

IN THE COURT OF APPEALS OF IOWA

No. 3-323 / 13-0311
Filed April 24, 2013

**IN THE INTEREST OF K.Z., H.Z., AND H.Z.,
Minor Children,**

**J.Z., Father,
Appellant.**

Appeal from the Iowa District Court for Woodbury County, Mary L. Timko,
Associate Juvenile Judge.

A father appeals the juvenile court's denial of his motion to dismiss a child-
in-need-of-assistance action. **AFFIRMED.**

Rees Conrad Douglas, Sioux City, for appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Patrick Jennings, County Attorney, and Loan Hensley, Assistant County
Attorney, for appellee State.

Angela Kayl of Kayl Law Office, Sioux City, for appellee mother.

Marchelle Denker of the Public Defender's Office, Sioux City, attorney and
guardian ad litem for minor children.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

The juvenile court denied a father's motion to dismiss a child-in-need-of-assistance action. The father appeals.

The pertinent facts are as follows. J.Z. is the father of three children. In April 2011, the children were adjudicated in need of assistance (CINA) following the parents' arrests and subsequent charges of three marijuana-related felonies and an aggravated misdemeanor of child endangerment. Hair stat tests were performed, and one of the children tested positive for marijuana.

The children were removed and placed with their maternal grandmother and the maternal grandmother's husband. In December 2011, the Iowa Department of Human Services (Department) recommended in its case plan that the children's guardianship be transferred to the maternal grandparents pursuant to Iowa Code section 232.104(7)(b) (2011). Section 232.104(7) provides, in part:

a. Following an initial permanency hearing and the entry of a permanency order which places a child in the custody or guardianship of another person or agency, the court *shall* retain jurisdiction and annually review the order to ascertain whether the best interest of the child is being served. . . .

b. In lieu of the procedures specified in paragraph "a", the court *may* close the child in need of assistance case by transferring jurisdiction over the child's guardianship to the probate court. The court shall inform the proposed guardian of the guardian's reporting duties under section 633.669 and other duties under the probate code.

(Emphasis added.)

Thereafter, the father filed a motion to dismiss the CINA action, requesting that the court, pursuant to section 232.104(7)(b), transfer the guardianship matter to the probate court. The State and the children's guardian ad litem resisted.

In January 2012, a permanency review hearing was held; however, because the hearing was only scheduled for thirty minutes, it was continued to February 2012. Nevertheless, following the January hearing, the court entered a permanency order transferring custody and guardianship of the children to the maternal grandparents. Although the permanency order stated it was a permanency order under section 232.104(7)(b), the court did not dismiss the CINA action in juvenile court or transfer the guardianship matter to the probate court. That permanency order was not appealed.

At the continued permanency hearing in February, the court took up the father's motion to dismiss. The father argued because the court's permanency order cited section 232.104(7)(b), the juvenile court was required to transfer the matter to probate court, and consequently, the juvenile court lost its jurisdiction. The State and the children's guardian ad litem (GAL) again resisted. The GAL pointed out that the maternal grandparents did not ask that the matter be transferred to probate court at that time, noting they were happy with it remaining in the juvenile court.

Ultimately, the court determined it would keep the matter in juvenile court, but it would continue the order under section 232.104(7)(b). The court explained it was very familiar with the history concerning the allowance of probate court to take jurisdiction of guardianships in CINA actions, and,

[a]t times, the court enters the [order pursuant to] section 232.104(7)(b) to allow the guardians to request that jurisdiction be transferred to [probate] court as opposed to the court having to do it on its own motion. That is part of the reason for (7)(b) is to give the guardians that opportunity to ask that it go to probate court. And then when it does, then the court has to inform them of their duties.

At this point, neither have they asked nor the court has ordered, so it stays in juvenile court as a guardianship here.

On appeal, the father contends the juvenile court erred in failing to follow “the directives of” section 232.104(7)(b) after the court instituted guardianship on the basis of that paragraph. He further argues the juvenile court lacked subject matter jurisdiction over the guardianship because the court relied on that paragraph. The State asserts the father waived error because he failed to appeal the January permanency order that first stated the guardianship would be under section 232.104(7)(b). Although we are inclined to agree with the State, we will nevertheless bypass our error preservation concerns and proceed to the merits. *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

While the father’s argument is appealing at first blush, we believe the decision to leave the CINA action open was a discretionary call on the part of the juvenile court. The plain language of section 232.104(7)(b) provides that the court “may” close the CINA case by transferring jurisdiction of the guardianship to the probate court. Ordinarily, “may” confers a power, while the word “shall” imposes a duty. See Iowa Code § 4.1(30)(a), (c); see also *State ex rel. Wright v. Iowa State Bd. of Health*, 233 Iowa 872, 875, 10 N.W.2d 561, 563 (1943). While there are exceptions, see *Iowa Nat’l Indus. Loan Co. v. Iowa State Dep’t of Revenue*, 224 N.W.2d 437, 442 (Iowa 1974), the mandatory rather than permissive meaning “will never be ascribed to [“may”] unless it is necessary to give effect to the clear policy and intention of the legislature.” *Wright*, 233 Iowa at 875, 10 N.W.2d at 563.

In section 232.104(7), the legislature conveyed a clear policy and intention to use the permissive form of “may.” As quoted above, the legislature stated in paragraph (a) of section 232.104(7) the juvenile court “shall” retain jurisdiction following the entry of a permanency order placing a child in a guardianship and “annually review the order to ascertain whether the best interest of the child is being served.” In paragraph (b), quoted above, the legislature stated the juvenile court “may” close its action and transfer jurisdiction to the probate court. Read together, these subsections leave it to the juvenile court to decide whether and when to close a juvenile court proceeding.

The juvenile court here believed the matter should remain in juvenile court until it and the children’s guardians determined the matter should be moved to probate court. While the court could have concluded otherwise and left it to the district court to oversee future events, we believe the court acted well within its statutorily-conferred discretion in retaining jurisdiction of this matter. For that reason, we affirm the court’s denial of the father’s motion to dismiss.

AFFIRMED.