

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

THE PEOPLE OF THE STATE OF SOUTH DAKOTA
IN THE INTEREST OF P.R.M., Minor Child, and concerning
D.J.M., Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Judge

JOHN R. HINRICHS of
Heidepriem, Purtell, Siegel,
Hinrichs & Tysdal, LLP
Sioux Falls, South Dakota

Attorneys for appellant D.J.M.

MARTY J. JACKLEY
Attorney General

COURT W. ROPER
Special Assistant Attorney General
Department of Social Services
Pierre, South Dakota

Attorneys for appellee State of
South Dakota.

CONSIDERED ON BRIEFS
JULY 13, 2026
OPINION FILED 09/16/26

JENSEN, Chief Justice

[¶1.] The State filed a petition alleging that Child was abused or neglected and later moved to terminate the parents' parental rights. Prior to the start of the final dispositional hearing, Father's court-appointed attorney (Counsel) moved to withdraw from representation based upon concerning messages he had received from Father. The circuit court granted the motion, appointed a different attorney (Substitute Counsel) for Father, and continued the dispositional hearing for two weeks. At the rescheduled dispositional hearing, Substitute Counsel made a motion to withdraw from representation due to Father's aggression toward Substitute Counsel. The circuit court granted the motion to withdraw, but appointed Substitute Counsel as standby counsel for Father during the dispositional hearing. The circuit court entered an order terminating the parental rights of both Father and Mother. Father appeals.¹ We affirm.

Factual and Procedural History

[¶2.] On January 22, 2023, Child, then four years old, was found outside playing by train tracks without a coat. When law enforcement returned Child to his home, Mother indicated she had fallen asleep and did not appear concerned that Child had left the apartment. Child was initially placed in the custody of the South Dakota Department of Social Services Child Protective Services (CPS). CPS substantiated the neglect allegation against Mother, but no additional services were provided after the case was closed on February 13.

1. Mother's appeal was dismissed on jurisdictional grounds for failure to timely serve the notice of appeal upon all parties.

[¶3.] On May 7, 2023, law enforcement responded to a report that Child was found outside alone in pajamas and without shoes. Law enforcement located Father approximately one hour after the report was made. Father indicated that he had been out of town and that a babysitter was watching Child. Upon further questioning, Father admitted that Child was in his care, that he had been sleeping, and that Child had used a chair to unlock the door and get out. CPS substantiated the neglect allegation against Father and Mother, but no additional services were provided.

[¶4.] On July 20, 2023, CPS received a referral alleging neglect of Child. The reporting party stated that Father locks Mother and Child in the second-floor apartment every day when he leaves for work. CPS discovered that there was a deadbolt on the door that had been reversed so the door could be locked from the outside. CPS was unable to contact Father or Mother.

[¶5.] On August 4, 2023, law enforcement received a report that Child was running around outside unattended and was nearly hit by a car. When law enforcement responded, Mother arrived and stated that her friends were supposed to be watching Child. Mother was arrested for outstanding felony warrants for child abuse. Child was placed in CPS custody after law enforcement was unable to contact Father.

[¶6.] CPS initially placed Child with his maternal grandparents in Lead, South Dakota. CPS noted that Child presented as developmentally delayed and exhibited aggressive and sexualized behaviors. Taylor Albright, a family services specialist at CPS, later testified that “[h]e didn’t know how to put a coat on, was not

able to use silverware or drink from a cup” and that “he could use swear words . . . very comfortably in sentences.” Albright also testified that Mother reported incidents that CPS believed constituted domestic abuse by Father. Additionally, Albright noted that Mother and Father had reported to CPS that Child had been sexually abused by their landlord. Child was ultimately moved to Children’s Home Society (CHS) for treatment.

[¶7.] On August 18, 2023, the State filed a petition, alleging that Child was abused or neglected. Father appeared at an advisory hearing with Counsel, who had been appointed to represent him in a related criminal matter, but had not been appointed in the abuse and neglect case. The court formally appointed Counsel to represent Father in the abuse and neglect case at the start of the hearing.

[¶8.] On February 28, 2024, Father and Mother waived their right to an adjudicatory trial and stipulated that Child was abused or neglected within the meaning of SDCL 26-8A-2(3) because his “environment is injurious to [his] welfare.” The circuit court entered an order adjudicating Child as abused and neglected consistent with the stipulation.

