statutory language in ambiguous. The relevant language in 13-209 here, however, is not ambiguous. Although both Plaintiff and *Amici* rely heavily on this legislative history, even if it is considered, the history does not help Plaintiff's or *Amici's* arguments. This history of the legislation does not suggest that a plaintiff, who is explicitly governed by subsection (c) due to the undisputed fact that she was *unaware* of the death of the deceased defendant when she filed her original lawsuit, can instead follow the procedures set forth in Section (b)(2).

The statements from the legislative history relied upon do not clarify the important aspect of the history of the legislation: *legislative intent*. One of the persons quoted, Charles Winkler. was not even a legislator, and there is no indication that he participated in the statute's drafting; he was only a witness to the legislative debate. (*Amicus* brief, A-1) As such, Mr. Winkler's statements cannot assist in construing section 13-209. The same is true of the statements by the bill's sponsor, Mr. Lang, on which both Plaintiff and *Amici* also rely. Mr. Lang admitted that he was not involved in drafting the relevant bill or its amendment. (Response Supplemental Appendix, A69.) In fact, *no one* in the legislature drafted the bill: it was written, as Mr. Lang explained, by a Cook County judge who was not named in the



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hearing. (*Id*.) When Mr. Lang was asked why the bill did not apply to certain legal actions, he could not answer the question because he had not inquired of the actual author why he or she had "excluded that" application. *Id.* Mr. Lang instead simply speculated that the actual author "must have [had] good reason for doing" what he or she had done and that "we could put you in touch with the judge that came to me with this piece of legislation.").)(*Id*., A69-70) Given this lack of information as to actual legislative intent, none of the statements upon which Plaintiff and *Amici* rely here should be afforded any interpretative weight.

Additionally, none of those statements support Plaintiff's and *Amici*'s position, because none of the statements suggest subsection (b)(2) can be applied even if the plaintiff is unaware of the defendant's death when the original complaint is filed or further, whether subsection (b)(2) can be applied separate and apart from the remainder of subsection (b) In fact, the substance of Mr. Lang's comments addressed the portion of the bill amending not section 13-209 but rather section 2-1008, which concerns the appointment of a representative to replace a party who dies during the pendency of an action that has already been brought. (*Amicus* brief Appendix, A-1) See 735 ILCS 5/2-1008(b) (setting forth the procedures for substitution "[i]f a party to an action dies"); (stating that the proposed amendment "would allow a judge to substitute a special representative if [a] party dies *while the case is pending in court*" (emphasis added)); *Id.* (stating that the proposed amendment "covers the situation where someone in litigation, a party, *dies during the case*" (emphasis added)).

Further, Mr. Winkler's comments, which did address section 13-209, do not support Plaintiff and *Amici*'s arguments. When he was asked to comment on the practical context of the proposed amendment to section 13-209, Mr. Winkler noted there was a need for a special



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representative alternative in situations "where one of the potential parties to the litigation is deceased and *we are now at a point where the statute of limitations is just about there*"— in other words, where the statute of limitations has *not* yet run when the plaintiff learns of the defendant's death. (Emphasis added.) (*Amici* Response, A-2)( noting the importance of dealing with "the mechanics of appointing someone to *commence the action* when someone is dead." (*Id*., A-1) This is not Plaintiff's situation in the present case as she did not learn of Donald Christopher's death until well after the limitations period had expired and her original complaint was already filed. (Appellant Brief, A-2)

There is no support in the legislative history for Plaintiff and *Amici*'s argument that subsection (b)(2) can applied separately from the remainder of subsection (b) because an estate has not been opened and, further, that (b)(2)'s application can disregard the fact that subsection (b) explicitly states that it applies when a plaintiff is unaware of the defendant's death. While the statute's legislative history does not expressly address this issue, it does strongly suggest that no such choice exists. At best, then, Plaintiff and *Amici* may argue only that the legislative history of section 13-209 does not *explicitly* deny Plaintiff the right to follow (b)(2). It is well-settled, however, that "silence in the legislative history, no matter how clanging, cannot defeat the better reading of the [statutory] text." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) (explaining that "[i]f the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity" (internal quotation marks omitted)); see also, *e.g.*, *Armstrong v. Resolution Trust Corp.*, 157 Ill. 2d 49, 59-60 (1993) (noting that "silence [in the legislative history] is not an unmistakable implication" of what the legislature intended).



