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"Santa Baby, Just Slip a Sable under the Tree for Me:" Or at Least a Catchall Exception to the Hearsay Rule?

Cynthia Ford
Alexander Blewett III School of Law at the University of Montana, cynthia.ford@umontana.edu

"Santa Baby, just slip a sable under the tree for me[1]"

Or at least a catchall exception to the hearsay rule?

By Cynthia Ford

In previous columns, I have covered the non-hearsay definitions in 801(d). In my Evidence class at UM, I go on from there to look at the specific hearsay exceptions in 803 and 804, discussing the requirements and underlying policy for each. I postpone discussion of the "residual" or "catchall" exceptions until the very end of our hearsay study, because I am afraid that once the students learn about those, they will not see any point in focusing on the articulated specific exceptions. I should (and do) confess here that I began this column as a big skeptic of the residual exceptions.

However, as we are in the holiday season, I decided to devote this article to what seems like an enormous gift if you are struggling to escape from a hearsay objection: the residual exceptions to the hearsay rule. Are they a Black Friday door buster? (A related matter of philosophy: Is it ever worth getting up to go shop in the middle of the night?) Could Santa load Rudolph's sleigh with residual exceptions and still fit down the chimney? Should you bother with a specific exception when there is a catchall? In the process of considering these life-changing questions, a miracle happened: I was converted and now believe the residual exceptions are in fact real, not just a lump of coal in the evidence stocking. Otherwise, why would they be included in the rules? And isn't an extra way around the hearsay rule as good as a '54 Convertible, or "decorations from Tiffany's"?

FEDERAL AND MONTANA RESIDUAL HEARSAY EXCEPTIONS

Both Montana and the federal systems have a safety valve to allow admission of some hearsay even if it does not fit within the specific exceptions. Both systems used to show this by having "residual" exceptions as part of Rules 803 and 804. In 1997, the federal rule makers removed the residual components of Rules 803 and 804, and combined them into new F.R.E. 807, which now reads:

> (a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
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> (2) it is offered as evidence of a material fact;
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> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

(807(b) requires "reasonable notice" of the intent to use this provision, so the opponent has a "fair opportunity" to meet it.) The 1997 Advisory Committee Note to F.R.E. 807 states:

> The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

When Montana adopted the M.R.E., we generally modeled them on the F.R.E., and chose to add this catchall to conform to the F.R.E. The Montana Commission Comment to M.R.E. 803(24) notes:

> There is no equivalent Montana law to this exception. The adoption of this exception changes existing Montana law to the extent that it allows a court to admit hearsay because an equivalent guarantee of trustworthiness exists even though there is no specific exception allowing it.

Montana still retains the two separate versions of the residual exception: M.R.E. 803(24) and 804(b)(5). Rule 803 provides exceptions to the hearsay rule for certain categories of

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1 Eartha Kitt, "Santa Baby."

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hearsay, even if the out-of-court declarant is available to testify:

> **Rule 803. Hearsay exceptions: availability of declarant immaterial.**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: …
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Rule 804 provides additional exceptions but only if the declarant is unavailable under 804(a). It ends with 804(b)(5):

> **Rule 804. Hearsay exceptions: declarant unavailable. …**
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: …
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

The Montana residual clauses are simpler and less restrictive than the current federal corollary, omitting any need for prior notice. The Montana version is identical to the federal version which was submitted by the federal Advisory Committee; the difference lies in the additions made to the federal rule by Congress. The Montana Evidence Commission Comment to 803(24) intentionally rejected the Congressional amendment and kept the original federal language:

> The Commission believed this exception should allow "room for growth and development of the law of evidence in the area of hearsay" (Advisory Committee's Note, supra 56 F.R.D. at 320) and that the amendments by Congress are too restrictive and contrary to the purpose of the provision. These amendments can be criticized as follows: the requirement that the statement be offered as evidence of a "material" fact is redundant in requiring relevance as defined in Rule 401 and uses outmoded language so indicated in the Commission Comments to that rule. The requirement that the evidence be more probative on the point for which it is offered restricts the use of these types of exceptions by imposing a requirement similar to that of unavailability under Rule 804; this restriction would have the effect of severely limiting the instances in which the exception would be used and be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of this requirement. The requirement that the general purposes of these rules and interests of justice will be served is unnecessarily repetitive in view of Rule 102. Finally, the notice requirement is unnecessary because of discovery procedures and the discretion of the court in allowing advance rulings on the admissibility of evidence.

