

HOUSE BILL No. 2802

By Committee on Judiciary

2-10

AN ACT concerning civil procedure; relating to hearsay evidence exceptions; relating to certain elder and dependent adults; amending K.S.A. 2003 Supp. 60-460 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2003 Supp. 60-460 is hereby amended to read as follows: 60-460. Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

(a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.

(b) *Affidavits.* Affidavits, to the extent admissible by the statutes of this state.

(c) *Depositions and prior testimony.* Subject to the same limitations and objections as though the declarant were testifying in person, (1) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered or (2) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a preliminary hearing or former trial in the same action, or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (A) the testimony is offered against a party who offered it in the party's own behalf on the former occasion or against the successor in interest of such party or (B) the issue is such that the adverse party on the former occasion 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 testimony is offered, but the provisions of this subsection (c) shall not apply in criminal actions if it denies to the accused the right to meet the witness face to face.

(d) *Contemporaneous statements and statements admissible on ground of necessity generally.* A statement which the judge finds was made (1) while the declarant was perceiving the event or condition which

1 the statement narrates, describes or explains, (2) while the declarant was
2 under the stress of a nervous excitement caused by such perception or
3 (3) if the declarant is unavailable as a witness, by the declarant at a time
4 when the matter had been recently perceived by the declarant and while
5 the declarant's recollection was clear and was made in good faith prior to
6 the commencement of the action and with no incentive to falsify or to
7 distort.

8 (e) *Dying declarations.* A statement by a person unavailable as a wit-
9 ness because of the person's death if the judge finds that it was made (1)
10 voluntarily and in good faith and (2) while the declarant was conscious of
11 the declarant's impending death and believed that there was no hope of
12 recovery.

13 (f) *Confessions.* In a criminal proceeding as against the accused, a
14 previous statement by the accused relative to the offense charged, but
15 only if the judge finds that the accused (1) when making the statement
16 was conscious and was capable of understanding what the accused said
17 and did and (2) was not induced to make the statement (A) under com-
18 pulsion or by infliction or threats of infliction of suffering upon the ac-
19 cused or another, or by prolonged interrogation under such circumstances
20 as to render the statement involuntary or (B) by threats or promises con-
21 cerning action to be taken by a public official with reference to the crime,
22 likely to cause the accused to make such a statement falsely, and made
23 by a person whom the accused reasonably believed to have the power or
24 authority to execute the same.

25 (g) *Admissions by parties.* As against a party, a statement by the per-
26 son who is the party to the action in the person's individual or a repre-
27 sentative capacity and, if the latter, who was acting in such representative
28 capacity in making the statement.

29 (h) *Authorized and adoptive admissions.* As against a party, a state-
30 ment (1) by a person authorized by the party to make a statement or
31 statements for the party concerning the subject of the statement or (2)
32 of which the party with knowledge of the content thereof has, by words
33 or other conduct, manifested the party's adoption or belief in its truth.

34 (i) *Vicarious admissions.* As against a party, a statement which would
35 be admissible if made by the declarant at the hearing if (1) the statement
36 concerned a matter within the scope of an agency or employment of the
37 declarant for the party and was made before the termination of such
38 relationship, (2) the party and the declarant were participating in a plan
39 to commit a crime or a civil wrong and the statement was relevant to the
40 plan or its subject matter and was made while the plan was in existence
41 and before its complete execution or other termination or (3) one of the
42 issues between the party and the proponent of the evidence of the state-
43 ment is a legal liability of the declarant, and the statement tends to es-

1 tablish that liability.

2 (j) *Declarations against interest.* Subject to the limitations of excep-
3 tion (f), a statement which the judge finds was at the time of the assertion
4 so far contrary to the declarant's pecuniary or proprietary interest or so
5 far subjected the declarant to civil or criminal liability or so far rendered
6 invalid a claim by the declarant against another or created such risk of
7 making the declarant an object of hatred, ridicule or social disapproval in
8 the community that a reasonable person in the declarant's position would
9 not have made the statement unless the person believed it to be true.

10 (k) *Voter's statements.* A statement by a voter concerning the voter's
11 qualifications to vote or the fact or content of the voter's vote.

12 (l) *Statements of physical or mental condition of declarant.* Unless
13 the judge finds it was made in bad faith, a statement of the declarant's
14 (1) then existing state of mind, emotion or physical sensation, including
15 statements of intent, plan, motive, design, mental feeling, pain and bodily
16 health, but not including memory or belief to prove the fact remembered
17 or believed, when such a mental or physical condition is in issue or is
18 relevant to prove or explain acts or conduct of the declarant or (2) pre-
19 vious symptoms, pain or physical sensation, made to a physician consulted
20 for treatment or for diagnosis with a view to treatment, and relevant to
21 an issue of declarant's bodily condition.

22 (m) *Business entries and the like.* Writings offered as memoranda or
23 records of acts, conditions or events to prove the facts stated therein, if
24 the judge finds that (1) they were made in the regular course of a business
25 at or about the time of the act, condition or event recorded and (2) the
26 sources of information from which made and the method and circum-
27 stances of their preparation were such as to indicate their trustworthiness.