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The lack of specific discussion in the legislative history here, therefore, does not have any bearing on what the legislature intended in enacting section 13-209.

What *is* significant as to the legislation is the fact that the legislature has not chosen to amend section 13-209 since the Illinois Supreme Court construed it in *Relf* over nine years ago. *Relf*, 2013 IL 114925. "[I]t is axiomatic that where a statute has been judicially construed and the construction has not evoked an amendment," the legislature is presumed to have "acquiesced in the court's exposition of the legislative intent." *People v. Casler*, 2020 IL 125117, ¶ 36 (presuming such acquiescence when, like here, "nearly 10 years" had elapsed since the Supreme Court's construction). The Supreme Court's interpretation of section 13-209 was – *and still is* – correct.

## III. *Relf v. Shatayeva* Applies to the Undisputed Case Facts; the Appellate Court Decision is Contradictory to the Holding in *Relf* and the Unambiguous Statutory Text

### A. The Court's Holding in *Relf* was not Dependent on Whether an Estate had Already Been Opened

Plaintiff contends in her Response that "*Relf* is inapplicable because a personal representative had already been appointed and a special representative was therefore unnecessary." (Response brief, p. 18) The *amicus curiae* brief similarly states that, "The actual holding in *Relf* is that simply when a probate estate has already been opened a plaintiff must sue the estate representative." (*Amicus curia* brief, p. 10) Plaintiff argues that because of this alleged "limited holding" in *Relf*, "Any additional commentary on the matter was *Obiter dictum* not essential to the outcome of the case, is not an integral part of the opinion, and is generally not binding authority or precedent within the *stare decisis* rule making *Relf*



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inapplicable to these facts." (Plaintiff Response, p. 17) These assertions are incorrect and indicate a misreading of *Relf*.

Plaintiff states that subsection (c) applies "where there is a death of the Defendant unknown to the Plaintiff and a personal representative was already appointed (like in *Relf*.") (Response, p. 5) Plaintiff's statement is wrong. This Court did not determine that section (c) applied in *Relf* because an estate had already been opened for the defendant. Rather, this Court determined that subsection (c) applied because, as opposed to subsection (b), subsection (c) deals "specifically *** with the situation" in which the defendant's death "is unknown to the [plaintiff] before the statute of limitations expires" and, "unaware of the death, the plaintiff [sues] the deceased defendant directly"—which was "precisely the situation before" this Court in *Relf*. 2013 IL 114925, ¶¶ 27-28.

This Court's determination in *Relf* was *not* dependent on whether an estate had already been opened for the defendant. In *Deleon-Reyes v. Guevara*, a federal court applying Illinois law held that it could appoint a special representative under subsection (b) because the plaintiff there *had* learned of the defendant's death before the limitations period expired. *Deleon-Reyes*, No. 18-cv-1028 at *2 and n.3 (N.D. Ill. Mar. 14, 2019). Citing *Relf*, the court specifically determined that subsection (c) did not apply "because that provision controls where a plaintiff does not discover the defendant's death until *after* the expiration of the statute of limitations." *Id.* at *2 n.3. The court summarized the holding of *Relf*: "Section 209(b) applies where [the] plaintiff is aware of the defendant's death before the expiration of the statute of limitations, while Section 209(c) applies where the plaintiff is unaware of the defendant's death until after the statute of limitations has run." *Id.*



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The federal court in *Stewart v. Evanston Insurance Company* similarly relied on *Relf* in holding that because the defendant's death was *unknown* to the plaintiff at the time the action was filed, the situation was governed by subsection (c), not subsection (b), even though it was unclear from the record whether an estate had been opened. No. 12 C 50273, 2015 WL 6407210, at *3-4, 18 (N.D. Ill. Oct. 21, 2015) The court stated:

> The Illinois Supreme Court, which this court is bound to defer to in matters of Illinois statutory interpretation, has unequivocally held that "[t]he 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." *Relf v. Shatayeva,* 2013 IL 114925, ¶ 27. Section 13–209(c) applies "where, as in this case, the defendant's death is not known to plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. *See Id.*; *see also Relf*, 2013 IL 114925, at ¶ 70

The court did not hold that whether an estate was already opened was a determining fact in *Relf* as to which subsection of 13-209 applied. Rather, the court stated that it "reads *Relf* as holding that the plaintiff's mental state at the time of initially filing the action is the relevant inquiry for determining which section applies: if the plaintiff is not aware that the defendant is dead when filing the action, 13–209(c) applies and 13–209(b) does not." *Id*. at *18, see also *Sopron v. Cassidy*, 19-CV-08254, 2022 WL 2316204, at *7 (N.D. Ill. June 28, 2022)(Section 13-209(c) "deals specifically and unambiguously" with the situation where a party has timely commenced an action against a person whose death is unknown to the party until *after* the statute of limitation expires. *Relf*, 998 N.E.2d at 26, *Deleo-Reyes*, 2019 WL 1200348 at *2, n.3; *Stewart*, 2015 WL 6407210, at *18; *see* 735 ILCS 5/13-209(c)."



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As noted above, Plaintiff and *Amici* rely greatly on *Richards v. Vaca*, 2021 IL. App. (2d) 210270 in their briefs, but *Richards* does not involve the situation when a plaintiff is unaware of the death of decedent with the suit was filed. Unlike the undisputed situation in the present case, *Richards* was "aware that [the] decedent was deceased" when she filed the complaint against him. *Richards*, 2021 IL App (2d) 210270, ¶ 4. Given this fact, it was undisputed that the plaintiff could proceed only under subsection (b). The question presented in *Richards* was merely whether she could do so by appointing a special representative after the original "statutory period ha[d] expired." *Id.* ¶ 9

Similarly, although *Amici* relies also on *Amor v. John Reid & Associates,* 2020 C 1444 (N.D. Ill. Mar. 4, 2021), the facts of *Amor* are also dissimilar to the present case; the court stated, "the parties do not dispute that *Amor* has followed the correct procedure" and further made clear that whether subsection (c) applied was not at issue in that case. *Id.* at *2 ("But that opinion [*Relf*] deals primarily with a different subsection of the statute. See *Relf*, 998 N.E.2d at 25–26 (discussing § 13-209(c))")

**B. The Appellate Court's Decision Contradicts *Relf* Because It Determined that 13-209(b)(2) Could Be Applied Despite the Fact that Plaintiff was Unaware of Defendant's Death when Suit Was Filed**

Plaintiff contends that "As the First District Court has articulated in this case, 209(b)(2) does not have limiting instructions." (Response, p. 9) Plaintiff's brief does not elaborate further regarding the appellate court's decision here as to 209(b)(2)'s lack of "limiting instructions." Plaintiff states only that the First District has "found that the intent of the legislature was to give broad application to Section 209(b)(2)." However, as discussed above, the relevant language in the statute is unambiguous; this Court determined in *Relf* that



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subsection (c) – not subsection (b) – was the applicable section to be applied when a plaintiff is unaware of the defendant's death when the original lawsuit is filed. This Court stated that subsection (c) "deals *specifically and unambiguously* with the situation" where "the defendant's death is *not* known to [the] plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff [sues] the deceased defendant directly." (Emphases added.) *Relf*, 2013 IL 114925 at ¶¶ 27-28.

The appellate court determined in the present case that a special representative can be appointed under 13-209(b) in a circumstance where the plaintiff is unaware of the defendant's death prior to the expiration of the limitations period but an estate has not been opened. The appellate court stated, "We thus find nothing in the language of subsection (b)(2), nor in its purpose, to indicate that it applies only if the plaintiff knows of the defendant's death before the limitations period runs." (Appellant brief, A15 ¶ 43) The appellate court, however, could *only* reach this conclusion by departing from the Court's holding in *Relf* as well as the other case law that followed the *Relf* decision. This decision contradicts the Court's decision in *Relf*.