The Montana Commission Comment to 804(b)(5) indicates that the same considerations apply to that version of the residual rule as to 803(24) and that "the Commission Comments to that Rule applies [sic] here."

The Montana Supreme Court has described the difference between the two rules as:

> Rule 804(b)(5), M.R.Evid., provides an exception to the hearsay rule for statements not specifically covered by any of the exceptions enumerated in 804(b)(1) through 804(b)(4), but having "comparable circumstantial guarantees of trustworthiness". Rule 804(b)(5) has been characterized as a "catchall exception" to the hearsay rule. However, it is distinguished from Rule 803(24), M.R.Evid., where the availability of the declarant to testify is immaterial, in that Rule 804(b)(5) comes into play when the declarant is unavailable to testify…
>
> *State v. Mayes*, 251 Mont. 358, 364, 825 P.2d 1196, 1200 (1992).

My review of the cases indicates, though, that the Court uses the same loose analysis in deciding cases under both rules. If your declarant is available to testify, you should proceed under 803(24) alone, but if your declarant is unavailable, try both 803(24 and 804(b)(5).

RECENT MONTANA CASES

My personal view of the residual exceptions was that when you have to use them to surmount a hearsay exception, you are on the ropes and unlikely to succeed. I vastly prefer to use one or more of the specific exceptions or the non-hearsay definitions than to launch upon a vague "circumstantial guarantee of trustworthiness" quest. The Montana Supreme Court also has several times indicated that the residual exceptions are an extraordinary tool:

> the residual exception "should be used sparingly, and only in exceptional circumstances," … *Hocevar,* ¶ 50 (citing *State v. Brown,* 231 Mont. 334, 338, 752 P.2d 204, 207 (1988).
>
> *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 547-48, 208 P.3d 836, 845.

However, it turned out that I am too squeamish, and

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"sparingly" is not the same as "never." Montana lawyers have presented residual exception arguments to the Supreme Court since 2000 in 9 cases under 803(24) and 8 cases under 804(b)(5)[2]. (There is some overlap where both were used in a particular case). I discuss some of these below, as illustrative of the Court's approach to these catchalls. Because the Court has treated hearsay by child declarants as a separate category, I do the same.

In *In re Estate of Harmon*, 360 Mont. 150, 253 P.3d 821, 2011 MT 84, the proponents of a holographic will made before the testator executed her written formal will filed affidavits opposing summary judgment for the named heir. The affiants recounted various statements that the testator had allegedly made about being "hoodwinked" into signing the formal will and about her desire to stick with the handwritten version. The Supreme Court observed:

> In sum, the affidavits contain purported statements of the decedent, Cecilia, to show her intent to give property to Waitt and to allow Knudson to purchase his rental home at discount, and about Harmon's allegedly heavy-handed and self-interested treatment of Cecilia….

Thus, the Court found, the statements were hearsay and the affidavits inadmissible unless some hearsay exception applied. The appellant advanced several specific exceptions and both of the catchall exceptions (803(24) and 804(b)(5)) for admissibility; the Supreme Court rejected all of them and found the trial judge did not abuse her discretion in granting summary judgment for the heir.

> ¶ 37 Finally, Waitt claims the statements are admissible under M.R. Evid. 804(b)(5). This rule is a "catch-all" provision when the declarant is unavailable, and allows admission of a statement that has "comparable circumstantial guarantees of trustworthiness" to the four enumerated exceptions in Rule 804(b): former testimony, statements made under belief of impending death, statements against interest, and statements of personal or family history. There are no such circumstantial guarantees of trustworthiness associated with the statements in the affidavits submitted by Waitt. Given the often highly contentious nature of estate distribution, the opposite is true. Montana law has historically been hostile to the admissibility of out-of-court statements made by the testator regarding his or her testamentary intentions when a valid will exists and the testator's mental capacity is not at issue. In re Colbert's Est., 31 Mont. at 472–73, 78 P. at 974–75 (quoting *Throckmorton v. Holt*, 180 U.S. 552, 573–74, 21 S.Ct. 474, 482–83, 45 L.Ed. 663 (1901)). The District Court did not abuse its discretion in concluding that Rule 804(b)(5) was inapplicable.
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> 253 P.3d at 830.

