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Note

Nebraska’s Residual Hearsay Exceptions: How Broad A Scope?


I. INTRODUCTION

The residual hearsay exceptions contained in the Nebraska Rules of Evidence, sections 27-803(22) and 27-804(2) (e) of the Nebraska Revised Statutes,1 allow the trial court, under certain circumstances, to admit hearsay evidence which does not fall within any of the traditional hearsay exceptions.2 These two “catch-all” provisions, which follow nearly verbatim their counterparts in the Federal Rules of Evidence,3 include as admissible hearsay, statements “not specifically covered by any of the [listed] exceptions but having equivalent circumstantial guarantees of trustworthiness.”4

Section 27-804(2) (e) applies to situations in which the declarant is unavailable as a witness, while section 27-803(22) is applicable even though the declarant is available to testify. However, because identical language appears in both sections, the appropriate

1. NEB. REV. STAT. §§ 27-803(22), -804(2) (Reissue 1979). Both sections define as admissible hearsay:
   [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

2. For a discussion of hearsay and its common law exceptions, see C. McCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 579-751 (2d ed. 1972); 5 & 6 J. WIGMORE, WIGMORE ON EVIDENCE §§ 1360-1810 (J. Chadbourn rev. 1974).

3. FED. R. EVID. 803(24), 804(b)(5).

Admissibility of hearsay under the residual exceptions requires five findings by the trial court: (1) the statement to be admitted must have "equivalent circumstantial guarantees of trustworthiness"; (2) the statement must be offered "as evidence of a material fact"; (3) the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; (4) the proponent of the statement must demonstrate that the "general purposes of the rules and the interests of justice will be served" by admission of the evidence; and (5) the proponent must give the opposition no-


tice of "his intention to offer the statement."\textsuperscript{10}

Although all five requirements of the residual exceptions under the Federal Rules of Evidence have been litigated,\textsuperscript{11} most of the controversy has focused on what constitutes the "equivalent circumstantial guarantees of trustworthiness."\textsuperscript{12} This was the primary issue presented in \textit{State v. Beam},\textsuperscript{13} which marked one of the first attempts by the Nebraska Supreme Court to delineate the scope of the residual exceptions.\textsuperscript{14} This Note will examine \textit{Beam} in light of the history of the residual exceptions under the Federal Rules of Evidence and the construction given the provisions by

\begin{itemize}
  \item \textit{Beam}, 206 Neb. 248, 254, 292 N.W.2d 302, 305 (1980).
\end{itemize}

\textsuperscript{10} The Nebraska Supreme Court strictly construed the notice requirement in \textit{State v. Leisy}, 207 Neb. 118, 295 N.W.2d 715 (1980) and \textit{State v. Reed}, 201 Neb. 800, 272 N.W.2d 759 (1978) to require a finding by the trial court that notice was given by the proponent of his intention to offer hearsay evidence under the residual exceptions. \textit{Accord, United States v. Mandel}, 591 F.2d 1347 (4th Cir. 1979), \textit{aff'd en banc}, 602 F.2d 653 (4th Cir. 1979); \textit{United States v. Davis}, 571 F.2d 1354 (5th Cir. 1978). \textit{But see Furtado v. Bishop}, 604 F.2d 80 (1st Cir. 1979), \textit{cert. denied}, 444 U.S. 1045 (1980) (trial court, believing notice requirement discretionary, admitted hearsay affidavit in a prisoner's civil rights action even though formal notice was not given to opposing counsel); \textit{United States v. Williams}, 573 F.2d 284 (5th Cir. 1978) (affidavit admitted in a prosecution for tax fraud absent notice to the opposition); \textit{Muncie Aviation Corp. v. Party Doll Fleet, Inc.}, 519 F.2d 1178 (5th Cir. 1975) (FAA advisory circulars concerning airplane safety admitted absent any notice).

\textsuperscript{11} \textit{See cases cited in notes 5-10 supra.}

\textsuperscript{12} \textit{Fed. R. Evd.} 803(24), 804(b)(5). \textit{See cases cited in note 6 supra.}

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} After \textit{Beam}, the court examined the residual exceptions in \textit{State v. Leisy}, 207 Neb. 118, 295 N.W.2d 715 (1980), and held that the conditions precedent to the implementation of the residual exceptions are mandatory. \textit{Id.} at 68-69, 295 N.W.2d at 723. Because the defendant had given no notice of his intention to introduce evidence under the residual exceptions, the court affirmed the rejection of the hearsay testimony by the trial court. \textit{Id.}
various courts and legal writers. It will conclude by suggesting the proper application of the residual exceptions and by highlighting the factors which need to be emphasized in reaching such a determination.