The appellate court here justified this departure based largely on its assumption that *Relf*'s discussion of the significance of the plaintiff's mental state concerned *only* the first provision of subsection (b)—that is, 13-209(b)(1)—and not 13-209(b)(2). *Id.* at ¶ 39. This assumption by the appellate court, however, is without basis in either the statutory text or the *Relf* decision. This Court specifically observed in *Relf* that "[t]he *provisions*"- plural - "of section 13-209(b) presuppose that the plaintiff is aware of the defendant's death" before the limitations period has expired. (Emphasis added.) *Relf*, 2013 IL 114925 at ¶ 27. There are only two "provisions" of section 13-209(b): (b)(1) and (b)(2). As such, this Court's holding



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that the "provisions" of section 13-209(b) presuppose that the plaintiff is aware of the defendant's death before the limitations period has expired encompassed *both* (b)(1) and (b)(2). The discussion did not only encompass 13-209(b)(1) as the appellate court held.

Furthermore, in determining whether 13-209(b) or 13-209(c) applied to the case before it in *Relf*, this Court made no mention of the fact that an estate had been opened for the deceased defendant; per the statute's text, the relevant question was whether the plaintiff was *aware* of the defendant's death, *no*t whether an estate had been opened. *Id.* ¶¶ 27-28. The Court considered the fact that an estate had been opened only after it held that the applicable provision was subsection (c), in order to determine whether the plaintiff had satisfied the requirements of that subsection. *Id.* ¶¶ 30-41, 46, 60.

While the fact that a personal representative already existed in *Relf* would have likely made it easier for the plaintiff there to comply with subsection (c)'s requirements, this fact was not the basis for the Court's conclusion that those requirements applied in the first place. The appellate court's decision that subsection (b)(2) applies in this case - *and only (b)(2)* - is without basis. *Relf* cannot reasonably be distinguished because an estate was opened for the deceased defendant in that case. The appellate court's decision is contradictory to this Court's holding in *Relf*.

### C. There is No Support in the Text of 13-209 for Application of (b)(2) Separate and Apart from Subsection (b)(1)

Further, there is no support in the statute for the appellate court's determination that sub-subsection (b)(2) "stands separate and apart" thereby permitting a party to appoint a special representative rather than a personal representative. Subsection (b)(1), like subsection



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(c), permits suit against a personal representative. See 735 ILCS 5/13-209(b)(1) (providing that "an action may be commenced against [the deceased's] personal representative"). But subsection (c) provides that if the plaintiff does not learn of the defendant's death before the limitations period has run, an action may be filed "against the *** personal representative" only "if all of the *** terms and conditions [in *that* subsection] are met." *Id.* § 13-209(c) (Emphasis added.) As such, the language in the statute does not support the appellate court's holding that (b)(1) and (c) can somehow be read together. The statute explicitly prohibits a plaintiff whose action is governed by subsection (c) from proceeding instead under subsection (b)(1).

The appellate court's decision also ignores the very different ways in which subsections (b) and (c) filing periods are measured. While subsection (c) measures the filing period from "the time limited for the commencement of the original action," 735 ILCS 5/13-209(c), subsection (b) instead provides that a suit against the defendant's representative—whether "personal" or "special"—must be filed by the later of the original filing deadline and "6 months *after the [defendant's] death*," (emphasis added) *Id.* § 13-209(b)(1) (addressing actions "commenced against [the deceased's] personal representative"); *Richards v*, 2021 IL App (2d) 210270, ¶ 19 (holding that "the time limitation contained in subsection (b)(1) [also] applies when a special representative is appointed pursuant to subsection (b)(2)"). The defendant's death, however, is "unknown to the party" eligible to proceed under subsection (c). 735 ILCS 5/13-209(c).