[¶9.] Subsequently, the State filed a petition for termination of parental rights, and the circuit court scheduled a dispositional hearing for November 20. At the beginning of the dispositional hearing, Counsel moved to withdraw from representation due to concerning messages² Counsel received from Father. The circuit court granted the motion to withdraw and asked Father whether he wanted

2. The messages from Father are not in the record, but the circuit court referred to the messages as “threatening” after reviewing them.

substitute counsel appointed. When Father answered affirmatively, the circuit court appointed Substitute Counsel. In making this appointment, the circuit court noted that the case had been pending since August 4, 2023, and that “[Child] is entitled, under state and federal law, to have a permanent placement. So this case will go forward, and you may be at a disadvantage because it’s your behavior that has resulted in this trial being postponed from today’s date.” The circuit court informed Father that the dispositional hearing would be continued for two weeks and that “if you damage the relationship that is built with [Substitute Counsel], you’ll have no option but to represent yourself.”

[¶10.] At the start of the rescheduled dispositional hearing two weeks later, Substitute Counsel moved to withdraw from representation of Father and stated:

We had set three appointments for [Father] He no-showed for all of those. He did have our email and indicated in telephonic correspondence he was going to email a number of things to me. That never happened. He did show up for an arraignment . . . the Tuesday before Thanksgiving. I set an appointment the next day, moving everything I had in that afternoon for him to come in. He no-showed for that. Then showed yesterday at my office bringing in four totes of stuff. One tote . . . with backpacks, other materials that he said were related to his business, property, housing rental. I told him in no uncertain terms I wasn’t going to look at that; that he should have brought that to me before we had other stuff to look at.

Things at that point, Judge, escalated, after he drug that large tote back into my office from the entryway. Things escalated from there to the point where my paralegal . . . was calling . . . security.

At one point I was told that we were going to start throwing fists. [Father] then started to walk back towards where I was seated behind my desk, and I did stand up.

I will say that when [Father] was in my office, . . . I had seen on at least two occasions that he did have what I would say a large

pocket knife in his left pocket, that he did have out on at least two occasions, which obviously he did not threaten me with—I will not allege that—but I did see that for sure. And that raised my concern more after I was told we were going to throw fists.

[¶11.] Father objected and stated, “I do need counsel.” Father did not respond to or dispute Substitute Counsel’s stated reasons for withdrawal but argued that he did not believe his attorneys were representing his interests because they were unwilling to review information he felt was important to his case.

[¶12.] In addition to Father’s behavior in Substitute Counsel’s office, the circuit court noted other conduct by Father during the sixteen months the case was pending. This included Father sending threatening messages to Counsel and CPS, telling Counsel numerous times that he was fired, and attempting to enter the courthouse with a pocketknife. The court also mentioned that Father’s behavior in the courthouse and during court proceedings required the presence of extra court security.

[¶13.] In its oral findings, the circuit court stated that “Father’s behaviors are increasing in their severity and frequency such that representation by counsel . . . is not expected.” The circuit court found that “this is the most severe case of misconduct that this [c]ourt is aware of, and I don’t believe any lesser restrictive measure is appropriate.” Additionally, the court stated, “I believe that [Father’s] behavior has been egregious, and that because of his misbehavior and conduct towards counsel in conjunction with his conduct here in the courtroom, his conduct towards the [CPS] staff, that he has forfeited his right to have counsel.” The circuit court granted Substitute Counsel’s motion to withdraw but appointed him as

standby counsel “to have [Father’s] interests represented as we proceed through our trial here today.”

[¶14.] The dispositional hearing continued as scheduled with Substitute Counsel appearing as standby counsel. The State called two CPS family services specialists as witnesses. Mother also testified on her own behalf. Father cross-examined each witness. After each cross-examination, Substitute Counsel was permitted to ask follow-up questions. Father also testified in narrative form at the dispositional hearing. Father’s testimony consisted of statements denying responsibility for Child’s removal and statements regarding his business dealings and wealth. After his testimony, Substitute Counsel asked Father follow-up questions to clarify his testimony. Father was not cross-examined by any of the other parties. The State and Mother offered several exhibits at the hearing. The circuit court asked both Father and Substitute Counsel about evidentiary objections to the offered exhibits. The court also permitted Father to submit one exhibit consisting of voluminous documents, all of which the circuit court described as irrelevant. At the close of the evidence, Father delivered his closing argument. The circuit court then allowed Substitute Counsel to provide additional closing argument for clarification.

[¶15.] The circuit court made additional findings of fact and conclusions of law regarding Substitute Counsel’s motion to withdraw as counsel at the close of evidence, finding that Father

damaged that relationship by missing three meetings with [Substitute Counsel] . . . brandishing and displaying a knife in his office on two occasions . . . and saying that they would be going hands on in a physical altercation after [Father] had

displayed the knife and was coming around the side of [Substitute Counsel]’s desk.