II. THE BEAM DECISION

A. The Facts

On January 15, 1979, the 911 emergency division in Omaha received a telephone message in which the caller stated: "I shot my wife . . . 3817 Monroe . . . get here fast . . . my wife is dying." When two uniformed police officers arrived on the scene the defendant refused to let them enter. Later, the defendant opened the door and stated: "You guys are too late. I have already shot my wife. You can’t help me and you can’t help her because she is already dead." Upon entering the Beam residence, the police and rescue squad personnel found the defendant's wife lying on the kitchen floor. A .22 caliber revolver containing six empty cartridge casings was located near the defendant's wife, and the floor on which she lay had been pierced by five bullet holes. The rescue personnel quickly affirmed the defendant's belief that his wife was dead. The defendant was arrested and charged with second-degree murder.

At trial, the defendant testified that on the day of the shooting he had noticed that the revolver was absent from the locked gun case where it was customarily kept. He asked his wife to bring him the gun and she did. He then testified that an argument ensued while he was standing near the kitchen table with the revolver and his wife was seated at the table. His wife reached for the gun, and the contact caused it to discharge accidentally into her head.

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16. Id.
17. Id.
18. Id.
19. Id.
20. Upon examination, the rescue personnel found that the defendant's wife had no vital signs of respiration or pulse and an electrocardiogram reflected terminal heart rhythm. Brief of Appellant at 6-7, State v. Beam, 206 Neb. 249, 292 N.W.2d 302 (1980). The body had brain matter protruding from the top of the skull and a later autopsy established the cause of death as a bullet wound in the top of the head. 206 Neb. at 249, 292 N.W.2d at 303-04.
22. 206 Neb. at 250, 292 N.W.2d at 304.
23. Id.
24. Id.
25. A police weapons expert examined the revolver and testified at trial that it
"conceded that he did not remember the events too well because he had had a great deal to drink."\(^{26}\)

The defendant had filed a motion in limine prior to trial in an effort to exclude from admission anticipated hearsay statements made by his wife to various individuals.\(^{27}\) This motion was granted as to several witnesses but was denied with respect to Sally Rau, Melvin Barnes, and Ellen Primeau.\(^{28}\) These three persons testified at trial.

Sally Rau, an attorney, testified that she met with the decedent on December 13, 1978, and discussed decedent's desire to file for a divorce.\(^{29}\) During this meeting, the attorney observed that the decedent was bruised on both arms and took a photograph of the bruises which was later received as evidence at trial.\(^{30}\) She testified that Mrs. Beam informed her that the bruises were the result of a beating by her husband the previous night and that there were several weapons at her residence.\(^{31}\)

Melvin Barnes, a Sarpy County Deputy Sheriff, testified that at 1:30 a.m. on January 13, 1979, he was on duty and investigated a truck he observed in a church parking lot.\(^{32}\) He discovered defendant's wife alone in the truck and found that she had been crying.\(^{33}\) He testified that she told him "she and her husband had had a fight and he had beaten her up."\(^{34}\) The decedent had no cash and the deputy sheriff took her to a motel and arranged for her to secure a room by check.\(^{35}\) The motel registration and the check receipt were admitted into evidence at trial.\(^{36}\)

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was a single action weapon requiring the hammer to be fully cocked before it would fire. \(^{Id.}\) at 249-50, 292 N.W.2d at 304. His tests showed that the only way the revolver would fire without pulling the trigger was to strike the hammer of the gun very hard with a brass mallet. \(^{Id.}\) at 250, 292 N.W.2d at 304. The defendant introduced testimony of a retired gunsmith and ballistic engineer who had tested the revolver and found it to be defective. He testified that the weapon would discharge accidentally more often than not and would do so consistently when an effort was made to pull the gun from the hand of a person holding it. \(^{Id.}\) However, defendant's witness admitted on cross-examination that the gun's defective condition could have been caused by the earlier testing conducted by the police in which the gun was struck by a brass mallet. \(^{Id.}\)

26. \(^{Id.}\)
27. \(^{Id.}\)
28. \(^{Id.}\)
29. \(^{Id.}\) at 251, 292 N.W.2d at 304.
30. \(^{Id.}\)
31. \(^{Id.}\)
32. \(^{Id.}\)
33. \(^{Id.}\)
34. \(^{Id.}\)
35. \(^{Id.}\)
36. \(^{Id.}\)
Ellen Primeau was a coworker and friend of the decedent. She testified that during the two-week period before the shooting, the decedent told her she had consulted an attorney and was going to divorce her husband.

The jury found the defendant guilty of second-degree murder and the district judge sentenced him to fifteen years' imprisonment. On appeal, "[t]he defendant's assignments of error all center[ed] on the contention that the admission of the hearsay testimony of Sally Rau, Melvin Barnes, and Ellen Primeau violated the hearsay rule and its exceptions as set out in the Nebraska statutes, and constituted prejudicial error." The defendant also asserted that the admission of the hearsay testimony violated his right to confront witnesses under the sixth amendment of the United States Constitution.