28 If the procedure specified by subsection (b) of K.S.A. 60-245a, *and*
29 *amendments thereto*, for providing business records has been complied
30 with and no party has required the personal attendance of a custodian of
31 the records or the production of the original records, the affidavit of the
32 custodian shall be prima facie evidence that the records satisfy the
33 requirements of this subsection.

34 (n) *Absence of entry in business records.* Evidence of the absence of
35 a memorandum or record from the memoranda or records of a business
36 of an asserted act, event or condition, to prove the nonoccurrence of the
37 act or event, or the nonexistence of the condition, if the judge finds that
38 it was the regular course of that business to make such memoranda of all
39 such acts, events or conditions at the time thereof or within a reasonable
40 time thereafter and to preserve them.

41 (o) *Content of official record.* Subject to K.S.A. 60-461 and amend-
42 ments thereto, (1) if meeting the requirements of authentication under
43 K.S.A. 60-465 and amendments thereto, to prove the content of the rec-

1 ord, a writing purporting to be a copy of an official record or of an entry
2 therein or (2) to prove the absence of a record in a specified office, a
3 writing made by the official custodian of the official records of the office,
4 reciting diligent search and failure to find such record.

5 (p) *Certificate of marriage.* Subject to K.S.A. 60-461 and amend-
6 ments thereto, certificates that the maker thereof performed marriage
7 ceremonies, to prove the truth of the recitals thereof, if the judge finds
8 that (1) the maker of the certificates, at the time and place certified as
9 the times and places of the marriages, was authorized by law to perform
10 marriage ceremonies and (2) the certificate was issued at that time or
11 within a reasonable time thereafter.

12 (q) *Records of documents affecting an interest in property.* Subject
13 to K.S.A. 60-461 and amendments thereto, the official record of a doc-
14 ument purporting to establish or affect an interest in property, to prove
15 the content of the original recorded document and its execution and de-
16 livery by each person by whom it purports to have been executed, if the
17 judge finds that (1) the record is in fact a record of an office of a state or
18 nation or of any governmental subdivision thereof and (2) an applicable
19 statute authorized such a document to be recorded in that office.

20 (r) *Judgment of previous conviction.* Evidence of a final judgment
21 adjudging a person guilty of a felony, to prove any fact essential to sustain
22 the judgment.

23 (s) *Judgment against persons entitled to indemnity.* To prove the
24 wrong of the adverse party and the amount of damages sustained by the
25 judgment creditor, evidence of a final judgment if offered by a judgment
26 debtor in an action in which the debtor seeks to recover partial or total
27 indemnity or exoneration for money paid or liability incurred by the
28 debtor because of the judgment, provided the judge finds that the judg-
29 ment was rendered for damages sustained by the judgment creditor as a
30 result of the wrong of the adverse party to the present action.

31 (t) *Judgment determining public interest in land.* To prove any fact
32 which was essential to the judgment, evidence of a final judgment deter-
33 mining the interest or lack of interest of the public or of a state or nation
34 or governmental division thereof in land, if offered by a party in an action
35 in which any such fact or such interest or lack of interest is a material
36 matter.

37 (u) *Statement concerning one's own family history.* A statement of a
38 matter concerning a declarant's own birth, marriage, divorce, legitimacy,
39 relationship by blood or marriage, race-ancestry or other similar fact of
40 the declarant's family history, even though the declarant had no means
41 of acquiring personal knowledge of the matter declared, if the judge finds
42 that the declarant is unavailable.

43 (v) *Statement concerning family history of another.* A statement con-

cerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant (1) was related to the other by blood or marriage, or was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other or as upon repute in the other's family and (2) is unavailable as a witness.

(w) *Statement concerning family history based on statement of another declarant.* A statement of a declarant that a statement admissible under exceptions (u) or (v) was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses.

(x) *Reputation in family concerning family history.* Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

(y) *Reputation—boundaries, general history, family history.* Evidence of reputation in a community as tending to prove the truth of the matter reputed, if the reputation concerns (1) boundaries of or customs affecting, land in the community and the judge finds that the reputation, if any, arose before controversy, (2) an event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community or (3) the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of the person's family history or of the person's personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community.

(z) *Reputation as to character.* If a trait of a person's character at a specified time is material, evidence of the person's reputation with reference thereto at a relevant time in the community in which the person then resided or in a group with which the person then habitually associated, to prove the truth of the matter reputed.

(aa) *Recitals in documents affecting property.* Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that (1) the matter stated would be relevant upon an issue as to an interest in the property and (2) the dealings with the property since the statement was made have not been inconsistent with the truth of the

1 statement.

2 (bb) *Commercial lists and the like.* Evidence of statements of matters
3 of interest to persons engaged in an occupation contained in a list, reg-
4 ister, periodical or other published compilation, to prove the truth of any
5 relevant matter so stated, if the judge finds that the compilation is pub-
6 lished for use by persons engaged in that occupation and is generally used
7 and relied upon by them.