The Court was briefer but equally clear in rejecting 803(24), the other "catch-all," as an alternative basis for admission.

Jordan Larchik was a freshman at Billings Central High School when he suffered a permanent eye injury during a P.E. class on lacrosse. The case went to a jury trial, where the P.E. teacher, Hardenbrook, testified that he was present in the gymnasium during the class. Several defense experts rendered opinions based on this fact. The jury rendered a verdict for the defense.

About six weeks after the trial ended, plaintiff's counsel Liz Halvorsen received a phone call. The caller identified himself as a friend" of the P.E. teacher, and said that Hardenbrook had asked him to call to tell Ms. Halvorsen that he had been pressured to, and did, lie about his presence in the gym at the time of the accident. Ms. Halvorsen immediately notified the trial judge of this call, and subsequently moved for a new trial based on newly discovered evidence. In support of her motion, the plaintiff submitted an affidavit from Ms. Halvorsen as well as phone company records substantiating that a call had been placed from a cell phone belonging to teacher Hardenbrook to Ms. Halvorsen's phone.

On appeal, the Supreme Court held that the lower court abused its discretion when it denied the new trial, and remanded the case for a new trial. It specifically held that Ms. Halvorsen's affidavit was admissible even though it contained hearsay, under 803(24):

> ¶ 31 Furthermore, despite the Diocese's argument to the contrary, the District Court did not err in determining that Halverson's affidavit was admissible even though it contained hearsay. Under the residual exception to the general prohibition on hearsay, a statement is admissible even though it is not specifically covered by the other exceptions on hearsay if it has "comparable circumstantial guarantees of trustworthiness." M.R. Evid. 803(24). This exception "looks to the circumstances surrounding a hearsay statement when it is made—the circumstantial guarantees of trustworthiness that lend reliability to the hearsay statement in lieu of cross-examination." State v. Hocevar, 2000 MT 157, ¶ 50, 300 Mont. 167, 7 P.3d 329. (Internal quotations omitted.) While the residual exception "should be used sparingly, and only in exceptional circumstances," we conclude that Halverson's affidavit was admissible as a trustworthy statement of an officer of Court under M.R. Evid. 803(24). Hocevar, ¶ 50 (citing State v. Brown, 231 Mont. 334, 338, 752 P.2d 204, 207 (1988). Significantly, the Diocese does not necessarily dispute Halverson's description of

2 These counts are from a WestlawNext search using the rule numbers as the search term. Several of the cases, though, when read, merely indicated that a residual exception had been cited by the lawyer, but was not considered by the Court because another specific exception applied.

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> the phone call from "Mr. Peterson" or the phone record which indicates that the call was placed from Hardenbrook's cell phone. (Emphasis added)
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> *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 547-48, 208 P.3d 836, 845.

In *In Re J.J.L.*, 355 Mont. 23, 223 P.3d 921 (2010), a public defender for a father facing termination of his parental rights failed to object to hearsay statements of the children and their mother made to a detective and two counselors. (Neither the children nor the mother testified themselves). The trial court apparently was concerned about the use of this hearsay in his decision, and asked the parties to brief its admissibility. The State filed a brief; the father's attorney did not, and thus the judge deemed an admission by the father that the State's position was well taken. The judge ruled that the hearsay statements were admissible under the residual hearsay exception in Rule 803(24). Based on these statements, the children were adjudicated Youths in Need of Care. Although the Supreme Court did not directly discuss the merits of the application of the residual exception, it did hold that the failure to object to the hearsay and the failure to file a brief on the issue constituted ineffective assistance of counsel. [3]