B. The Supreme Court Decision

After noting that the testimony of the three witnesses was hearsay, inadmissible unless it fell within an exception to the hearsay rule, the Nebraska Supreme Court focused on whether the residual exceptions would provide the basis for admissibility. The court initially determined that the procedural notice requirements had been satisfied and "that the statements were offered as evidence of a material fact" and had the requisite probative value. The court then examined "[t]he critical issue . . . [of] whether the circumstances surrounding the making of the hearsay statements by the decedent provided guarantees of trustworthiness comparable to the other specific [hearsay] exceptions," i.e., whether there were "equivalent circumstantial guarantees of trustworthiness." In making its examination, the court emphasized the element of corroboration, stating: "'[W]hen hearsay seems to the court highly probative and is corroborated in part, it becomes admissible, and is by the same token immune to confrontation clause challenge.'"

37. Id. at 252, 292 N.W.2d at 305.
38. Id.
39. Id.
40. Id.
41. See Brief of Appellant at 21.
42. 206 Neb. at 252, 292 N.W.2d at 305.
43. Id. at 253, 292 N.W.2d at 305.
44. Id.
45. Id.
46. Id. at 254, 292 N.W.2d at 305.
48. 206 Neb. at 255, 292 N.W.2d at 306 (quoting 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-129 (1979)).
In reference to the statements made by the decedent to Attorney Rau concerning her husband's physical abuse and her desire to obtain a divorce, the court first examined the decedent's possible motives for fabrication. 49 The court found that since the conversation took place during the course of a professional consultation between attorney and client, it was reasonable to assume that an accurate statement of the facts had been given by the decedent. 50 As the court stated: "There was no apparent reason to falsify any statement and ample reasons for accuracy and truthfulness." 51 The truth of the decedent's statements was also bolstered by a photograph of decedent's bruises which had been taken by the attorney and admitted into evidence at trial. 52 The court concluded that "the evidence of all the surrounding circumstances tends to corroborate the veracity of the declarant's statements and to indicate the absence of incentives to speak falsely." 53

The court reached a similar conclusion concerning the decedent's statements to the deputy sheriff relating the beating by her husband. Corroboration for these hearsay statements was found in evidence showing that the declarant was emotionally upset when the deputy sheriff found her alone in the church parking lot, was afraid to return home, and spent the night in a motel. 54

The court held that the hearsay statements made to these two witnesses were admissible and stated:

We believe the statements of the decedent made to her attorney and the statements made to the deputy sheriff, under the circumstances outlined by the evidence here, had substantial guarantees of trustworthiness equivalent to the guarantees of trustworthiness of some of the other specific hearsay exceptions. The trial court has broad powers of discretion in weighing and balancing the probative value of such evidence and the possible prejudice, and the statements were admissible under the provisions of § 27-804(2)(3). 55

The court reached a contrary conclusion with respect to the hearsay statements made by the decedent to her friend and co-worker. 56 The court emphasized that there was no evidence of cor-

49. 206 Neb. at 254, 292 N.W.2d at 306.
50. Id.
51. Id.
52. Id.
53. Id. The court assumed that Ms. Rau's testimony accurately reflected what took place during her meeting with the decedent due to the attorney's disinterested status and her having heard the statements while acting in the course of her professional employment.
54. Id. at 255, 292 N.W.2d at 306. As with the attorney's testimony, the court assumed that Mr. Barnes' law enforcement training and the fact that the statements were made only two days prior to the shooting gave assurance as to the sheriff's testimonial capabilities.
55. Id. at 255-56, 292 N.W.2d at 306.
56. Id. at 256, 292 N.W.2d at 306-07.
roboration nor of any relevant factors surrounding the making of the statements which might establish guarantees of trustworthiness. As a result, the testimony of Ellen Primeau was not admissible under any of the exceptions to the hearsay rule. Nevertheless, the court held that the error was not prejudicial due to the merely cumulative nature of the testimony.

III. ANALYSIS

At common law, it was presumed that all hearsay testimony should be inadmissible. This presumption proved to be unworkable because it often excluded material evidence which presented little danger of inaccuracy or untrustworthiness. As a result, the common law courts created various exceptions in order to admit hearsay testimony deemed reliable due to the circumstances surrounding the making of the hearsay statements. While this system of specific hearsay exceptions was effective in many instances, reliable and much-needed evidence often was not admitted because it did not fall within any of the specific categories, and unreliable testimony frequently was admitted simply because it fell within a recognized hearsay exception.

57. Id.
58. Id.
59. For a list and discussion of the common law cases, see 5 J. WIGMORE, supra note 2, § 1364. Well-known judges have spoken of the intrinsic weakness of hearsay evidence. Chief Justice Marshall, in Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813), stated:

That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

Id. at 295-96. This view was echoed by Justice Story in Ellicott v. Pearl, 35 U.S. (10 Pet.) 412 (1836). Justice Story stated that hearsay evidence has been excluded for the reasons that it is not upon oath, that parties affected have no opportunity for cross-examination, “that it is peculiarly liable to be obtained by fraudulent contrivances, and above all that it is exceedingly infirm, unsatisfactory, and intrinsically weak in its very nature and character.” Id. at 436.

