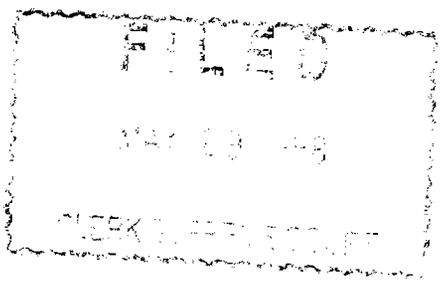
IN THE COURT OF APPEALS OF IOWA

No. 7-704 / 97-570



GLORIA M. RICHARDSON,
Appellant,

vs.

MERCY HOSPITAL and **ICU DEPARTMENT and DOCTORS OF INTERNAL MEDICINE (sic), and TREATMENTS, RADIOLOGY, SUPERVISING NURSES OF I.C.U.** and their **NURSING STAFF** (sic) for the Year of 1994,
Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

The plaintiff, Gloria M. Richardson, appeals a district court ruling dismissing her petition against the defendants for negligence in providing professional medical services to her deceased mother. **AFFIRMED.**

Gloria M. Richardson, Des Moines, pro se, appellant.

V. Glenn Goodwin, Jr. of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, for appellees.

Considered by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Gloria M. Richardson appeals a district court ruling dismissing her petition against the defendants for negligence in providing professional medical services to her now-deceased mother. She contends the district court erred in dismissing her petition because she failed to file the petition in the name of the proper party in interest and because she failed to provide proper original notice. We affirm the district court's dismissal of this action.

Background facts. On September 17, 1996, Gloria Richardson, filed a petition against Mercy Hospital and various doctors and staff members (hereinafter referred to as Mercy) alleging negligence in connection with professional medical services provided to her mother, who passed away while a patient at the hospital on September 20, 1994.

On December 17, 1996, the district court filed an order setting a deadline for service of process. The court noted that Gloria had not served the defendants with the original notice as required by Iowa Rule of Civil Procedure 49. The court ruled that the case would be dismissed on January 31, 1997, for failure to comply with the rules of civil procedure unless Gloria either served the original notice or filed an affidavit stating justification for her failure to timely serve the original notice.

Gloria failed to comply with the district court order. Mercy subsequently filed a motion to dismiss for failure to state a claim upon which relief could be granted.

Mercy maintained Gloria did not have standing to bring the action on behalf of her deceased mother, since she was neither the administrator nor the executor of the estate when the action was filed. Gloria subsequently retained legal counsel and filed a motion for leave to amend the petition to remove her name as a party and to substitute the estate as the real party in interest.

The court additionally ruled Gloria had failed to file an original notice. Gloria has appealed.

I. Failure to state a claim. Gloria argues the district court erred in granting the motion to dismiss as it could not permit the amendment of the petition to change parties when the effect would be to permit a new claim to be made after the statute of limitations had run. Gloria contends the district court should have simply substituted her name for that of the estate, especially in light of subsequent events in which she was named the executor of the estate.

We review the ruling on a motion to dismiss for correction of errors at law. *Estate of Dyer v. Krug*, 533 N.W.2d 221, 222 (Iowa 1995).

Gloria was not the executor nor the administrator of the Estate of Mary Jane Weddington on the September 17, 1996, filing date of the petition. Our courts long ago established that a plaintiff must be an administrator or an executor of the estate when an action is filed, or plaintiff lacks standing to sue. *Pearson v. Anthony*, 218 Iowa 697, 700, 254 N.W. 10, 12 (1934).

Gloria was appointed as executor of the estate on July 14, 1997, almost four months after the *appeal* was filed. A plaintiff's subsequent appointment as executor does not relate back to the filing of the wrongful death action; thus, it does not operate retroactively establishing a capacity to sue. *Id.*, 218 Iowa at 703, 254 N.W. at 13.

Accordingly, we find the trial court appropriately found Gloria to be an improper party and that allowing an amendment to the petition changing parties would be tantamount to permitting a new claim to be lodged after the statute of limitations had expired. We affirm on this issue.

II. Motion to dismiss. Gloria also argues the papers she sent Mercy regarding the filing of an action against it constituted original notice under the Iowa Rules of Civil Procedure. Mercy suggests that Gloria added hand-written words "original notice" to the documents while compiling the record for appellate review.

The burden is on Gloria to sustain jurisdiction by showing adequate and timely service of the original notice. *Dennis v. Christianson*, 42 N.W.2d 448, 450 (Iowa 1992). We review this issue to correct errors at law. *Alvarez v. Meadow Lane Mall*, 560 N.W.2d 588, 590 (Iowa 1997). We are bound by the district court's factual findings if they are supported by substantial evidence. *Alvarez*, 560 N.W.2d at 590.

A civil action is commenced by filing a petition with the court, along with an original notice; directions for service must be promptly delivered by the Clerk of Court to the Sheriff, or to another "appropriate person" for service on the defendant.

See Iowa R. Civ. P. 49(b). Our courts have recognized a delay beyond 120 days between filing and petition will raise a presumption of abuse of delay of service. *Alvarez*, 560 N.W.2d at 591; *accord Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa App. 1994). In this case, although there is a presumption of abuse for delay of service, the notice was not delayed; rather, notice was never effected as Gloria failed to serve an original notice. On February 25, 1997, the motion to dismiss hearing date, Gloria still had not provided an original notice even though she was in violation of a direct court order requiring she do so.

Once the presumption of delay arises, a plaintiff must present "good cause" to justify and explain the reason for the delay in service. *Dennis*, 42 N.W.2d at 450-51. If plaintiff is unable to provide justification for the delay, dismissal of the action is required. *Bean v. Midwest Battery & Metal, Inc.*, 449 N.W.2d 353, 355 (Iowa 1989); *see Dennis*, 482 N.W.2d at 450 (holding if delay in service found abusive, or if plaintiff cannot present justification sufficient to rebut a presumption of abuse, then proper service of process has not been made and thus the court has not acquired personal jurisdiction over the defendants). Gloria failed to serve the original notice in violation of a court order and did not at any time justify her failure for doing so. We therefore find the district court properly determined it had no personal jurisdiction over Mercy.

While we recognize Gloria's efforts and motives in bringing this action, she is held to the same legal standard as legal counsel:

> We do not utilize a deferential standard when persons choose to represent themselves. The law does not judge by two standards, one for lawyers and another for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk.

Kubik v. Burk, 540 N.W.2d 60, 63 (Iowa App. 1995) (citations omitted).

Having considered all issues properly before us on appeal, we determine substantial evidence supports the findings of the district court; we accordingly affirm the district court's dismissal of this action.

AFFIRMED.