IN THE COURT OF APPEALS OF IOWA

No. 8-647 / 06-1243
Filed September 17, 2008

**IN RE THE MARRIAGE OF TROY FRICK
AND LULA FRICK**

**Upon the Petition of
TROY FRICK,**
Petitioner-Appellee,

**And Concerning
LULA FRICK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Default judgment was entered against a woman in a dissolution action while she was in a county jail awaiting sentencing on a federal drug charge despite the fact that she had no representation when judgment was entered against her. **REVERSED AND REMANDED WITH INSTRUCTIONS**.

Lula Frick, Pekin, Illinois, appellant, pro se.

Lori Ubbinga, Sioux City, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

We must decide whether a person against whom a default judgment was entered in a dissolution action was entitled to a guardian ad litem based on her incarceration.

I. Background Facts and Proceedings

Troy Frick petitioned to dissolve his marriage to Lula Frick. Lula was served with process but did not file an answer to the petition. The district court subsequently entered a default judgment against her. The judgment recited that Lula "is currently incarcerated in the O'Brien County jail awaiting sentencing on a pending Federal charge."

Less than five weeks after the default judgment was entered, Lula wrote to the court. She stated,

> I haven't received any papers regarding these matters and therefore I was not able to appear in court due to my incarceration.
>
> I would like to know how I can proceed regarding this matter. I am unable to afford an attorney at this time and would like to know if there's any kind of assistance for me.

The record contains no response to or ruling on this letter.

Lula later submitted several letters and motions seeking relief from the judgment. All were deemed untimely.

Lula filed a pro se appeal. She raises substantive issues and she claims she did not receive notice that a default judgment would be entered against her. We need not address these issues because we discern a more fundamental problem the fact that she was not appointed a guardian ad litem before judgment was entered against her.

II. Analysis

Iowa Rule of Civil Procedure 1.211 provides:

> No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the mentally ill, or one adjudged incompetent, or whose physician certifies to the court that the party appears to be mentally incapable of conducting a defense. Such defense shall be by guardian ad litem; but the conservator (and if there is no conservator, the guardian) of a ward or the attorney appearing for a competent party may defend unless the proceeding was brought by or on behalf of such fiduciary or unless the court supersedes such fiduciary by a guardian ad litem appointed in the ward's interest.

A judgment against an incarcerated person who received no representation is void. *Garcia v. Wibholm*, 461 N.W.2d 166, 170 (Iowa 1990). "A void judgment is subject to attack at any time." *In re S.P.*, 672 N.W.2d 842, 846 (Iowa 2003); *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992); 46 Am. Jur. 2d *Judgments* § 29, at 404–05 (2006) ("It is not necessary to take any steps to have a void judgment reversed or vacated. Such a judgment is open to attack or impeachment in any proceeding, direct or collateral, and at any time.").

As a preliminary matter, we note that Lula's pro se filing with the appellate courts did not challenge the default judgment on the ground that rule 1.211 was violated. While error preservation rules normally would prevent us from considering issues that were not raised and decided below, and waiver rules would prevent us from considering issues not specifically raised on appeal, those rules have not been applied to certain void judgments. *See S.P.*, 672 N.W.2d at 846 (stating father "had every right to challenge the termination order even though he filed no posttrial motions and waited until he appealed to do so"); *Osage Conservation Club v. Bd. of Supervisors*, 611 N.W.2d 294, 298–99 (Iowa

2000) (stating failure to raise issue of void agency decision on certiorari did not preclude appellate court from considering issue on its own motion). We conclude we may raise on our own motion the fact that a default judgment was entered against an incarcerated person who was not appointed a guardian ad litem. *See Estate of Leonard v. Swift*, 656 N.W.2d 132, 139 (Iowa 2003) (stating "the court has the 'inherent power to do whatever is essential to the performance of its constitutional functions', including the appointment of a guardian ad litem").

Turning to the merits, the district court file reveals that Lula pled guilty to federal drug charges and was incarcerated three weeks before the default judgment was entered against her. We conclude she was entitled to the appointment of a guardian ad litem to defend her in this action. *Garcia*, 461 N.W.2d at 170.

In reaching this conclusion, we recognize Lula was initially incarcerated in a county jail, a facility not specifically mentioned in rule 1.211. *See* Iowa R. Civ. P. 1.211 (referring to "penitentiary" or "reformatory"); *In re T.C.*, 492 N.W.2d 425, 428–29 (Iowa 1992) (noting county jail is not penitentiary or reformatory). In our view, this fact is less important than the fact that her incarceration prevented her from appearing and defending. *See In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995) (stating rule 1.211 "is intended to bring before the court, through one acting as an officer of the court, the vicarious presence of one who for some reason is unable to attend a civil trial or present a defense"). Indeed, this is the distinguishing fact in opinions finding no violation of rule 1.211. *See In re Marriage of Smith*, 537 N.W.2d 678, 680 (Iowa 1995) ("[A] judgment entered against an incarcerated person without representation is not void 'where a

prisoner, otherwise competent, appears and participates in the trial.'" (quoting *McGonigle*, 533 N.W.2d at 525)); *T.C.*, 492 N.W.2d at 429 (although father initially unavailable, he "had the opportunity to litigate any errors of fact giving rise to" the order that was entered while he was in a county jail).

As Lula Frick was entitled to the appointment of a guardian ad litem, we reverse and remand with instructions to appoint a guardian ad litem pursuant to Iowa R. Civ. P. 1.211 and 1.212. *See Garcia*, 461 N.W.2d at 171.

REVERSED AND REMANDED WITH INSTRUCTIONS.