60. See generally 5 J. WIGMORE, supra note 2, §§ 1420-1427. Professor Wigmore stated: “The purpose and reason of the hearsay rule is the key to the exceptions to it.” Id. § 1420, at 251. When it was shown that hearsay testimony did not offend the policies supporting the hearsay rule, the main one being the absence of cross-examination, it no longer made sense to exclude such evidence. Consequently, as inherently reliable hearsay was presented to the common law courts, specific hearsay exceptions were established. Id. § 1420, at 251-52.

61. For a discussion of the development of the exceptions, see 5 J. WIGMORE, supra note 2, § 1420, at 251-52.
62. The point has been made by many commentators that often the traditional
To alleviate the problem of exclusion of reliable evidence when not within a specific exception, the Federal Rules of Evidence added the residual exceptions in the codification of the traditional common law exceptions. However, the common law policy of admitting hearsay testimony only when shown to be inherently reliable was preserved. This is indicated by the explicit statutory prerequisites for admissibility of hearsay under the residual exceptions and by the legislative history, which calls for their implementation "only in exceptional circumstances."

The Federal Rules of Evidence, including the hearsay provisions, represent an attempt to codify federal evidence law while leaving the trial judge sufficient discretion to administer justice in exceptional cases. Any increase in discretion afforded the trial judge would naturally run counter to the purpose of the Federal Rules to promote uniformity in evidentiary rulings. Prior to the adoption of the Federal Rules of Evidence, the trial court's discre-

 hearsay rule, along with its exceptions, operates to exclude the more reliable and admit the less reliable evidence. In short, much evidence routinely admitted under a recognized exception is simply not too trustworthy. See, e.g., E. Morgan, Basic Problems of State and Federal Evidence Law 229 (5th ed. 1976); J. Prince, Richardson on Evidence § 206 (10th ed. 1973).

The Advisory Committee's Note to Fed. Rule 803(24) explains the addition of the residual exceptions as follows:

The preceding 23 exceptions of Rule 803 and the first five [four] exceptions of Rule 804(b), infra, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in rule 804(b)(6) [5] are accordingly included.


See Imwinkelried, The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence, 15 San Diego L. Rev. 239 (1978). During the debate over the residual exceptions, Representative Holtzman asserted that the law of evidence could not be effectively codified. Holtzman stated:

The problems with rule 803(24) illustrate the serious reservations I have about codification of rules of evidence. This provision recognizes that it is impossible to codify the hearsay exceptions. Instead of permitting, by statute, any kind of hearsay to be used, we ought to have allowed courts to develop evidentiary principles on a case-by-case basis—as they have done for 200 years of our Federal history.


tionary power to create new hearsay exceptions was recognized at common law. This discretion provided the impetus for the Federal Rules' enumeration of specific exceptions. However, judges usually were hesitant to recognize a general catch-all provision for reliable hearsay evidence which did not fall within any defined exception.

The residual exceptions in the Nebraska statutes and Federal Rules are based upon considerations closely resembling Wigmore's two-pronged analysis of hearsay admissibility. Professor Wigmore contended that all hearsay exceptions were based on the principles of (1) necessity and (2) circumstantial probability of trustworthiness. Using this analysis, several courts implemented a residual-type exception prior to the enactment of the Federal Rules. In applauding this so-called "sensible" approach, Judge Wisdom, speaking for the Court of Appeals for the Fifth Circuit, stated that there is no legal "canon against the exercise of common sense in deciding the admissibility of hearsay evidence." After the promulgation of the Federal Rules of Evidence, courts


69. See 5 J. Wigmore, supra note 2, §§ 1420-1423.

70. Id.


72. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 397 (5th Cir. 1961). Dallas County set the trend for federal courts to admit hearsay evidence in the absence of an established common law exception. Dallas County, Alabama, insured its courthouse against damages occurring as a result of lightning or fire. The courthouse was damaged by the collapse of its clock tower; the county claimed that the collapse was caused by a bolt of lightning and filed suit to collect on its insurance policy. The insurance company introduced hearsay evidence, in the form of a 56-year old newspaper clipping, that the charred remains inside the clock tower debris were the result of an old fire instead of lightning. Although the newspaper clipping did not fit into any of the established common law hearsay exceptions, the Fifth Circuit held that since the clipping was necessary, trustworthy, relevant and material, it should be admitted as evidence. Dallas County is cited in SENATE
initially tended to use the residual exceptions solely to bolster the admittance of evidence on the grounds of other hearsay exceptions. This situation has changed, and contrary to the prediction of one commentator, there have been numerous decisions interpreting the residual exceptions. However, the courts have varied