The court noted Substitute Counsel’s substantial experience in representing difficult clients and found that Father’s “actions towards [Substitute Counsel] were severe misconduct . . . that they were a force of disruption and they were also dilatory tactics.”

[¶16.] The circuit court also provided extensive findings of fact and conclusions of law on the merits of the termination of parental rights. The court found that both parents had used controlled substances throughout the case and failed to follow through with necessary substance use and mental health services. The court also found that Father’s phone calls and visits with Child were inconsistent; that Father had unaddressed mental health concerns, violent tendencies, and narcissistic traits; and that “Father spent a majority of time in this case failing to recognize that he bears responsibility for the child being removed.”

[¶17.] While the circuit court was making these findings, Father became upset and left the courtroom. The court continued with its ruling, stating that “[t]he conditions which led to the removal of the child still exist” and that “[t]he parents have failed to make necessary behavioral changes to provide the child with a safe and appropriate home.” The court also found that CPS had made reasonable efforts to provide services designed to prevent the breakup of the family and both Mother and Father had “been given 16 months to address their substance use, domestic violence . . . and mental health concerns. In that time, the only completed item has been Mother’s parenting class.” Finally, the court found that termination of parental rights was the least restrictive alternative and in the best interests of

Child. The circuit court ordered that the parental rights of Mother and Father be terminated.

[¶18.] The court directed Substitute Counsel to continue as standby counsel until the “final pleadings have been filed by the [c]ourt” to assert objections to the findings “so we can preserve any rights that [Father] would have on appeal.” Substitute Counsel filed objections to the State’s proposed findings and conclusions on Father’s behalf. The circuit court thereafter entered its findings of fact and conclusions of law and final dispositional order terminating parental rights. The circuit court appointed new counsel to represent Father on appeal. Father appeals, raising several issues which we restate as follows:

1. Whether the circuit court erred in failing to appoint new counsel for Father for the dispositional hearing.

Standard of Review

[¶19.] “We review a claim alleging a due-process violation de novo.” *Matter of Snaza Fam. Tr.*, 2018 S.D. 23, ¶ 19, 909 N.W.2d 719, 724 (citing *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 11, 802 N.W.2d 905, 910). “Questions of statutory interpretation and application are reviewed under the de novo standard of review with no deference to the circuit court’s decision.” *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 7, 739 N.W.2d 475, 478–79 (citation omitted).

Analysis

[¶20.] A parent’s right to counsel in parental termination proceedings implicates both due process considerations and the statutory right to counsel provided for in SDCL 26-7A-31. In *Lassiter v. Department of Social Services of Durham County, N.C.*, the United States Supreme Court held that there is not a

constitutional right to counsel in every parental termination proceeding. 452 U.S. 18, 32 (1981).³ However, “state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (citation omitted). *Lassiter* applied the three factors from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to determine whether the Due Process Clause required the appointment of counsel in the case before the Court, noting that there is no “precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements.” 452 U.S. at 32. *See also People in Int. of L.N.*, 2022 S.D. 8, ¶ 42, 970 N.W.2d 531, 544 (applying the *Eldridge* factors in considering due process requirements within parental termination proceedings).

[¶21.] *Lassiter* emphasized, however, that due process protections afforded in termination proceedings are the constitutional floor, and many states require by statute the appointment of counsel in abuse and neglect proceedings:

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court’s opinion today in no

3. Father has not argued the right to counsel under the South Dakota Constitution extends to parental abuse and neglect proceedings. *See* S.D. Const. art. VI, § 7 (“In all criminal prosecutions the accused shall have the right to defend in person and by counsel . . .”).

way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

452 U.S. at 33–34 (internal citations omitted).

[¶22.] SDCL 26-7A-31 provides a statutory right to counsel for a parent in abuse and neglect proceedings:

If the . . . child’s parent[] . . . requests an attorney in proceedings under [SDCL chapter 26-8A] and if the court finds the party to be without sufficient financial means to employ an attorney, the court shall appoint an attorney for the party.

