

ELECTRONIC RECORDS

Phone: (517) 373-8080
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House Bill 6294 (proposed substitute H-1)
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Sponsor: Rep. Sarah L. Lightner
Committee: Government Operations
Complete to 10-13-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

The bills would amend different acts to allow for the remote signing, witnessing, notarization, and recording of certain documents from April 30, 2020, through December 31, 2020, and make related changes. To a large extent, the bills would put into law the provisions of Executive Order 2020-187 (see **Background**, below).

House Bill 6294 would amend the Estates and Protected Individuals Code (EPIC) to allow certain documents to be signed or witnessed using two-way real-time audiovisual technology and to allow certain visits required under EPIC to be conducted using that technology.

Signing or witnessing the execution of documents

Under the bill, and notwithstanding anything in EPIC to the contrary, for documents executed on or after April 30, 2020, and before January 1, 2021, the act of signing or witnessing the execution of a document or instrument under the act, including a will, a disclaimer under section 2903, a funeral representative designation, a parental appointment of a guardian of a minor, an appointment of a guardian of a legally incapacitated individual, a durable power of attorney, or a patient advocate designation would be satisfied by use of a two-way real-time audiovisual technology if all of the following requirements were met:

- The two-way real-time audiovisual technology must allow direct, contemporaneous interaction by sight and sound between the signatory and the witnesses.
- The interaction between the person signing the document and the witnesses must be recorded and preserved by the signer or his or her designee for at least three years.
- The signer must affirmatively represent either of the following:
 - That he or she is physically located in Michigan.
 - That he or she is physically located outside of Michigan and the document or instrument is intended to be filed with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of Michigan or involves property located in Michigan or a transaction substantially connected to Michigan.
- The signer must affirmatively state during his or her interaction with the witnesses on the two-way real-time audiovisual technology what document they are executing.

- Each title page and signature page of the document or instrument being witnessed must be shown to the witnesses on the two-way real-time audiovisual technology in a manner clearly legible to the witnesses, and every page of the document or instrument must be numbered to reflect both the page number of the document or instrument and the total number of pages of the document or instrument.
- Each act of signing the document or instrument must be captured close enough on the two-way real-time audiovisual technology for the witnesses to observe.
- The signer or his or her designee must transmit a legible copy of the entire signed document or instrument directly to the witnesses by facsimile, mail, or electronic means within 72 hours after it is executed.
- Within 72 hours after receipt, the witnesses must sign the transmitted copy of the document or instrument and return the signed copy of the document or instrument to the signer or the signer's designee by facsimile, mail, or electronic means.
- The document or instrument must be in writing or a record that is readable as text at the time of signing.

Requirements concerning visits

Beginning April 30, 2020, through December 31, 2020, a guardian, guardian ad litem, or visitor could satisfy any requirement concerning a visit with an individual, including a visit in the physical presence of a person under EPIC, by instead conferring with the individual through two-way real-time audiovisual technology that allows direct, contemporaneous interaction by sight and sound between the individual being visited and the guardian, guardian ad litem, or visitor.

MCL 700.2502 et seq.

House Bill 6295 would amend the Uniform Electronic Transactions Act. Section 18 of that act requires the Department of Technology, Management, and Budget (DTMB) to determine whether, and to what extent, each state department will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

Under the bill, beginning April 30, 2020, through December 31, 2020, strict compliance with section 18 would be suspended to allow each state department to send and accept electronic records and electronic signatures to and from other persons without a determination from or approval by DTMB.

The bill would provide that the act applies to section 1306 of the Uniform Commercial Code (UCC).

Further, the bill would provide that the act applies to a transaction governed by the UCC entered into on or after April 30, 2020, and before January 1, 2021, although during that period the UCC would control to the extent of a conflict between the two acts.

MCL 459.833 and 450.848 and proposed MCL 450.848a

House Bill 6296 would amend the Uniform Real Property Electronic Recording Act to provide that all of the following apply beginning April 30, 2020, through December 31, 2020:

- A register of deeds must accept electronic documents for recording. (If a register of deeds did not have the equipment to accept an electronic document, the register of deeds would have to accept for recording a document signed, witnessed, and notarized as provided in a section that is not currently in law but, by section number, is proposed to be added to the Michigan Law on Notarial Acts by House Bill 6297 or Senate Bill 1187.)
- A register of deeds need only act in substantial compliance with the act and any standards established by the Electronic Recording Commission.
- A register of deeds must deem all financial institutions and all title insurance companies or their employed or contracted settlement agents as covered by an agreement establishing a verified transactional relationship as required under the act. The register of deeds can ask the financial institution or title insurance company for verification of a notary's employment or contractual association.
- A financial instrument must accept a document or electronic document recorded by a register of deeds as provided above.

MCL 565.843 and 565.844 and proposed MCL 565.845a

The bill is tie-barred to Senate Bill 1187, which means that it could not take effect unless Senate Bill 1187 were also enacted.

House Bill 6297 would amend the Michigan Law on Notarial Acts to allow notaries public to use two-way real-time technology to perform notarial acts electronically under certain circumstances.