73. See Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975), where the Fifth Circuit admitted FAA standards as evidence of normative airport procedures under the hearsay exception for official national safety codes. The court determined that the standards were prepared by a neutral party interested only in safety. Id. at 1182. Judge Wisdom, who also wrote the Dallas County opinion, see note 72 supra, found additional support in the not yet effective residual exceptions and described the Federal Rules of Evidence as “[t]he most enlightened views on the law of evidence.” Id. at 1184. And in Ark-Mo Farms, Inc. v. United States, 530 F.2d 1394 (Ct. Cl. 1976), a hydrological survey prepared by government experts was admitted into evidence under a liberal interpretation of the shopbook hearsay exception. The trial judge refused to sustain plaintiff's objections to the study as hearsay. Id. at 1386. The judge found that the survey had sufficient guarantees of reliability to warrant admission pursuant to a judge's discretion to admit “hearsay found to be the best evidence reasonably available and to have assurances of accuracy and reliability.” Id. at 1386-87. The judge remarked that this residual discretion had been codified in the Federal Rules of Evidence. Id. at 1387. The trial judge's recommended decision was adopted by the court of claims as the basis for judgment. See also United States v. McClain, 531 F.2d 431, 435 (9th Cir. 1976), cert. denied, 429 U.S. 835 (1977). The Ninth Circuit found that the admission at trial of the hearsay testimony of an informant was harmless error. The court remarked that the government had made no attempt to admit the informant's testimony under the residual exceptions, id. at 437, but had instead relied on the seldom used predisposition to commit the crime hearsay exception. Id. The court rejected the use of such an exception. Id.

74. See Waltz, Rule 803-Hearsay Exceptions: Availability of Declarant Immaterial, in FEDERAL RULES OF EVIDENCE IN CRIMINAL MATTERS 13, 41 (1977); Waltz, Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?, 2 LITIGATION, Fall 1975, at 22. Waltz predicted that the residual exceptions would only be implemented in extremely rare situations, and as a result, would have a minimal effect on federal evidence law. Waltz, FEDERAL RULES OF EVIDENCE IN CRIMINAL MATTERS, supra, at 41.

considerably on the scope which is afforded the residual exceptions, and two main schools of thought have emerged with respect to the appropriate breadth of the provisions.\textsuperscript{76}

One view is that the residual exceptions should be construed narrowly in accordance with the legislative intent that they be used "only in exceptional circumstances."\textsuperscript{77} In 1972, the United States Supreme Court's Advisory Committee on Rules of Evidence submitted its revised draft of the proposed rules of evidence\textsuperscript{78} to the Supreme Court. The Supreme Court approved the proposed rules in November 1972,\textsuperscript{79} but Congress deferred the effective date of the rules pending congressional confirmation.\textsuperscript{80}

The House acted first on the Rules, and its Judiciary Committee recommended deleting the residual hearsay exceptions.\textsuperscript{81} The committee cited two reasons for its recommendation.\textsuperscript{82} First, the exceptions were criticized as "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to

\textsuperscript{76} In the following decisions, the courts held that the residual exceptions should be construed narrowly and that the evidence to be admitted must be inherently trustworthy: United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Reese, 561 F.2d 894 (D.C. Cir. 1977); United States v. Oates, 560 F.2d 45 (2d Cir. 1977); United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977); United States v. Palacios, 556 F.2d 1359 (5th Cir. 1977); Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975).

In contrast, the trustworthiness requirement was relaxed in Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), \textit{cert. denied}, 444 U.S. 1045 (1980); United States v. Lyon, 567 F.2d 777 (8th Cir. 1977), \textit{cert. denied}, 435 U.S. 918 (1978); United States v. Ward, 552 F.2d 1080 (5th Cir. 1977); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976); United States v. Homer, 545 F.2d 884 (3d Cir. 1976); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976); United States v. Piefeffer, 539 F.2d 688 (8th Cir. 1976); United States v. Gomez, 529 F.2d 412 (5th Cir. 1976); United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); United States v. Napier, 518 F.2d 316 (9th Cir. 1975).

\textsuperscript{77} Senate Report, supra note 63, at 20.


\textsuperscript{81} House Report, supra note 90, at 5-6.

\textsuperscript{82} Id.
prepare for trial." Second, it was believed that Rule 102, directing "the courts to construe the Rules of Evidence so as to promote 'growth and development,'" would provide the trial judge with sufficient flexibility to admit hearsay evidence in appropriate circumstances, without a recognized exception. The House subsequently deleted the two residual provisions in its version of the Rules.

While the Senate Judiciary Committee agreed that the Supreme Court version was too broad, it was opposed to the House's deletion of the residual exceptions. In explaining its position, the committee stressed two primary considerations. First, it feared that without separate residual exceptions, trial court judges would use Rule 102 to interpret the specific enumerated hearsay exceptions beyond recognition. Second, the committee believed that the enumerated exceptions could not possibly encompass every situation in which hearsay testimony was reliable. As a result, the Senate reinstated the residual exceptions; however, they were narrower than those proposed by the Supreme Court's Advisory Committee. Furthermore, the committee emphasized that the provisions were to be utilized "very rarely."

