OPD OFFICE OF THE PARENT DEFENDER

MONTHLY MEMO #3– RESIDUAL HEARSAY EXCEPTION

September 2024

Scenario:

You represent the parent and receive notice that DSS intends to use their child's statement that would otherwise not be admissible. DSS wants to use this statement into evidence under the residual hearsay exception to the NC Rules of Evidence.

The Problem:

You don't want the evidence to be admitted or you would rather have the child testify instead of allowing a social worker, teacher, therapist, etc., to testify about what the child communicated to them.

Applicable Law:

Rule 802 of the NC Rules of Evidence generally prohibits the admission of hearsay. Rules 803(24) and 804(b)(5) are disfavored exceptions to the inadmissibility of hearsay evidence which allow "residual" hearsay. *Strickland v. Doe*, 156 N.C. App. 292 (2003). To admit residual hearsay, the trial court must determine each of the following factors in detailed findings of fact. *In re B.W.*, 274 N.C. App. 280 (2020); *State v. Smith*, 315 N.C. 76 (1985). The burden is on the offering party to justify admission. It is not on the opposing party to justify exclusion. *See In re F.S.*, 268 N.C. App. 34 (2019).

(1) Proper notice was given;

- ❖ In writing
- ❖ With sufficient notice to give the party a fair opportunity to prepare
  - Time can range on a case-by-case basis. See *In re W.H.*, 261 N.C. App. 24, 27 (2018) (respondent-father had between one week and seven months of written notice and had the hearsay statements for months before the written notice).
- ❖ Contains
  a) a statement of the proponent's intention to offer the hearsay testimony,
  b) the "particulars" of the hearsay testimony, and
  c) the name and address of the declarant.

(2) The hearsay statement is not specifically covered by another rule;

- ❖ Filing a residual notice is a concession by the proponent that the statements don't fit another exception. Turn their shield into your sword.
- ❖ Other hearsay exceptions:
  - ➢ Rule 803(2): Excited Utterances
  - ➢ Rule 803(3): State of Mind
  - ➢ Rule 803(4): Medical Diagnosis or Treatment

- Rule 803(6): Business Records
- Rule 803(8): Official Records and Reports

(3) The declarant's availability and the statement's circumstantial guarantees of trustworthiness;

- When determining admissibility, the court must consider the declarant's availability. N.C. Rule of Evidence 804(b)(5) (explicitly required); 803(24); *In re F.S.*, 268 N.C. App. 34 (2019) (applying availability to 803(24)); *State v. Holden*, 106 N.C. App. 244 (1992) (under 803(24), declarant's availability is considered in analysis of statement's trustworthiness).
- When determining trustworthiness, the Court should consider:
  a) whether the declarant had personal knowledge of the underlying events,
  b) whether the declarant is motivated to speak the truth or otherwise,
  c) whether the declarant has ever recanted the statement,
  d) whether the declarant is available at trial for meaningful cross-examination, and
  e) the nature and character of the statement and the relationship of the parties. *State v. Wagoner*, 131 N.C. App. 285 (1998). *See also In re H.G.*, 290 N.C. App. 552 (2023) (unpublished).
- The closer that the declarant's unavailability due to trauma merges into incompetency to testify, the less trustworthy the hearsay statements are. *See State v. Stutts,* 105 N.C. App. 557 (1992) ("The very fact that a potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out-of-court statements to require excluding them.") *But see In re W.H.,* 261 N.C. App. 24 (2018).
- Also, the more competent and available the witness is to testify, the less need there is for the hearsay statements. *State v. Fearing*, 315 N.C. 167 (1985) ("If the witness is available to testify at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether.")
- Inherently, it is a fact-specific determination which is why there is a requirement for supported findings. *See In re B.W.*, 274 N.C. App. 280 (2020) (therapist's letter alone did not suffice to show child's unavailability); *In re A.J.*, 289 N.C. App. 632 (2023) (residual hearsay requires findings showing "careful consideration").

(4) The statement is of a material fact;

(5) The statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and

- "Evidence did not support finding that recordings of children were more probative than other evidence reasonably available, thus, recordings were inadmissible under residual exception to hearsay rule for available declarants." *In re B.W.*, 274 N.C. App. 280 (2020).

(6) The proffered evidence will best serve the general purposes of the Rules of Evidence and the interests of justice.

See State v. Smith, 315 N.C. 76 (1985) (discussing the six-part test).

Action Steps:

- File a Response to the Notice to exclude/determine admissibility of residual hearsay.
  - All conditions must be met for the residual hearsay exception to apply. If there is an argument that a condition is not met, make the argument about the deficiency. Ideally, the argument is in writing. If it is orally argued, ensure it is on the record by having the hearing recorded and asking for a written ruling.[1]
  - The residual hearsay exception was designed to be used very rarely, and only in exceptional circumstances.
- If the court allows the residual hearsay evidence, you should object when it is offered at trial to preserve the issue for appeal. *See* *State v. Oglesby*, 361 N.C. 550 (2007).
- Issue a subpoena to the juvenile to testify.
  - Even with a showing of harm to the child's mental health, case law in A/N/D cases focuses on the need to balance the parent's due process rights with the need to protect children's mental health. Generally, both can be protected through making accommodations for testimony.[2]
  - If the request for residual hearsay is allowed, object to other hearsay issues (such as double or triple hearsay).

[1] *In re Hayden*, 96 N.C. App. 77 (1989) (holding evidence was inadmissible under Rule 803(24) because no notice was given); *State v. Wagoner*, 131 N.C. App. 285 (1998) (child's incompetence to testify satisfied the unavailability requirement but did not render her statements to a social worker too untrustworthy to be admitted); *In re B.W.*, 274 N.C. App. 280 (2020) (competent evidence did not support finding that children were unavailable to testify, thus, recordings of children were inadmissible under residual exception to hearsay rule for unavailable declarants); *In re A.J.*, 289 N.C. App. 632 (2023) (In an A/N/D/case, a child's statements were improperly admitted under the residual hearsay exception, where the trial court failed to make any of the requisite findings of fact to determine whether notice was provided, the interests of justice were served, and the remaining factors related to need and trustworthiness).

[2] See Monthly Memo #1 – Child Testimony

Conclusion:

A parent is entitled to the most effective legal representation, which sometimes includes hearing what their own child has to say. Instead of allowing DSS take an out of court statement under the residual hearsay exception and present it in a way that could potentially hurt your client, arguing for live testimony allows the parent to directly hear from their child about a situation without their words or context behind their words getting tangled up by someone else. It is not always easy to hear what the child has to say; however, no one knows the story better than them. Hearing something directly from them could provide support in your client's favor.

Attorney Tools:

- AND/TPR Manual, p. 11-46 to 11-51.
- North Carolina Criminal Law Blog: Hearsay Exceptions: The Residual Exceptions