The defendant in *State v. Hocevar*, 300 Mont. 167, 7 P.3d 329, 2000 MT 157 was the mother of Wesley, who was four years old when he was taken to the hospital for an overdose of Benadryl. The treating physician, who was aware of the prior deaths of two other children, reported her suspicion of Munchausen-by-proxy syndrome. Wesley recovered, but Susan was convicted of criminal endangerment. (The jury could not reach a verdict on the other crimes charged). On appeal, she argued that she should have been allowed to introduce at trial the videotape of Wesley's interviews, which occurred five and twelve days after the overdose. When the prosecution objected on hearsay grounds, the defense cited three hearsay exceptions in 803: 803(1),"present sense impression;" 803(5) "recorded recollection;" and the residual exception in 803(24)[4]. The Supreme Court rejected both specified exceptions, and also held that the trial court was correct in refusing to apply the residual exception:

> The residual exception "look[s] to the circumstances surrounding a hearsay statement when it is made-the 'circumstantial guarantees of trustworthiness' that lend reliability to the hearsay statement in lieu of cross-examination." State v. J.C.E. (1988), 235 Mont. 264, 272, 767 P.2d 309, 314. "Everything that bears on the credibility of the speaker and the accuracy of his statement counts...." Christopher B. Mueller and Laird C. Kirkpatrick, Evidence § 8.65 (1995). We have held that the residual exceptions "should be used sparingly, and only in exceptional circumstances." State v. Brown (1988), 231 Mont. 334, 338, 752 P.2d 204, 207.
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> *State v. Hocevar*, 2000 MT 157, 300 Mont. 167, 183, 7 P.3d 329, 341.

The Court recited the trial judge's findings about the reliability of the interviews, which he apparently viewed in making his decision, and summarily concluded: "The admission of the videotaped interviews was properly denied under the residual exception because the videotapes did not manifest circumstantial guarantees of trustworthiness." 300 Mont. at 184.

The Supreme Court affirmed the opposite ruling in the same year, obviously on different facts. In *Estate of Silver*, the opponents were the decedent's son and the decedent's estate, which was trying to reclaim approximately $200,000 in cash which the son claimed his father gave him. The son, Jack, had visited his 86 year-old father, Morris, on the eve of surgery, and they agreed both that it would be necessary for the father to have at-home caregivers after he was released, and that the large amount of cash the father kept in his house should be moved somewhere safer. The son and the father's friend/employee arranged for a safe deposit box at a bank, and brought the paperwork home for the father to sign. The box was in the name of the father, but the son was also to be "a signer allowed access," according to the father's written instructions to the bank. The banker had checked the "joint tenant" box on the lease form. A few days before the father died, the son visited the safe deposit box and removed the cash in it, putting it into a separate safe deposit box which was in the son's name only.

The son moved for summary judgment, which the estate opposed. When the trial judge granted summary judgment for the estate, requiring the son to return the money, he appealed and alleged error in the judge's admission of the hearsay statements of the father (who was obviously unavailable under 804(a)) under the residual exception. The Supreme Court affirmed both the evidentiary ruling and the final judgment:

> ¶ 18 Over Jack's objection, the District Court allowed testimony by Kathleen St. John and Carolyn Sauro regarding statements Morris made to them concerning the money in the safe deposit box. Kathleen stated by affidavit that when Morris agreed to put the money in the safe deposit box, he asserted that it was still his. She stated that she never heard him say he intended to make a gift of the money to Jack or that he did not consider it to be his money. Carolyn stated in her affidavit that Morris was most emphatic that the contents of

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3 A 2013 case also discussed failure to object to clear hearsay (again, reports of sexual assault by a child to a trusted adult) as ineffective assistance of counsel. The majority held that it did not, citing possible strategic considerations for not objecting. Justice McKinnon wrote a strong dissent, joined by Justice Cotter. Neither opinion actually considered whether either of the residual exceptions would apply. See, *State v. Aker,* 371 Mont. 491, 310 P.3d 506, 2013 MT 253.

4 Wesley did not appear to testify at trial, although there was no specific finding or argument that he was unavailable. If he in fact was, the defense technically could have also cited the other residual exception, 804(b)(5), but it seems they did not, and it is not at all likely to have changed the ruling at trial or on appeal.