Based on the appellate court's ruling that subsections (b)(1) and (c) should be viewed together, a plaintiff's filing clock could be triggered by an event of which she is necessarily



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unaware. Perhaps this is the "broad interpretation" that Plaintiff referred to in her Response brief, but this interpretation of the Act cannot be correct based on the statute's language. As the Supreme Court stated in *Relf*, a plaintiff may sue under "the provisions of section 13-209(b)" only if she becomes "*aware* of the defendant's death" before the limitations period expires. (Emphasis added) *Relf*, 2013 IL 114925, ¶ 27. In concluding that the statute's language does not preclude a choice between subsections (c) and (b)(2), the appellate court here failed to address that the filing clock for subsection (c) is different than that of subsection (b)(1) and (b)(2).

That a plaintiff may seek appointment of a special representative only if she becomes aware of the defendant's death *before* the limitations period has run also makes practical sense. The legislature recognized that if letters of office have not yet issued—such that a "personal" representative does not yet exist, *Relf*, 2013 IL 114925, ¶ 33—it may be some time before the plaintiff can proceed against that individual. In cases where the limitations period has not yet expired, the statute necessarily provides a kind of quick alternative to allow the plaintiff to proceed: "appoint[ment of] a special representative." 735 ILCS 5/13-209(b)(2). This alternative makes it as easy as possible for the plaintiff to file her complaint so that her or she does not run out of time in which to move forward with her pleading.

This quick alternative, however, is not needed if the limitations period has already expired when the plaintiff learns of defendant's death. In this different fact situation, a quick fix is no longer necessary to protect the plaintiff's cause of action and, therefore, the balance of interests reverts to honoring the decedent's choice of representative. But because that person may not yet have been appointed, subsection (c) provides two more years after that



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time limitation has run for plaintiff to accomplish this by appointing a personal representative. 735 ILCS 5/13-209(c)(4); *see also Stewart*, 2015 WL 6407210, at *18 (noting that if the deceased person's estate is not yet open, the decedent's creditors may petition the circuit court either for admission of the decedent's will to probate or for letters of administration).

The appellate court here based its contradictory decision on its conclusion that the statutory language permitted a plaintiff an "option" or a choice between subsections (c) and (b)(2) as well as a brief discussion of the statute's legislative history. (Appellant brief, A-15, ¶¶ 41-43. The statutory language does not permit such a choice, and the legislative history (which cannot be considered here due to the fact that the language is unambiguous) gives no indication of such a choice.

## IV. Even if Subsection 209(b)(2) is Applied, Plaintiff Did Not Comply with (b)(2) based on the Second District Appellate Court's Holding in *Richards v. Vaca*

The appellate court's decision that 2-209(b)(2) can be applied independently of subsection (b)(1) is without basis based on both this Court's decision in *Relf* and the unambiguous language in the statute. Regardless, even if 2-209(b)(2) is applied here, Plaintiff did not comply with the requirements in that subsection. Of note, Plaintiff did not file a motion to amend pursuant to 2-209; instead, Plaintiff incorrectly brought her motion under 725 ILCS 5/2-1008 (Appellant brief, C57) Plaintiff contends that "there is no dispute" that she complied with 2-209(b)(2) and that "any argument to contrary was waived." (Response, p. 13) Waiver, however, is inapplicable as Plaintiff herself asserts in her Response the argument that she complied with the requirements of subsection (b)(2). Plaintiff's response to Defendant's motion to dismiss focused on what subsection was applicable, not whether she complied with



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that subsection.C214-C225, C297-305.Regardless, because Plaintiff has asserted the argument in her Response brief that she complied with the requirements of 209(b)(2), Defendant is entitled to reply to Plaintiff's argument.

