

Rule 27. Depositions Before Action or Pending Appeal

(a) Before action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in this Court may file a verified petition in this Court or in a court of competent jurisdiction for the place of residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in this Court but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each. The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined for the purpose of perpetuating testimony.

(2) Notice and service. The petitioner shall serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the Court at a specified time and place for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in SCR-Dom Rel 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the Court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in SCR-Dom Rel 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of SCR-Dom Rel 17(c) apply.

(3) Order and examination. If the Court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these Rules; and the Court may make orders of the character provided for by SCR-Dom Rel 34 and 35. For the purpose of applying these Rules to depositions for perpetuating testimony, each reference to this Court shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of deposition. If a deposition to perpetuate testimony is taken under these Rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in this Court, in accordance with the provisions of SCR-Dom Rel 32(a).

(b) Pending appeal. If an appeal has been taken from a judgment of the Court or before the taking of an appeal if the time therefor has not expired, the Court may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the Court. In such case the party who desires to perpetuate the testimony may make a motion for leave to take the depositions, upon the same notice and service as if the action was pending in the Court. The motion shall show (1) the names and

addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; and (2) the reasons for perpetuating their testimony. If the Court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may order the depositions to be taken and make orders of the character provided for by SCR-Dom Rel 34 and 35. A deposition pending appeal may be used in the same manner and under the same conditions as these Rules prescribe for depositions taken in pending actions.

(c) Perpetuation by action. This Rule does not limit the power of a court to entertain an action to perpetuate testimony.

COMMENT

SCR-Domestic Relations 27 provides auxiliary proceedings for the perpetuation of testimony either before an action is initiated or after judgment and before the expiration of the time for taking an appeal or pending appeal, for use in the event of further proceedings in the Superior Court. Paragraphs (a) and (b). Paragraph (c) makes it clear that the rule does not preclude an action for perpetuating testimony. However, an action to perpetuate testimony requires service of process in the same manner as in the expected action. Consequently, an action cannot proceed unless service of process is effected and personal jurisdiction obtained over the defendant.