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> the safe deposit box were to remain his. She also attested that at no time did Morris indicate he had made any gift to Jack of the contents of the safe deposit box and once during the summer of 1997 he said he may have to go to the safe deposit box to secure some of his cash.
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> *In re Estate of Silver*, 2000 MT 127, 299 Mont. 506, 509, 1 P.3d 358, 360.

The Court found that the admission of the affidavits fell within the residual exception of 803(24):

> ¶ 21 Similarly, [to two earlier cases discussed at length] in the present case, the contested testimony is evidence of Morris›s stated intent to retain ownership of the cash which he had placed in the safe deposit box. Rule 803(24), M.R.Evid., provides that statements not covered by the enumerated exceptions to the hearsay rule will be allowed if comparable circumstantial guarantees of trustworthiness exist. Here, the statements put into context Morris›s opening of the safe deposit box and the placement of the cash within the box. We hold that the District Court did not abuse its discretion in admitting the testimony about Morris›s statements of intent concerning the money which he arranged to have placed in the safe deposit box
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> 2000 MT 127, 299 Mont. at 510-11, 1 P.3d at 361.[5]

Silver was cited by the appellant in *Estate of Harmon*, discussed above, but held inapplicable.

CHILD HEARSAY

The Montana Supreme Court has faced several difficult cases involving child witnesses. The unique nature of these cases led it to carve a subset of "residual" hearsay requirements to determine the admissibility of statements made by the child declarant to an adult who then testifies to prove the matter asserted by the child. The legislature stepped in to codify a special exception to the hearsay rule for criminal cases, but some questions remain undecided about the interpretation and application of that statute, and it does not apply to civil cases.

State v. S.T.M., 317 Mont. 159, 75 P.3d 1257, 2003 MT 221, involved a charge of incest by the defendant with his toddler daughter. Both sides agreed that the girl was incompetent (she was only 35 months old, and described as "shy"), and thus "unavailable" per 804(a), to testify at trial. The trial judge held that the daughter's out-of-court statements to her mother and a social worker were admissible under 804(b)(5). On appeal, the Supreme Court applied an abuse of discretion standard:

> ¶ 14 …Where a court is determining circumstantial guarantees of trustworthiness, we will defer to the court's decision unless an abuse of discretion is clearly shown. J.C.E., 235 Mont. at 275, 767 P.2d at 316 (citing State v. LaPier (1984), 208 Mont. 106, 676 P.2d 210).

The Court then reviewed its prior law on the use of 804(b)(5) for evidence from young victims of sexual abuse:

> The exception permits the admission of out-of-court statements, which would otherwise be excluded as hearsay, if the statements have "comparable circumstantial guarantees of trustworthiness" to the enumerated exceptions to the hearsay rule.
> ¶ 18 In J.C.E., we established a framework to guide district courts in determinations about the admissibility of hearsay testimony from young child victims in sexual assault cases. Before hearsay testimony can be considered under Rule 804(b)(5), we held the district court must make the following preliminary findings:
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> 1. The victim must be unavailable to testify, whether through incompetency, illness, or some other like reason (e.g., trauma induced by the courtroom setting);
> 2. The proffered hearsay must be evidence of a material fact, and must be more probative than any other evidence available through reasonable means; and
> 3. The party intending to offer the hearsay testimony must give advance notice of that intention. J.C.E., 235 Mont. at 273, 767 P.2d at 315.
>
> The Supreme Court quoted at length from the trial judge's careful finding and conclusions on these factors[6], and stated "¶ 22 Were we to decide this case solely on the basis of the hearsay challenge, we might simply affirm here, and end our analysis."

In fact, the Court went on, saying "However, S.T.M. also challenged the admission of the child's statements in light of his Sixth Amendment right to confront his accusers. As explained below, we will no longer consider these two challenges independently." The Supreme Court ultimately held that a

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5 Justice Trieweiler dissented on the holding that the statements by Morris in the affidavits were hearsay at all; if they were, he disagreed with their admission. However, he took the view that the statements were not offered for the truth of the matter they asserted, but "were offered, instead, to prove that Morris actually made the statement, and, therefore, depended solely on the credibility of Kathleen St. John and Caroline Sauro." In my Evidence class, we call this "offered not to prove the truth of the matter asserted, but to prove the state of mind of the speaker." If this is the reason they were offered, then the out of court statements by Morris do not meet the definition of hearsay under 801(c), and are not barred by 802, so there would be no need to deal with the residual (or any) exception.

