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BILL ANALYSIS



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House Bill 6294 (Substitute H-1 as passed by the House)
House Bill 6295 (Substitute H-1 as passed by the House)
House Bill 6296 (Substitute H-3 as passed by the House)
House Bill 6297 (Substitute H-2 as passed by the House)
Sponsor: Representative Sarah Lightner
House Committee: Government Operations
Senate Committee: Committee of the Whole

Date Completed: 10-21-20

CONTENT

House Bill 6294 (H-1) would amend the Estates and Protected Individuals Code to do the following:

- Specify that the act of signing or witnessing the execution of a document or instrument under the Code would be satisfied by use of a two-way real-time audiovisual technology if the bill's requirements were met.
- Specify that the rights or interests of a person who relied in good faith and without actual notice that a document or instrument as described in the bill were executed on or after April 30, 2020, and before January 1, 2021, but was not executed as specified would not be impaired, challenged, or terminated on that basis alone.
- Specify that the bill would apply to a document or instrument executed on or after April 30, 2020, and before January 1, 2021.

House Bill 6295 (H-1) would amend the Uniform Electronic Transactions Act to do the following:

- Specify that, beginning, April 30, 2020, and ending December 31, 2021, strict compliance with a requirement that the Department of Technology, Management, and Budget (DTMB) determine whether, and the extent to which, each State department will send and accept electronic documents and signatures would be suspended.
- Specify that the Act would apply to a transaction that is governed by Uniform Commercial Code (UCC) and entered into on or after April 30, 2020, and before January 1, 2021.

House Bill 6296 (H-3) would amend the Uniform Real Property Electronic Recording Act to do the following:

- Require, while the bill's provisions applied, a register of deeds to accept electronic documents for recording.
- Specify that, while the bill's provisions applied, a register of deeds need only act in substantial compliance with the Act and any standards established by the Electronic Recording Commission.

- **Require a financial institution to accept a document or electronic document recorded by a register of deeds as specified in the bill.**
- **Specify that the bill would apply after April 29, 2020, and before January 1, 2021.**

House Bill 6297 (H-2) would amend the Michigan Law on Notarial Acts to do the following:

- **Specify that a notary public's commission that expired after March 1, 2020, and before December 31, 2020, would be valid through December 31, 2020.**
- **Allow a notary public to use a two-way real-time audiovisual technology to perform notarial acts if certain requirements were met.**
- **Specify that, beginning April 30, 2020, and before January 1, 2021, absent an express prohibition in a record against signing the record in counterparts, a record signed under the Law could be signed in counter parts.**
- **Specify that the bill would apply to a notarial act performed on or after April 30, 2020, and before January 1, 2021.**
- **Specify that if a record were notarized electronically, it would not need to be notarized under any other provision of the Law.**
- **State legislative intent with respect to use of electronic records and signatures and notarial acts performed electronically.**

House Bill 6296 (H-3) is tie-barred to House Bill 6297.

House Bill 6294 (H-1)

Notwithstanding anything in the Code to the contrary, the act of signing or witnessing the execution of a document or instrument under the Code, including a will, a disclaimer of property interests, 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 requirements were met:

- The technology would have to allow direct, contemporaneous interaction by sight and sound between the signatory and the witnesses.
- The interaction between the signatory and the witnesses would have to be recorded and preserved by the signatory or the signatory's designee for a period of at least three years.
- The signatory would have to represent affirmatively either that the signatory was physically situated in Michigan or was physically located outside the geographic boundaries of Michigan and that: a) the document or instrument was intended for filing with or related to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of the State; or b) the document or instrument involved property located in the territorial jurisdiction of the State or a transaction substantially connected to the State.
- The signatory would have to affirmatively state during his or her interaction with the witnesses what document they were executing.
- Each title page and signature page of the document or instrument being witnessed would have to 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 would have to be numbered to reflect both the page number of the document and the total number of pages of the document or instrument.
- Each act of signing the document or instrument would have to be captured sufficiently up close on the two-way real-time audiovisual technology for the witnesses to observe.

- The signatory or the signatory's designee would have to transmit by facsimile, mail, or electronic means a legible copy of the entire signed document or instrument directly to the witnesses within 72 hours after it was executed.
- Within 72 hours after receiving it, the witnesses would have to sign the transmitted copy as a witness and return the signed copy to the signatory or designee by facsimile, mail, or electronic means.
- The document or instrument was in writing or a record that was readable as text at the time of signing.