Plaintiff's Response relies in large part on *Richards v. Vaca*, 2021 IL App (2d) 210270. As discussed above, *Richards* does not support Plaintiff's position because the plaintiff in *Richards* was aware of the defendant's death before suit was filed and prior to expiration of the statute of limitations; this awareness of the death of defendant when suit was filed is the threshold question under *Relf* for determining whether (b) or (c) applies. *Id*. at ¶ 4

However, even if Plaintiff could proceed under subsection (b)(2), the holding of *Richards* requires that Plaintiff's lawsuit be dismissed because Plaintiff did not comply with the requirements of subsection 2-209(b)(2), despite Plaintiff's contention in her Response to the contrary. The court in *Richards* determined that the time limit set forth in (b)(1) applied also to (b)(2). *Id.* at ¶ 21 As such, the action "must be commenced within the limitations period or within six months of the defendant's death, whichever occurs later." *Id*. at ¶ 16 In the present case, it is undisputed that Plaintiff did not move to appoint a special representative either within the limitation period or within six months of Donald Christopher's death. The failure to timely take action to appoint a special representative did not comply with (b)(2) as clearly held in *Richards*.

Plaintiff contends in her Response that the appellate court here held "the actions plaintiff took squarely tracked the language of paragraph (2) of subsection (b)." (Response, p. 11) The actions that Plaintiff took did not "squarely track" with the language of (b)(2) as the appellate court stated and as Plaintiff asserts. Subsection (b)(2) clearly states that a special



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representative may be appointing "after notice to the party's heirs or legatees." 735 ILCS 5/13-209(b)(2) Plaintiff did not give notice to the party's heirs or legatees after she appointed her attorney's assistant as special representative. (C57, C70, 80-C82) Plaintiff's actions did not "squarely track" with subsection (b)(2).

## V. Subject-matter Jurisdiction Cannot Be Waived

Plaintiff incorrectly contends that Defendant "submitted to the jurisdiction" of the court by participating in the lawsuit. Illinois law is clear that an argument as to lack of subject-matter jurisdiction cannot be waived because the parties cannot create subject-matter jurisdiction by consent, acquiescence, waiver or estoppel. *Board of Education of the City of Chicago v. Box*, 191 Ill.App.3d 31 (1st Dist. 1989). Plaintiff's reliance on the doctrine of revestment is incorrect as that doctrine does not apply under the facts in the present case. Under the revestment doctrine, jurisdiction may revest after it the matter has been dismissed if the parties ignore the dismissal and continue to litigate. *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 927 (1st Dist. 2009) There can be no "revestment" if there was no subject-matter jurisdiction in the case.

A lack of subject-matter jurisdiction cannot be waived since the parties cannot create subject-matter jurisdiction by consent, acquiescence, waiver or estoppel. *Board of Education* \ 191 Ill.App.3d at 35 Further, subject matter jurisdiction may be challenged by a defendant at any time. *Id.* at 36, *Dubin v. The Personnel Board of the City of Chicago,* 128 Ill.2d 490, 496 (1989)



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Plaintiff's action against Donald Christopher was a nullity because Mr. Christopher was deceased. *Relf*, 2013 IL 114925, ¶¶ 22-23 The trial court granted Defendant's motion to dismiss ruling that the statute of limitations had passed under 13-209(c) for Plaintiff to name a personal representative. C305 The circuit court correctly stated in its Memorandum Opinion that "To permit Lichter to correct her errors at this point would read *Relf* out of existence. This is a result the court cannot order." C305. Defendant filed a motion to dismiss and had a valid reason under the law for doing so. There is no basis for Plaintiff's contention that Defendant chose a "form over substance victory" or had "unclean hands" among other contentions. (Response, p. 13) Defendant did not violate any statutory rule and did not engage in misconduct when the motion to dismiss was filed. The Court did not have subject matter jurisdiction over the case.

## VI. *Relf* Properly Determined that Subsection (c) is Applicable Based on the Undisputed Facts of this Case

A court cannot choose to construe a statute in a way that changes the plain meaning of the language adopted by the legislature; however, this is what was done by the appellate court in this matter when it chose to construe 13-209. The plain language of subsection 209(c) states that when a plaintiff filing a lawsuit, *who is not aware that the defendant has died before the statute of limitations expires*, names the deceased defendant when filing the original complaint, the lawsuit may be commenced against the deceased person's personal representative.735 ILCS 5/13-209(c)(emphasis added). Based on the clear language in subsection (c), this subsection only applies to a plaintiff who *does not know* of the death of a defendant prior to filing the lawsuit; because a plaintiff was not aware of defendant's death,



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plaintiff would not know at the time the complaint was filed (even if complaint was filed more than six months after deceased defendant's death) that either a probate estate was opened or that a personal representative needed to be appointed.