8 (cc) *Learned treatises.* A published treatise, periodical or pamphlet
9 on a subject of history, science or art, to prove the truth of a matter stated
10 therein, if the judge takes judicial notice, or a witness expert in the subject
11 testifies, that the treatise, periodical or pamphlet is a reliable authority in
12 the subject.

13 (dd) *Actions involving children.* In a criminal proceeding or a pro-
14 ceeding pursuant to the Kansas juvenile justice code or in a proceeding
15 to determine if a child is a child in need of care under the Kansas code
16 for care of children, a statement made by a child, to prove the crime or
17 that a child is a juvenile offender or a child in need of care, if:

18 (1) The child is alleged to be a victim of the crime or offense or a
19 child in need of care; and

20 (2) the trial judge finds, after a hearing on the matter, that the child
21 is disqualified or unavailable as a witness, the statement is apparently
22 reliable and the child was not induced to make the statement falsely by
23 use of threats or promises.

24 If a statement is admitted pursuant to this subsection in a trial to a
25 jury, the trial judge shall instruct the jury that it is for the jury to deter-
26 mine the weight and credit to be given the statement and that, in making
27 the determination, it shall consider the age and maturity of the child, the
28 nature of the statement, the circumstances under which the statement
29 was made, any possible threats or promises that might have been made
30 to the child to obtain the statement and any other relevant factor.

31 (ee) *Certified motor vehicle certificate of title history.* Subject to
32 K.S.A. 60-461, and amendments thereto, a certified motor vehicle certif-
33 icate of title history prepared by the division of vehicles of the Kansas
34 department of revenue.

35 (ff) *Elder and dependent adults, statements by victims of medicaid
36 fraud or mistreatment.* Subject to the same limitations and objections as
37 though the declarant were testifying in person, in a criminal proceeding
38 charging a violation, or attempted violation, of K.S.A. 21-3844 et seq.,
39 and amendments thereto, or K.S.A. 21-3437, and amendments thereto,
40 evidence of a statement made by a declarant is not made inadmissible by
41 the hearsay rule if the declarant is unavailable as a witness, as defined in
42 subsection (g)(3) of K.S.A. 60-459, and amendments thereto, and all of
43 the following requirements are met:

1 (1) *The party offering the statement has made a showing of particu-*
2 *larized guarantees of trustworthiness regarding the statement, the state-*
3 *ment was made under circumstances which indicate its trustworthiness*
4 *and the statement was not the result of promise, inducement, threat or*
5 *coercion. In making its determination, the court may consider only the*
6 *circumstances that surround the making of the statement and that render*
7 *the declarant particularly worthy of belief.*

8 (2) *There is no evidence that the unavailability of the declarant was*
9 *caused by, aided by, solicited by or procured on behalf of, the party who*
10 *is offering the statement.*

11 (3) *The entire statement has been memorialized in a videotape re-*
12 *ording made by a law enforcement official, prior to the death or disabling*
13 *of the declarant.*

14 (4) *The statement was made by the victim of the alleged violation.*

15 (5) *The statement is supported by corroborative evidence.*

16 (6) *The victim of the alleged violation is an individual who meets both*
17 *of the following requirements:*

18 (A) *Was 65 years of age or older or was a dependent adult, as defined*
19 *in subsection (c) of K.S.A. 21-3437, and amendments thereto, when the*
20 *alleged violation or attempted violation occurred.*

21 (B) *At the time of any criminal proceeding, including, but not limited*
22 *to, a preliminary hearing or trial, regarding the alleged violation or at-*
23 *tempted violation, is either deceased or suffers from the infirmities of*
24 *aging as manifested by advanced age or organic brain damage, or other*
25 *physical, mental or emotional dysfunction, to the extent that the ability*
26 *of the person to provide adequately for the person's own care or protection*
27 *is impaired.*

28 *If the prosecution intends to offer a statement pursuant to this section,*
29 *the prosecution shall serve a written notice upon the defendant at least*
30 *10 days prior to the hearing or trial at which the prosecution intends to*
31 *offer the statement, unless the prosecution shows good cause for the failure*
32 *to provide that notice. In the event that good cause is shown, the defendant*
33 *shall be entitled to a reasonable continuance of the hearing or trial.*

34 *If the statement is offered during trial, the court's determination as to*
35 *the availability of the victim as a witness shall be made out of the presence*
36 *of the jury. If the defendant elects to testify at the hearing on a motion*
37 *brought pursuant to this section, the court shall exclude from the exami-*
38 *nation every person except the court reporter, the prosecutor, the inves-*
39 *tigating officer, the defendant and the defendant's counsel, an investigator*
40 *for the defendant, and the officer having custody of the defendant. Not-*
41 *withstanding any other provision of law, the defendant's testimony at the*
42 *hearing shall not be admissible in any other proceeding except the hearing*
43 *brought on the motion pursuant to this section. If a transcript is made of*

1 *the defendant's testimony, it shall be sealed and transmitted to the clerk*
2 *of the court in which the action is pending.*

3 Sec. 2. K.S.A. 2003 Supp. 60-460 is hereby repealed.

4 Sec. 3. This act shall take effect and be in force from and after its
5 publication in the statute book.

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