"Electronic" would mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. "Record" would mean information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. "Sign" or "signing" would mean with present intent to authenticate or adopt a record to do either of the following: a) execute or adopt a tangible signal; or b) affix to or logically associate with the record an electronic symbol or process.

The rights or interests of a person who relied in good faith and without actual notice that a document or instrument described above was executed on or after April 30, 2020, and before January 1, 2021, but was not executed in accordance with the above requirements would not be impaired, challenged, or terminated on that basis alone.

Compliance with the above provisions would be presumed. A person challenging a document or instrument described in and executed as describe above could overcome the presumption by establishing, by clear and convincing evidence, that the signatory or witness intentionally failed to comply with the above requirements. The bill would apply to a document or instrument described above executed on or after April 30, 2020, and before January 1, 2021.

Beginning April 30, 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 the Code by instead conferring with the individual via two-way real-time audiovisual technology that allowed direct, contemporaneous interaction by sight and sound between the individual being visited and the guardian, guardian ad litem, or visitor. This provision would not apply after December 31, 2020.

House Bill 6295 (H-1)

Section 18 of the Uniform Electronic Transactions Act requires the DTMB to determine whether, and the extent to which, each State department will send and accept electronic records and signatures to and from other entities and otherwise create, communicate, store, process, use, and rely on electronic records and signatures.

Notwithstanding any other provision of the Act, for the period beginning April 30, 2020, and ending 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 entities without a determination from or approval by the DTMB.

Except as otherwise provided, the Act would apply to a transaction that was governed by the UCC and entered into on or after April 30, 2020, and before January 1, 2021. During this period, to the extent there was a conflict between the UCC and the Act, the UCC would control.

House Bill 6296 (H-3)

Under the Uniform Real Property Electronic Recording Act, if a law requires as a condition for recording that a document be an original, be on paper or another tangible medium, or be in

writing, the requirement is satisfied by an electronic document. If a law requires as a condition for recording that a document be signed, the requirement is satisfied by an electronic signature. A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature.

The provisions above do not require that a register of deeds accept electronic documents for recording. Under the bill, this would apply except as provided in proposed Section 5a

The Act requires a county register of deeds who implements any of the listed functions (e.g., receive, index, store, archive and transmit electronic documents) to do so in compliance with any standards established by the Electronic Recording Commission. In addition, a county register of deeds must accept electronic documents for recording only from a person with which the register of deeds has entered into an agreement establishing a verified transactional relationship. These provisions would apply except as provided in proposed Section 5a

Under Section 5a, while it applied, a register of deeds would have to accept electronic documents for recording. If a register of deeds did not have the equipment to accept an electronic document, he or she would have to accept for recording a tangible copy of that electronic document properly notarized under the Michigan Law on Notarial Acts.

During the time that Section 5a applied, a register of deeds would need only act in substantial compliance with the Act and any standards established by the Commission.

Also, while Section 5a applied, a register of deeds would have to 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. The register of deeds could ask the institution or title insurance company for verification of a notary's employment or contractual association. A financial institution would have to accept a document recorded by a register of deeds under Section 5a.

Section 5a would apply after April 29, 2020, and before January 1, 2021.

House Bill 6297 (H-2)

Notary Public Commission

The Michigan Law on Notarial Acts allows the Secretary of State to appoint as a notary public a person who complies with the Law's requirements. A notary public may reside in, move to, and perform notarial acts anywhere in Michigan from the date of appointment until the notary's birthday occurring not less than six, and not more than seven, years after the date of his or her appointment unless the appointment is canceled, suspended, or revoked by the Secretary or by operation of law. Under the bill, this would apply except that a notary public's commission that expired after March 1, 2020, and before December 31, 2020, would be valid through December 31, 2020.

"In the Presence of"

Under the Law, a notarial act performed using a remote electronic notarization platform that otherwise satisfied the Law's requirements is presumed to satisfy any requirement that a notarial act be performed in the presence of a notary public. "In the presence of" means in the same physical location with and close enough to see, hear, communicate with, and exchange tangible identification credentials with another individual. The term also means

interacting with another individual by means of audio and visual communication technology that is part of a remote electronic notarization platform approved under the Law. The bill would add to this portion of the definition two-way real-time audiovisual technology that meets the bill's requirements.