83. Id.
84. HOUSE REPORT, supra note 80, at 5-6 (quoting FED. R. EVID. 102).
85. HOUSE REPORT, supra note 80, at 5-6. FED. R. EVID. 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."
87. See SENATE REPORT, supra note 63, at 19.
88. Id.
89. Id.
90. Id.
91. The Senate version of the residual exceptions provided as follows:
   Other Exceptions—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
   CONF. REP. NO. 1597, 93 Cong., 2d Sess. 4 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7098, 7106 [hereinafter cited as CONFERENCE REPORT]. The Senate version was later enacted by Congress after a notice requirement was added to the provisions by a conference committee. See notes 93-94 & accompanying text infra.
92. SENATE REPORT, supra note 63, at 20. In outlining the desired scope of the exceptions, the Senate Report stated:
The Rules were referred to a conference committee to resolve the conflict between the House and Senate over the residual exceptions. The conference committee adopted the Senate version, but added a provision for pretrial notice to the adverse party regarding the intended use of the hearsay testimony.\footnote{Conf. Rep., supra note 91, at 4.} Congress ultimately adopted the conference committee's recommendation and enacted the residual exceptions in their present form.\footnote{Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926. The text of the provisions, see note 1 supra, which sets forth the nearly identical Nebraska residual exceptions.}

The residual exceptions adopted by the Nebraska legislature follow nearly verbatim their counterparts in the Federal Rules. The legislative history of the Nebraska Rules of Evidence reveals that this identity of language manifests an intent by the Nebraska legislature to adopt the policy considerations underlying the residual exceptions as enacted by Congress.\footnote{The Nebraska Supreme Court Committee on Practice and Procedure was established in 1969 and was charged to "undertake a study of modernized and simplified rules of evidence for consideration by bench and bar and . . . to transmit its recommendations to the Supreme Court." The Nebraska Supreme Court Committee on Practice and Procedure, Proposed Nebraska Rules of Evidence 5 (1973). This study was done "in connection with a group of proposals being submitted to the Congress . . . by the [United States] Supreme Court." Proposed Nebraska Rules of Evidence: Hearings on LB 279 Before the Judiciary Comm. of the Nebraska Unicameral, 84th Legis., 1st Sess. 1 (1975) (statement of David Dow).

The initial draft of the Proposed Federal Rules of Evidence was utilized by the state committee as a foundation for its study, and the Nebraska "proposed rules follow[ed] in many respects the Proposed Federal Code." Proposed Nebraska Rules of Evidence, supra. When the Nebraska and Federal Rules were consistent in substance, the committee "attempted to conform the language of the Nebraska Rule to the Proposed Federal Rule." Id. This attempt toward uniformity continued throughout the period of revision. As the Nebraska legislative history reveals:

When the final Federal Rules were adopted by the House and Senate, the Committee had further meetings to try and revise [the Nebraska] rules so . . . the State and Federal rules would be the same
scope afforded the residual exceptions by a minority of authorities would seem to correctly reflect the intent of Congress in enacting the exceptions. The residual exceptions were passed by the House only after Senate assurance that the exceptions were to be used "very rarely"96 and "only in exceptional circumstances."97 The Senate Report also placed emphasis on Dallas County v. Commercial Union Assurance Co.,98 in which the extremely unusual facts surrounding the hearsay evidence were held to guarantee the trustworthiness of the statements and made it "inconceivable" that the hearsay was fabricated.99

While many courts have given lip service to the apparent desire of Congress to limit the application of the residual exceptions, in practice these courts have relaxed and modified the trustworthiness requirement to a great degree.100 A majority of courts and

96. SENATE REPORT, supra note 63, at 20.
97. Id.
98. 285 F.2d 388 (5th Cir. 1961).
99. SENATE REPORT, supra note 63, at 19.

In these decisions, the courts found evidence admissible under the residual exceptions and based their rulings on circumstantial guarantees of trustworthiness. Nevertheless, upon examination is it apparent that the admitted hearsay lacked any degree of trustworthiness. Furthermore, the courts did not address the circumstances surrounding the making of the hearsay statements which clearly diminished the reliability of the hearsay testimony.

Medico involved a bank robbery and a bank employee's description of the getaway car. About five minutes after the robbery occurred, the bank employee heard a regular customer of the bank pounding on the entrance door and shouting out a description of the car. The bank employee quickly wrote down this description. The customer had been given the description by an unidentified young man sitting in a car parked outside the bank. In affirming the admission of the double hearsay evidence under Rule 804(b)(5), the Second Circuit upheld Judge Weinstein's finding that the evidence was trustworthy. 557 F.2d at 315. The majority rejected the dissent's arguments that the excitement may have made the customer's perception faulty. Id. at 316. In addition, it found that although the rest of the evidence raised suspicions regarding the ownership of the getaway car, these suspicions were not disturbing enough to make the description untrustworthy. Id.

In Leslie, the defendant was convicted of transporting a stolen automobile between states and subsequently selling it. The defendant was one of the four men arrested with the stolen vehicle. At the time of the arrest, the other three men made statements indicating that the defendant was the ringleader of the scheme. At trial, the government introduced the statements to impeach the credibility of the three men, who claimed that their earlier state-
legal scholars have either expressly or covertly advocated a liberal interpretation of the residual exceptions. Several arguments have been advanced to support this position. First, it has been reasoned that the language of the statutes themselves should be afforded greater emphasis than the various congressional reports. Second, it has been argued that a broad interpretation would be more consistent with the Federal Rules of Evidence as a whole. Third, since many of the specific hearsay exceptions of

ments were not true. The men explained that they had been under the influence of drugs when they made the statements and had been led to believe that they would receive a lesser charge if they made the statements to the F.B.I. Despite this inconsistency, the court of appeals admitted the testimony as substantive evidence under Rule 803(24). The most dangerous aspect of this decision was the court's disregard of the fact that the initial statements of the three men were self-serving and were a possible frame-up of the defendant. It is difficult to see how the later admission by the men that they actually made the statements diminishes this danger.

