

60-227. Perpetuation of testimony; petition; order. (a) *Before an action is filed.* (1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in a Kansas state court may file a verified petition in the district court in the county where any expected adverse party resides; but if the subject matter of the expected action or proceeding is the validity of a will, the petition must be filed in the district court in the county of the testator's residence. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) That the petitioner or the petitioner's personal representatives, heirs, beneficiaries, successors or assigns may be parties to an action or proceeding cognizable in a Kansas state court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action or proceeding and the petitioner's interest, and if the validity or construction of a document may be called in question or if the document is connected with the deposition's subject matter, a copy of the document must be attached to the petition;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address and expected substance of the testimony of each deponent.

(2) *Notice and service.* At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice must be served either inside or outside the state in the manner for personal service of summons, by restricted mail or by any other method the court orders that affords actual notice. Upon application and showing of extraordinary circumstances, the court may order a hearing on shorter notice.

(3) *Order and examination.* If satisfied that the petition is not for the purpose of discovery, that perpetuating the testimony may prevent a failure or delay of justice, and that the petitioner is unable to bring the contemplated action or cause it to be brought, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, states when, where and before whom the depositions will be taken, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under the rules of civil procedure, and the court may issue orders like those authorized by K.S.A. 60-234 and 60-235, and amendments thereto. A reference in these rules of civil procedure to the court where an action is pending means, for purposes of this section, the court where the petition for the deposition was filed.

(4) *Using the deposition.* Subject to the same limitations and objections as though the deponent were testifying at the trial in person, a deposition to perpetuate testimony may be used as evidence in any later-filed action when the deposition is that of a party to the action, or when the issue is such that an interested party in the proceedings in which the deposition was taken had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the deposition is offered. Except for the deposition of a party to the action that is offered against the party, the deposition may not be used as evidence unless the deponent is unavailable as a witness at the trial.

(b) *Pending appeal.* (1) *In general.* The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) *Motion.* The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) The name, address and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) *Court order.* If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by K.S.A. 60-234 and 60-235, and amendments thereto. The depositions may be taken and used as any other deposition taken in a pending district court action.

(c) *Filing.* Depositions taken under this section must be filed with the court in which the petition is filed or the motion is made.

(d) *Perpetuation by an action.* This section does not limit a court's power to entertain an action to perpetuate testimony.

(e) *Impeachment.* This section does not limit the use of any deposition to impeach the deponent when the deponent is a witness in an action.

(f) *Reciprocity.* A deposition taken under similar procedure of another jurisdiction is admissible in an action in this state to the same extent as a deposition taken under this section.

History: L. 1963, ch. 303, 60-227; L. 2010, ch. 135, § 96; July 1.