6 The defendant had raised a Confrontation Clause objection in addition to his hearsay objection at trial, but the trial judge virtually ignored it in his ruling. The Supreme Court devoted much of its opinion to the constitutional element, but ultimately affirmed admission of the statements over both objections.

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fourth factor which J.C.E. had established, (and which I omitted from the list in the quotation above) existence of corroborating evidence, is no longer to be considered in deciding conjoined Confrontation/804(b)(5) cases.

The Court then assessed the young daughter's hearsay statements without considering whether they were corroborated. It concluded that the circumstantial guarantees of trustworthiness inherent in the statement sufficed to withstand both the hearsay and Confrontation Clause objections:

> ¶ 39 Upon considering the totality of the circumstances surrounding K.M.'s hearsay statements, exclusive of the corroborating evidence, we conclude that her statements were supported by the particularized guarantees of trustworthiness necessary to withstand a Confrontation Clause challenge. In fact, her statements satisfied a number of the factors upon which state and federal courts have historically relied for indicia of reliability. See ¶ 31. Most notably, K.M. made the initial statement to her mother spontaneously. Her statement referenced oral-genital contact, a matter not normally within the contemplation of a toddler under three years old. Further, K.M.'s mother was reluctant to participate in the prosecution of her husband, which makes her a particularly reliable witness to relate the hearsay statement. Moreover, neither she nor K.M. had any reason to fabricate the story.
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> *State v. S.T.M.*, 2003 MT 221, 317 Mont. 159, 171, 75 P.3d 1257, 1264.

The Court acknowledged more difficulty with the girl's statement to the social worker, which was videotaped and played to the jury, but ultimately held that it, too, was admissible.

S.T.M. was decided before the U.S. Supreme Court rewrote Confrontation Clause jurisprudence in *Crawford v. Washington* in 2004. The Montana Supreme Court acknowledged this in 2007:

> ¶ 33 We note further that the District Court did not discuss the "corroborating evidence" factors in light of our holding in State v. S.T.M. that corroborating evidence could no longer be considered in assessing a hearsay statement's reliability. 2003 MT 221, ¶ 34, 317 Mont. 159, ¶ 34, 75 P.3d 1257, ¶ 34. We decided S.T.M. prior to Crawford and our holding was based on the Supreme Court's decision in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). We removed the corroborating evidence factor because we could not "conceive of a case in which the admission of the hearsay statements of an alleged victim of child sexual abuse would not implicate the Confrontation Clause as well as the rule against hearsay." S.T.M., ¶ 34. The Supreme Court's rulings in Crawford and Davis recently have clarified that the Confrontation Clause only applies to testimonial statements; thus, it is now entirely conceivable that a hearsay statement that fails to implicate the Confrontation Clause may nevertheless be inadmissible hearsay. Davis, 547 U.S. at ––––, 126 S.Ct. at 2274–75. However, the "corroborating evidence" factor does not affect the case before us; the District Court's lack of "corroborating evidence" analysis could only advantage Spencer because the District Court did not consider as evidence S.S.'s and R.S.'s physical

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> injuries discovered by Dr. Gerrity. Thus, we leave for another day an analysis of S.T.M.'s continued vitality. In light of Crawford, however, we note that courts must again consider Confrontation Clause and hearsay challenges independently, contrary to our announcement in S.T.M., ¶ 22.
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> *State v. Spencer,* 2007 MT 245, 339 Mont. 227, 237, 169 P.3d 384, 392-93.

Even earlier, in *State v. Osborne*, the state was able to introduce the hearsay statements of a 33-month-old child sexual abuse victim made to a sheriff's deputy and a social worker, over the defendant's hearsay exception.