In Ward, the defendants were convicted of stealing and disposing of a truck in interstate commerce. The driver of the truck, who was unavailable to testify at the trial because he was a fugitive on an unrelated state charge, had told the F.B.I. that he was sleeping at a truck stop when the truck was stolen. His statement was admitted under Rule 804(b)(5), despite the possibility that it was made solely to cover up his own participation in the theft. The court acknowledged that the statement might have been self-serving, but found that this possibility was not enough to violate the Rule 804(b)(5) trustworthiness requirement.

In Carlson, the declarant was the government's chief witness. He testified before a grand jury that he purchased cocaine from the defendant and distributed it to a third conspirator, who then sold the cocaine to a government agent. The night before the trial began, the declarant decided not to testify. The declarant's only explanation for his decision was a vague fear of reprisals from the defendant. In admitting the grand jury testimony under Rule 804(b)(5), the court neglected to consider the suspicious nature of the declarant's refusal to testify. Clearly, there was little reason for the declarant to be so vague and secretive since greater specificity would have made him more credible. It is possible that the real reason for the declarant's decision was that his earlier statements were not true and were made in order to spread the guilt or protect an unnamed party. In any event, the circumstances surrounding the declarant's sudden refusal to testify should have been considered in determining the trustworthiness of his statements.


See note 100 supra.

See Imwinkelried, supra note 65, at 258-61.

fer only scant assurance of trustworthiness, it has been suggested that the circumstances supporting the admission of evidence under the residual exceptions also need not be extensive.105 Finally, it has been urged that the Senate's limiting language was included only to appease the House, and therefore such language does not represent the true intent of Congress.106

It would appear that the language of the residual exceptions could be at odds with the supporting legislative history in regard to the appropriate scope which should be afforded the provisions. While the legislative history indicates that the provisions should be rarely used,107 there is no limiting language in the statute beyond the five findings the trial court must make.108 Nevertheless, since Congress explicitly intended to limit the use of the residual exceptions, trial courts should strictly construe the five findings prior to admitting hearsay testimony under the exceptions to assure that only extremely reliable evidence is admitted. Courts which give mere lip service to the limiting nature of the statute are acting contrary to the intent of Congress.109

In addition to the controversy over the appropriate scope which should be given the residual exceptions, disagreement exists as to what factors should be used to determine whether circumstantial guarantees of trustworthiness exist. Some courts have focused almost entirely on the element of corroboration for such proof,110 others have held that the declarant's motivation in making the statement should be the sole consideration.111

Neither approach alone is adequate to fully assess the possible guarantees of trustworthiness.112 Weinstein has long advocated an examination of all "the other evidence in the case"113 to determine the credibility of the extra-judicial declarant. Courts and commen-

105. See Yasser, supra note 101, at 608.
106. Imwinkelried, supra note 65 at 259.
107. See note 92 supra.
108. See notes 5-10 & accompanying text supra.
109. See notes 77-99 & accompanying text supra.
tators have emphasized that an examination of the following factors is necessary to determine the applicability of the residual exceptions: (1) the declarant’s motivation in making the statement,114 (2) corroboration,115 (3) circumstances surrounding the making of the statement,116 and (4) the declarant’s availability for cross-examination.117

In Beam, the Nebraska Supreme Court emphasized the apparent corroboration of the hearsay declarations made by the decedent to the attorney and deputy sheriff.118 The decedent’s motivation in making the statements was seemingly given little weight in the court’s determination of “circumstantial guarantees of trustworthiness,”119 other than the court’s statement that “[t]here was no apparent reason to falsify any statement and ample reasons for accuracy and truthfulness.”120 In regard to the conversation between the decedent and her attorney, the court thought it “reasonable to assume that an accurate statement of the facts”121 was given to attorney Rau by the decedent, because their conversation took place during the course of a professional consultation. While complete honesty between attorney and client is a laudable goal, it is questionable whether a client always gives an impartial and accurate statement of the facts to an attorney during an initial consultation.122 This may be especially true in the area of domestic relations where animosity has developed between the parties. The court also failed to address the decedent’s possible motivation in making her statements to the deputy sheriff. The decedent was found alone in a parking lot and it does not take a vivid imagination to construct a scenario in which the decedent would have been tempted to fabricate a story to the law enforcement official. It is questionable whether an analysis which focuses almost entirely on the hearsay’s corroboration is compatible with the legislative mandate calling for use of the exceptions “only in excep-