[¶23.] Father contends the circuit court violated his due process rights under the Fourteenth Amendment and his statutory right to counsel under SDCL 26-7A-31 when the court refused to appoint new counsel for Father after granting the motion to withdraw by Substitute Counsel.⁴ Father argues that the circuit court violated his due process rights by refusing to appoint counsel for him at the dispositional phase of the proceedings, when the State was seeking to terminate his parental rights. He also argues that the circuit court failed to follow the plain language of SDCL 26-7A-31, requiring the appointment of counsel when requested

4. Father also argues the circuit court abused its discretion when it granted Substitute Counsel’s motion to withdraw. *See State v. Abraham-Medved*, 2024 S.D. 14, ¶ 12, 4 N.W.3d 436, 439 (applying an abuse of discretion standard to a decision on a counsel’s motion to withdraw). We have held that a motion to withdraw as counsel can be granted “only upon a showing of good cause” and where withdrawal “will not unreasonably disrupt the judicial process.” *State v. Iron Necklace*, 430 N.W.2d 66, 79 (S.D. 1988) (citation omitted). Father does not contend that good cause did not exist to support the motion to withdraw nor has he demonstrated that Substitute Counsel’s withdrawal unreasonably disrupted the judicial process. Rather, Father’s argument derives from his overarching claim that he was entitled to counsel, and the court should have either denied the motion to withdraw or appointed a third attorney. However, a review of the record shows the circuit court did not abuse its discretion in granting Substitute Counsel’s motion to withdraw.

by an indigent parent. *See Long v. State*, 2017 S.D. 78, ¶ 13, 904 N.W.2d 358, 364 (“When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court’s only function is to declare the meaning of the statute as clearly expressed.”). He further maintains that the failure of the circuit court to appoint counsel for the dispositional hearing in derogation of due process protections and SDCL 26-7A-31 entitles him to a new hearing without any assessment of prejudice or harmlessness.⁵

[¶24.] In denying Father’s request for the appointment of a third attorney, the circuit court did not directly address Father’s due process rights or the statutory right to counsel. Instead, the court determined that Father had forfeited his right to counsel by his conduct. The circuit court’s decision requires us to consider, for the first time, whether constitutional due process protections or a parent’s statutory right to counsel may be forfeited or waived by the conduct of a parent in a termination proceeding.

[¶25.] Relying on *United States v. Olano*, this Court has emphasized that “[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or

5. In *In re People ex rel. South Dakota Department of Social Services*, this Court held that the circuit court erred under SDCL 26-7A-31 in failing to appoint an attorney for a parent after the court granted her attorney’s request to withdraw at the start of an adjudicatory hearing. 2004 S.D. 131, ¶ 13, 691 N.W.2d 586, 591. Nonetheless, this Court concluded the failure to appoint counsel for the parent at the adjudicatory phase of the abuse and neglect proceedings “was harmless because it did not taint the disposition of this matter, and remanding for an adjudicatory hearing would accomplish nothing.” *Id.* ¶ 20. Given our disposition of this case, we need not determine whether an error in failing to appoint counsel for a parent at the dispositional phase is presumptively prejudicial.

abandonment of a known right.” *State v. Bryant*, 2020 S.D. 49, ¶ 18 n.2, 948 N.W.2d 333, 338 n.2 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). In *United States v. Goldberg*, the Third Circuit discussed this distinction in the context of the Sixth Amendment right to counsel in a criminal case. 67 F.3d 1092, 1099–1101 (3d Cir. 1995) (citing federal circuit court decisions applying both waiver by conduct and forfeiture of the right to counsel in a criminal case based upon misconduct or dilatory behavior by the defendant in the attorney-client relationship). *Goldberg* explained that “[a] waiver is an intentional and voluntary relinquishment of a known right.” *Id.* at 1099 (citation omitted). The most commonly understood type of waiver is “an affirmative, verbal request.” *Id.* However, waiver may also occur by conduct. “Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel.”⁶ *Id.* at 1100. In contrast, a “forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right.” *Id.* When a defendant has not been warned of the right to counsel, *Goldberg* cautioned that the drastic nature of a forfeiture sanction requires extreme misconduct. *Id.* at 1101.

6. In discussing waiver and forfeiture under the Sixth Amendment, *United States v. Goldberg* emphasized that any waiver of the right to counsel in criminal cases can only occur when a defendant has been advised of the risk of proceeding *pro se* with a prior *Faretta* warning. 67 F.3d 1092, 1101 (3d Cir. 1995); see also *Faretta v. California*, 422 U.S. 806 (1975). Since the Sixth Amendment right to counsel is not applicable in parental abuse and neglect proceedings, the same warning under *Faretta* is not implicated.

[¶26.] *Goldberg* further observed that the United States Supreme Court “has approved a trial court’s decision to deprive a defendant of a fundamental constitutional right at least where the defendant is aware of the consequences of his actions, but regardless of whether the defendant affirmatively wishes to part with that right.” *Id.* (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970)). In *Allen*, the Court held “a defendant can lose his [Sixth Amendment] right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.” 397 U.S. at 343.