Audiovisual Technology; Notarial Acts

Notwithstanding any other provision of the Law, a notary public could use a two-way audiovisual technology to perform notarial acts electronically if all of the following requirements were met:

- The technology allowed direct interaction between the individual seeking the notary's services, any witnesses, and the notary, so that each could communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.
- The technology was capable of creating an audio and visual recording of the complete notarial act and the recording was made and retained as a notarial record.
- The individual seeking the notary's services and any required witnesses, if not personally known to the notary, presented satisfactory evidence of identity to the notary during the video conference, and did not merely transmit it before or after the transaction, to satisfy the Law's requirements and any other applicable law.
- The individual seeking the notary's services affirmatively represented that he or she was physically situated in Michigan or was physically located outside the geographic boundaries of Michigan and that: a) the record was intended for filing with or related to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of the State; or b) the record involved property located in the territorial jurisdiction of Michigan or a transaction substantially connected to Michigan.
- If an individual was physically located outside of Michigan, the notary had no actual knowledge that his or her act of making the statement or signing the record was prohibited by the laws of the jurisdiction in which he or she was located.
- The individual seeking the notary's services, any required witnesses, and the notary were able to affix their signatures to the record in a manner that rendered any subsequent change or modification of the remote online notarial act to be tamper evident.
- The individual seeking the notary's services or his or her designee transmitted by facsimile, mail, or electronic means a legible copy of the entire signed record directly to the notary on the same day it was signed, regardless of the manner in which it was signed.
- Once the notary received a legible copy of the record with all necessary signatures, the notary notarized the record and transmitted the notarized record back to the individual seeking the notary's services.

The official date and time of the notarization performed in the manner described above would be the date and time when the notary witnessed the signature via the technology.

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 Law could be signed in counterparts.

If a record was notarized electronically, it would not have to be notarized under another provision of the Law. The rights or interests of a person who relied in good faith and without actual notice that the record was executed on or after April 30, 2020, and before January 1, 2021, but was not executed or notarized in accordance as described above would not be impaired, challenged, or terminated on that basis alone. Compliance with the above requirements would be presumed. A person challenging a record notarized as described above could overcome the presumption, by clear and convincing evidence, that the notary or

individual seeking the notary's services intentionally failed to comply with a requirement listed above.

The provisions above apply to notarial acts performed in the manner described above on or after April 30, 2020, and before January 1, 2021.

Legislative Intent

The bill states the following with respect to the intent of the Legislature:

(1) Beginning April 30, 2020, it is the intent of the legislature that, governmental agencies and officials of this state are encouraged to use or permit the use of electronic records and electronic signatures to transact business, process applications, and recognize the validity of legal instruments, and, when a notarized signature is required by a law of this state, to use a notary public who performs notarial acts electronically under this act.

(2) Beginning April 30, 2020, it is the intent of the legislature that, any requirement under the law of this state that an in-person witness attests to or acknowledges an instrument, record, or deed is satisfied by the use of 2-way real-time audiovisual technology in accordance with section 26c.

(3) Beginning April 30, 2020, it is the intent of the legislature that, any requirement that an individual appears personally before or be in the presence of either a notary public at the time of a notarization or a witness at the time of an attestation or acknowledgment is satisfied if the individual, the witnesses, or the notary public are not in the physical presence of each other but can communicate simultaneously by 2-way real-time audiovisual technology in accordance with section 26c at the time of the notarization, attestation, or acknowledgment.

This language would not apply after December 31, 2020.

MCL 700.2502 et al. (H.B. 6294)
450.833 et al. (H.B. 6295)
565.843 et al. (H.B. 6296)
55.263 et al. (H.B. 6297)

Legislative Analyst: Jeff Mann

FISCAL IMPACT

House Bill 6294 (H-1)

The bill likely would not have a significant fiscal impact on the State or local units of government, including local court systems. The use of two-way real-time audiovisual technology to satisfy certain requirements under the Estates and Protected Individuals Code has been allowed since April 2020, beginning with Executive Order 2020-41, and continuing under multiple subsequent orders.

House Bill 6295 (H-1)

The bill would have a minor positive fiscal impact on State government and no fiscal impact on local units of government. The bill likely would result in minor cost savings to the Department of Technology, Management, and Budget. This would continue any administrative

savings seen under the previous emergency orders regarding electronic records and signatures.

House Bill 6296 (H-3)

The bill would have no fiscal impact on State or local government.

House Bill 6297 (H-2)

The bill would have a minor negative fiscal impact on the Department of State and no fiscal impact on local units of government.

The Department could experience minor administrative costs related to the proposed provisions, but these likely would be negligible. The delay in notary commission renewals would result in a temporary decrease in revenue to the Department. Revenue is used for activities related to the regulation of the notary profession. An estimate of the number of notaries whose renewals would be delayed under the bill is unavailable at this time.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.