116. Id.
117. Id.
118. 205 Neb. at 254-55, 292 N.W.2d at 306.
119. Id. at 254, 292 N.W.2d at 306.
120. Id. This observation was made with respect to decedent’s statements to Attorney Rau. As to the decedent’s statements to the sheriff, the court merely noted that “the evidence tends to corroborate . . . the absence of incentives to speak falsely.” Id. at 255, 292 N.W.2d at 306.
121. Id. at 254, 292 N.W.2d at 306.
Several courts have warned of the danger in using corroboration as the sole indicator of hearsay reliability. In United States v. Bailey, the court stated that because of the general purpose of the residual provisions, "we do not feel that the trustworthiness of a statement offered pursuant to the [residual exceptions] should be analyzed solely on the basis of the facts corroborating the authenticity of the statement." In advocating a broader analysis, the court stated:

[T]he trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the veracity of the statement, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely. Further consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness.

This broad analysis is even more desirable in the criminal context where added assurances of reliability should be required to avoid confrontation clause challenge.

While the Nebraska Supreme Court may have placed too little emphasis on the declarant's motivation in Beam, it would appear that the court has generally implemented the residual exceptions in an admirable manner. The court has indicated that the five conditions contained in the residual exceptions must be satisfied prior to the admission of evidence pursuant to those provisions. This stance is much more compatible with the spirit of the residual exceptions than is the practice of those courts which have given little credence to the conditions precedent to the use of the exceptions. The Nebraska court's stance would also free the court

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125. 581 F.2d 341 (3d Cir. 1978).
126. The court reasoned that because the residual exceptions were designed to admit hearsay when circumstances required such evidence to establish the truth, it would be illogical to rule on admissibility based on corroborating evidence because the existence of a great deal of corroboration negates the need for such hearsay via the residual exceptions. Id. at 349.
127. Id.
128. Id.
131. See notes 77-99 & accompanying text supra.
132. See notes 100-06 & accompanying text supra.
from the burden of defining "circumstantial guarantees of trustworthiness," by excluding hearsay testimony unable to meet the other conditions precedent prior to the court's determination of the trustworthiness factor.\textsuperscript{133}

Because \textit{Beam} and \textit{State v. Reed}\textsuperscript{134} are the only cases in which the Nebraska Supreme Court has addressed the issue of "circumstantial guarantees of trustworthiness," it is difficult to predict future developments in regard to the residual exceptions. It would appear that the court will afford great weight to the overall circumstances surrounding the making of the hearsay statements to determine if there exist the required guarantees of trustworthiness. The court apparently adopted that approach in \textit{Beam} when it stated: "The evidence of all the surrounding circumstances tends to corroborate the veracity of the declarant's statements and to indicate the absence of incentives to speak falsely."\textsuperscript{135} \textit{Reed} also indicates that the court may tend to view the big picture rather than to focus on the specific elements of corroboration or the particular motives to falsify.\textsuperscript{136} However, the \textit{Beam} court perhaps placed undue emphasis on "who" the hearsay statements were communicated to in determining reliability.\textsuperscript{137} It is questionable whether statements made to persons in authority or to those in the performance of their professional duties are any more trustworthy than other hearsay evidence presented before the trial court.

\section*{IV. CONCLUSION}

In admitting hearsay evidence under the residual exceptions, courts should be sensitive to the congressional intent to limit the use of the exceptions to "exceptional circumstances."\textsuperscript{138} Only by strictly applying the five conditions of admissibility under the residual exceptions and rigorously scrutinizing the "circumstantial

\begin{itemize}
\item \textsuperscript{133} See \textit{State v. Leisy}, 207 Neb. 118, 295 N.W.2d 715 (1980), in which the Nebraska Supreme Court did not rule on the issue of circumstantial guarantees of trustworthiness because it found that the mandatory notice requirement had not been satisfied. \textit{Id.} at 129-30, 295 N.W.2d at 723. In \textit{State v. Reed}, 201 Neb. 800, 272 N.W.2d 759 (1978), the court ruled on the issue of circumstantial guarantees of trustworthiness, but could have reached the same conclusion without such a determination due to the defendant's failure to meet the other conditions contained in the residual exceptions. \textit{Id.} at 807, 272 N.W.2d at 763.
\item \textsuperscript{134} 201 Neb. 800, 272 N.W.2d 759 (1978). See note 14 \textit{supra}.
\item \textsuperscript{135} 206 Neb. at 254, 292 N.W.2d at 306.
\item \textsuperscript{136} 201 Neb. at 807, 272 N.W.2d at 763.
\item \textsuperscript{137} See notes 50-55 & accompanying text \textit{supra}.
\item \textsuperscript{138} \textit{Senate Report}, \textit{supra} note 63, at 20. See notes 77-99 & accompanying text \textit{supra}.
\end{itemize}
guarantees of trustworthiness\textsuperscript{139} of the hearsay evidence will courts preserve that intent and further the appropriate use of hearsay evidence.

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\textsuperscript{139} Neb. Rev. Stat. §§ 27-803(22), -804(2) (e) (Reissue 1979).