> ¶ 20 There was no evidence, other than the hearsay evidence, implicating Osborne. Therefore it was evidence of a material fact, more probative than any other evidence available through reasonable means. However, the material fact that the State sought to prove through the hearsay evidence was not simply the identity of the rapist, it was that Cassie identified Osborne as the rapist. The fact that she may have identified Heen to the deputy and the social worker is evidence of a different fact, and does not constitute more probative evidence of the same material fact. Accordingly, we conclude that the hearsay evidence of Cassie's statements to Heen and Jamie addressed a material fact and was more probative than any other evidence available through reasonable means. We further conclude that the District Court made adequate preliminary inquiry before it admitted the hearsay statements.
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> *State v. Osborne,* 1999 MT 149, 295 Mont. 54, 59, 982 P.2d 1045, 1047.

Abuse and neglect cases also involve children who have the primary personal knowledge of their treatment, but may be reluctant or unable to testify at trial. The trial witnesses usually are adults to whom the children have spoken out of court. Although the Confrontation Clause is not implicated, the statements are still hearsay and frequently prompt "residual exception" responses to hearsay objections.

In Re O.A.W., 335 Mont. 304, 153 P.3d 6, 2007 MT 13, was decided the same year as the *Spencer* case cited above. Because *O.A.W.* was an abuse and neglect, not a criminal, case, M.C.A. 46-16-220 (see below) did not apply. The prosecution moved in limine for an order allowing hearsay testimony about the children's statements to be admitted at the adjudicatory hearing at which they were found to be youths in need of care:

> At the hearing, after argument on the matter, the court ruled from the bench that the children were unavailable to testify and that videotaped interviews made by law enforcement officer Lewis Barnett, social worker Shelly Verwolf, and Dr. Cindy Miller, a clinical psychologist, were admissible under M.R. Evid. 804(b)(5).
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> *In re O.A.W.*, 2007 MT 13, 335 Mont. 304, 306, 153 P.3d 6, 9.

Later, the state petitioned for permanent termination of parental rights and, after another hearing, the Court granted the petition. The parents both appealed, arguing, inter alia, that the Court erred in allowing witnesses to present the children's out of court statements under 804(b)(5). The Supreme Court affirmed both the finding that the trauma to the children from testifying in court against their parents[7] made them "unavailable" and the holding that the hearsay was trustworthy enough for 804(b)(5) to apply at the adjudicatory hearing:

¶ 35 The court further found that the statements of the children were trustworthy, pursuant to M.R. Evid. 804(b)(5) and its "residual exception,":

> And having viewed the tapes, I believe that the two interviews in question, in particular, were well-documented and would give the trier of fact in this case the ability to assess the contents of what they're saying for accuracy without the need for cross-examination, and I don't do that lightly, but I think weighing all those factors, I think the truth here could be discerned without subjecting these children to cross-examination or the trauma of facing their parents in court. So I'll find that the children are unavailable as witnesses for this hearing.
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> ¶ 36 The District Court›s finding on this issue was supported by the testimony of Dr. Ruggiero and Dr. Miller. This finding was not arbitrary and was made with conscientious judgment. …
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> 335 Mont. at 311, 153 P.3d at 12.

(The Supreme Court also affirmed admission of the children's hearsay through their treating therapist at the final termination hearing, although that appeared to be under 803(4) and 703 rather than the residual exception.)

STATUTORY TREATMENT OF CHILD VICTIM HEARSAY

In 2003, the Montana legislature enacted M.C.A. 46-16-220, entitled "Child Hearsay Exception—Criminal Proceedings." It basically incorporates the criteria announced by the Supreme Court in the *S.T.M.* case, discussed above. This statute creates an additional hearsay exception for out-of-court statements by child[8] (under 15) victims or witnesses in sexual assault

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7 There was considerable expert testimony on this point.

8 The statute defines "child" as "a person under 15 years of age." It does not specify whether the relevant age is that at the time of the crime, the time of the statement, or the time of trial. I expect that this ambiguity will come up, and be resolved judicially, in short order, because of the flood of cases implicating this kind of evidence.

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and abuse cases: "Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, if…" (One of the requirements is that the child victim be unavailable at trial, so if this exception were reflected in the Rules of Evidence, it should be part of 804 rather than 803.) Although *S.T.M.* found that the existence of corroborating evidence was not to be used in deciding the admissibility of child victim hearsay statements, this factor is included in the statute. Further, the statute contains two procedural requirements: the proponent must give detailed notice of intent to introduce the evidence and the judge must file written findings and conclusions on the admissibility of the child's testimony.