Subsections (b) and (c) each contain different text as to the time period when the original complaint must be "commenced." As noted above, subsection (c) requires the original complaint must be timely filed within the statute of limitations for the original claim, but subsection 209(b) extends the statute of limitation for filing the original claim. Based on the language of Subsection (b), it cannot apply to a claim that has been filed before a plaintiff discovers defendant has died, as does subsection (c). It is evident from the text of the statute itself that Subsection (c) was enacted as a "savings statute" to allow, for a set limited period, the claims of plaintiffs who were unaware a defendant had died and who would then need to amend an otherwise timely-filed claim upon learning of defendant's death.

The statute's unambiguous language states clearly that when subsections (b) and (c) apply depends on when a plaintiff learns of the death of defendant. This Court held as such in *Relf*. 2013 IL 114925 at ¶27 If the legislature had wanted to have subsection (b) apply to a plaintiff such as Lichter - who did not learn of the death until *after* her suit was filed - it would have incorporated the necessary language in subsection (c) stating as such. The legislature did not do so, and further, as noted above, has not done so since *Relf* was decided years ago. ("The members of our General Assembly, elected to their offices by the citizenry of this State, are best able to determine whether a change in the law is desirable and workable." *Charles v. Seigfried*, 165 Ill. 2d 482, 493 (1995) Substantive changes to a statute should not be the result of an interpretation of the 2-209 that includes a determination that subsection



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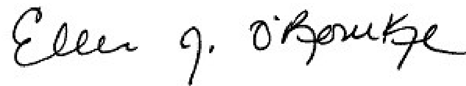
(b)(2) stands "separate and apart" from the remainder of (b) and can be applied despite when a plaintiff learned of the death of a defendant. Neither the unambiguous language in the statute nor this Court's holding in *Relf* supports such a finding.

## CONCLUSION

For all the foregoing reasons, Defendant KIMBERLY PORTER CARROLL as Special Representative of the Estate of Donald Christopher, respectfully requests that this Honorable Court reverse the appellate court's order and opinion of March 31, 2022 that reversed and remanded the trial court's dismissal order of June 4, 2020. Defendant requests that this Court affirm the trial court's dismissal order of June 4, 2020.

Respectfully submitted,



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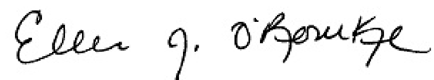
**CERTIFICATION OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and 315. The length of this brief, excluding the pages and words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 20 (twenty) pages.



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**Docket No. 128468**

**IN THE ILLINOIS SUPREME COURT**

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|---|---|
| JAMIE LICHTER,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>KIMBERLY PORTER CARROLL, as special administrator of the Estate of DONALD CHRISTOPHER,<br><br>Defendant/Appellant. | On Acceptance of Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, Third Division<br><br>Docket No 1-20-0828<br><br>There Heard on Appeal from Circuit Court of Cook County, Illinois County Department, Law Division<br><br>Circuit Court No. 2018 L 000696<br><br>The Honorable John H. Ehrlich, Judge Presiding |

**NOTICE OF FILING AND CERTIFICATE/AFFIDAVIT OF SERVICE**

PLEASE TAKE NOTICE that on February 1, 2023, I certify that I have filed with the Clerk of the Illinois Supreme Court, Defendant-Appellant's Reply Brief and have on February 1, 2023 also served a copy of this Reply Brief and certificate to all counsel at the addresses noted below in the noted manner(s):

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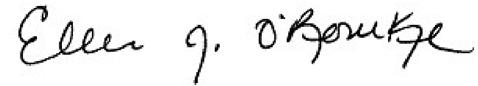
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

YVONNE M. KAMINSKI & ASSOCIATES



By: ____________________________________

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