Under the bill, and notwithstanding any other provision of the act, for notarial acts performed on or after April 30, 2020, and before January 1, 2021, a notary public could use a two-way real-time audiovisual technology to perform notarial acts electronically if all of the following requirements were met:

- The two-way real-time audiovisual technology must allow direct interaction between the individual seeking the notary's services, any witnesses, and the notary, so that each can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.
- The two-way real-time audiovisual technology must be able to create an audio and visual recording of the complete notarial act and the recording must be made and retained as a notarial record in the journal the notary public maintains for recording notarial acts using a remote electronic notarization platform.
- The individual seeking the notary's services and any required witnesses, if not personally known to the notary, must present satisfactory evidence of identity to the notary during the video conference, and not merely transmit it before or after the transaction, to satisfy the requirements of the act and any other applicable law.
- The individual seeking the notary's services must affirmatively represent either of the following:

- That he or she is physically located in Michigan.
- That he or she is physically located outside of Michigan and the record is intended to be filed with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of Michigan or involves property located in Michigan or a transaction substantially connected to Michigan.
- If an individual is physically located outside of Michigan, the notary must have no actual knowledge that the individual's act of making the statement or signing the record is prohibited by the laws of the jurisdiction where the individual is located.
- The individual seeking the notary's services, any required witnesses, and the notary must be able to affix their signatures to the record in a manner that renders evident any subsequent change or modification of the remote online notarial act.
- The individual seeking the notary's services or his or her designee must transmit by facsimile, mail, or electronic means a legible copy of the entire signed record directly to the notary on the same date it was signed, regardless of the manner in which it is signed.
- Once the notary has received a legible copy of the record with all necessary signatures, the notary must notarize the record and transmit the notarized record back to the individual seeking the notary's services.
- The official date and time of the notarization must be the date and time when the notary witnesses the signature through two-way real-time audiovisual technology as required under these provisions.

Notwithstanding any other state law or regulation, beginning April 30, 2020, and before January 1, 2021, absent an express prohibition in a record against signing it in counterparts, a record signed under the act could be signed in counterparts.

The bill would also provide that a notary public commission that expired after March 1, 2020, and before December 31, 2020, is valid through December 31, 2020.

Legislative intent

Finally, the bill states that, beginning April 30, 2020, through December 31, 2020, it is the intent of the legislature that government agencies and officials are encouraged to use or allow the use of electronic records and signatures and the performance of notarial acts as described above; that any state requirement for in-person witnessing or attestation is satisfied by the use of two-way audiovisual real-time technology; and that any state requirement that a person be in the presence of a notary public or witness for a notarization, attestation, or acknowledgment is also satisfied by the use of two-way audiovisual real-time technology.

MCL 55.263 et seq. and proposed MCL 55.286c and 55.286d

BACKGROUND:

On October 2, 2020, in a 4–3 opinion, the Michigan Supreme Court ruled that the governor did not have the authority to declare a state of emergency or issue emergency orders after April 30, 2020.¹

The governor’s declarations of a state of emergency, and the executive orders issued under them, were primarily based on two acts: 1945 PA 302 (commonly known as the emergency powers of the governor act) and the Emergency Management Act (1976 PA 390).

Each act authorizes the governor to proclaim a state of emergency and issue orders responding to the emergency. 1945 PA 302 provides that these orders are effective until the state of emergency ends. Under the Emergency Management Act, a state of emergency or disaster must be terminated after 28 days unless the legislature approves an extension.

In its opinion, the Supreme Court ruled 1945 PA 302 to be an unconstitutional delegation of legislative power. Because the legislature had extended the state of emergency under the Emergency Management Act to April 30 but did not extend it past that time, the court also ruled that the governor had no authority to declare a state of emergency or issue emergency orders under that act after that date.

Although some COVID-19-related orders can be effective under other authority (the Public Health Code, for example), the governor’s orders issued after April 30 have no continuing legal effect. In a court filing, the governor said that over 30 executive orders in effect on October 2 were based on authority granted under 1945 PA 302.

House Bills 6294 through 6297 would address the same issues as one of those orders, EO 2020-187, the most recent executive order concerning remote signing, witnessing, and visitation under Michigan law, including the acts these bills would amend.²

FISCAL IMPACT:

House Bill 6294 would be unlikely to have a significant fiscal impact of the state or local units of government. Any additional costs incurred under the bill would be minor and sufficiently offset by existing appropriations.

House Bill 6295 would provide for minor administrative cost savings to DTMB by temporarily waiving the department’s responsibility to dedicate personnel resources to oversee and determine certain matters regarding each state department’s use and administrative processing of electronic records and electronic signatures. Any potential savings would come from increased administrative costs from state administrative changes in response to the coronavirus outbreak.

The bill would have no fiscal impact on local units of government.

¹ <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/161492/In%20re%20Certified%20Questions-OP.pdf>

² Executive Order 2020-187, issued September 29, 2020 (<https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-187.pdf>).

House Bill 6296 would have no fiscal impact on the state or local units of government.

House Bill 6297 would result in a minimal decrease in revenue to the Notary Fees Fund and the Notary Education and Training Fund. Extending to January 1, 2021, the valid period of a notary public's commission that would have expired between March 1, 2020, and December 31, 2020, will result in a decrease in renewal fees for that period. Revenue from both funds supports costs of the secretary of state associated with training and administration of notary public regulations. In FY 2020-21, \$343,500 from the Notary Fees Fund and \$100,000 from the Notary Education and Training Fund was appropriated to the Department of State.

Legislative Analyst: Rick Yuille
Fiscal Analysts: Robin Risko
Michael Cnossen

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.