State v. Spencer, supra, is the only reported case to discuss M.C.A. 46-16-220 at length. There, the trial judge issued a 12-page order admitting the hearsay statements offered by the State with the requisite notice. On appeal, among other things, defendant argued that the trial judge violated the statute by failing to delineate portions of his decision "Findings of Fact" and "Conclusions of Law." The Supreme Court held that the trial judge "adequately complied" with the statute and affirmed the admission of the victim's statements through her foster mother and a counselor. [9] (It also found that the statements were "non-testimonial" under *Crawford* so that the Confrontation Clause objection did not bar admission either).

The statute is ambiguous as to the time at which the declarant's age is to be measured. Perhaps more importantly, it does not indicate whether it supplants the residual exceptions for child-victim hearsay. Before the statute, Montana cases had resorted to the residual exceptions for this special form of hearsay. The unresolved question is whether a party who wants to introduce a child-victim's statements through an adult witness must meet the requirements of M.C.A. 46-16-220, or if the proponent is still free to argue for admission also under 803(24) and/or 804(b)(5).

The only pronouncement on this subject is a single sentence in *Spencer*:

> Section 46–16–220, MCA, sets forth the requirements for admitting child hearsay in Montana criminal proceedings.
>
> *State v. Spencer*, 2007 MT 245, 339 Mont. 227, 234, 169 P.3d 384, 390.

However, it does not appear that the State in that case actually presented the issue of the continued applicability of the residual hearsay exceptions, nor did the Supreme Court directly address the question. Thus, an advocate might consider invoking all three bases for admission of the hearsay statements of child witnesses in criminal cases. In civil cases, the statute does not apply, so the residual exceptions are still the only law at play.

NUMERICAL ANALYSIS

As I read through the significant cases, I kept a running tally of the rulings of the trial judges on residual exception claims and the results on appeal. Under 803(24), I considered five cases. In two, the trial judges admitted the hearsay and in two, the trial judges refused the hearsay. The Supreme Court upheld all four rulings, finding no error. Under 804(b)(5), three cases admitted the hearsay and one refused it. Again, the Supreme Court found no error in any of the rulings.

CONCLUSION

Montana has two rule-based "catchall" or "residual" hearsay exceptions, and a statutory exception which applies only to child declarants in criminal cases. The purpose of the residual exceptions is to make "room for growth and development of the law of evidence in the area of hearsay.[10]"

Although Montana cases express the general policy that these exceptions are to be used sparingly, cases do affirm this route to admissibility when the enumerated hearsay exceptions do not apply.

Accordingly, I recommend that proponents of hearsay evidence first try to fit their hearsay into one or more of the specific exceptions of 803 and 804. (I am a big believer in skinning the cat in as many ways as possible). If the outcome is doubtful, deploy the wild card residual exception(s): if your declarant is available to testify, you should proceed under 803(24) alone, but if your declarant is unavailable, try both 803(24 and 804(b)(5). In either case, be prepared to identify the circumstances about the declarant, the witness, the subject matter, and the statement which constitute "circumstantial guarantees of trustworthiness" comparable to those in the rest of the rule (803, 804, or both) which contains the residual exception(s). If you are able to convince the trial court to use this safety valve, chances are the Supreme Court will affirm.[11]

As we say at my house, "Santa only comes to those who believe in him." If you believe in the residual exceptions, they might come true for you and your client. Better than a fur coat?

Cynthia Ford *is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.*

9 Obviously, it is better for the judge to actually label the portions of her written order on the admissibility of evidence under this statute as "Findings of Fact" and "Conclusions of Law" to avoid the technical challenge that the court failed to comply with the statute. Lawyers presenting proposed orders to judges should be sure to do so.

10 Montana Commission Comment to 803(24), citing the federal Advisory Committee Note and rejecting the more restrictive federal provisions.

11 Better not use Eartha Kitt's argument: "Think of all the fun I've missed/Think of all the 'fellas that I haven't kissed/ Next year I could be just as good/ If you'll check off my Christmas list [or at least allow the hearsay]."