[¶27.] Apart from constitutional considerations, this Court has recognized that statutory rights may be expressly or impliedly waived by conduct. *See Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 20, 863 N.W.2d 540, 548 (holding that the statutory attorney-client privilege may be waived “when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege”).

[¶28.] Other state courts have explicitly held that a “parent’s right to legal counsel in proceedings affecting the care and protection of delinquent, dependent, abused, or neglected children is subject to waiver” and “the right may be waived or forfeited by conduct.” 43 C.J.S. *Infants* § 90 (2026); *see Matter of Dependency of G.C.B.*, 535 P.3d 451, 457 (Wash. Ct. App. 2023) (“A parent can waive the right to

counsel by (1) voluntarily relinquishing the right, (2) waiving it by conduct, or (3) forfeiting it.” (citation omitted)); *People In Int. of B.H.*, 488 P.3d 1026, 1040 (Colo. 2021) (holding that the right is waivable and “waiver may take the form of an express statement . . . , or under certain circumstances, a waiver can be implied” by conduct (citation omitted)). The Colorado Supreme Court has held that although an indigent parent has a statutory right to court-appointed counsel, “[t]hreatening to kill one court-appointed lawyer and then failing to cooperate with the replacement is clearly inconsistent with asserting the right to appointed counsel.” *People In Int. of B.H.*, 488 P.3d at 1041.

[¶29.] In *K.R. v. Department of Children & Families*, a Florida court affirmed a trial court’s determination that a father had forfeited his right to counsel in a parental termination proceeding after the court had permitted multiple court-appointed attorneys to withdraw due to the father’s conduct. 368 So. 3d 986, 991 (Fla. Dist. Ct. App. 2023). The court in *K.R.* concluded that “there was sufficient evidence of abuse and non-cooperation on the part of the parent that ‘rendered it obvious that he simply would not permit himself to be represented by anyone and amounted to a binding forfeiture or waiver of that right.’” *Id.* at 992 (quoting *Jackson v. State*, 2 So. 3d 1036, 1037 (Fla. Dist. Ct. App. 2009) (a criminal case affirming a trial court’s decision requiring a defendant to proceed without counsel based upon forfeiture)). Massachusetts applies a waiver of the right to counsel by conduct rule in both criminal and parental termination proceedings. *Care & Prot. of Ollie*, 236 N.E.3d 1220, 1224 (Mass. App. Ct. 2024), review denied, 494 Mass. 1104, 239 N.E.3d 117 (2024). “The key to waiver by conduct is misconduct occurring *after*

an express warning has been given to the [parent] about the [parent's] behavior and the consequences of proceeding without counsel.” Adoption of Raissa, 105 N.E.3d 1218, 1224 (Mass. App. Ct. 2018) (quoting *Com. v. Means*, 907 N.E.2d 646, 658 (Mass. 2009)). In *Means*, the court reviewed the judge’s determination of waiver of counsel de novo, with “substantial deference” to the trial judge’s factual findings. 907 N.E.2d at 655. We do the same here.

[¶30.] In granting Counsel’s motion to withdraw in this case, the circuit court found that Father had sent threatening emails to Counsel. In appointing Substitute Counsel to represent Father, the circuit court warned Father, “So I have found an attorney who will accept your case, and if you damage the relationship that is built with this attorney, *you’ll have no option but to represent yourself.*” (Emphasis added.) After receiving this clear warning, Father engaged in even more aggressive conduct toward Substitute Counsel by verbally and physically threatening him in preparation for the dispositional hearing. At the time Substitute Counsel made a motion to withdraw from representing Father, the court also made extensive findings about Father’s threatening conduct toward his attorneys, and that Father’s conduct had already resulted in delaying the case. Because Father was clearly warned that the court would not appoint another attorney for him, and that Father would have to represent himself if his conduct continued, we conclude that these circumstances support a determination that he waived the due process protections afforded by the right to counsel and his statutory right to counsel under SDCL 26-7A-31. As such, the circuit court did not

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violate Father's due process rights or err in refusing to appoint a third attorney upon request under SDCL 26-7A-31.⁷

[¶31.] We affirm.

[¶32.] SALTER, DEVANEY, MYREN, and GUSINSKY, Justices, concur.

7. Given our determination that Father waived his right to counsel by conduct in this proceeding, we need not reach the circuit court's determination that Father engaged in such "extreme misconduct" so as to forfeit his right to counsel. *See Goldberg*, 67 F.3d at 1101.