STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

SECRETARY OF SENATE
2020 AUG 28 PM3:53

EXECUTIVE ORDER

No. 2020-173
Encouraging the use of electronic signatures and remote notarization, witnessing, and visitation during the COVID-19 pandemic

Rescission of Executive Order 2020-158

In order to reduce in-person interactions that may lead to the spread of COVID-19, this order continues until September 30 the suspension of certain requirements related to notarizations, witnessing of signatures, and in-person visitation previously permitted by Executive Order 2020-158.

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration

under the EPGA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

Those executive orders have been challenged in Michigan House of Representatives and Michigan Senate v. Whitmer. On August 21, 2020, the Court of Appeals ruled that the Governor's declaration of a state of emergency, her extensions of the state of emergency, and her issuance of related EOs clearly fell within the scope of the Governor's authority under the EPGA.

On August 7, 2020, I issued Executive Order 2020-165, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Strict compliance with rules and procedures under the Uniform Electronic Transactions Act ("UETA"), 2000 PA 305, as amended, MCL 450.831 et seq., and the Uniform Real Property Electronic Recording Act ("URPERA"), 2010 PA 123, as amended, MCL 565.841 et seq., is temporarily suspended to the extent necessary to permit the use of an electronic signature for a transaction whenever a signature is required under Michigan law, unless the law specifically mandates a physical signature. As provided in section 7 of the UETA, MCL 450.837, a signature will not be denied legal effect or enforceability solely because it is in electronic form and if a law requires a signature, an electronic signature satisfies the law.

2. Strict compliance with rules and procedures under section 18 of the UETA, MCL

450.848, is temporarily suspended so as to permit each state department to send and accept electronic records and electronic signatures to and from other persons without a determination from or approval by the Department of Technology, Management and Budget.

3. Strict compliance the Michigan Law on Notarial Acts, 2003 PA 238, as amended, MCL 55.261 et seq., is temporarily suspended, to the extent it requires a notary to be in the physical presence of an individual seeking the notary's services or of any required witnesses.

4. To minimize in-person interaction and facilitate remote work during the declared states of emergency and disaster:

   (a) Governmental agencies and officials of this state are encouraged to use or permit the use of electronic records and electronic signatures for transaction of business, processing of applications, and recognition of the validity of legal instruments, and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.

   (b) Persons and entities engaged in transactions are encouraged to use electronic records and electronic signatures and, when a notarized signature is mandated by law, to use a remote electronic notary pursuant to the Michigan Law on Notarial Acts, MCL 55.261 et seq.

5. In addition to other means available by law, any notarial act that is required under Michigan law may be performed by a notary who currently holds a valid notarial commission in this state ("notary") utilizing two-way real-time audiovisual technology, provided that all of the following conditions are met:

   (a) The two-way real-time audiovisual technology must allow direct interaction between the individual seeking the notary's services, any witnesses, and the notary, wherein each can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.

   (b) The two-way real-time audiovisual technology must be capable of creating an audio and visual recording of the complete notarial act and such recording must be made and retained as a notarial record in accordance with sections 26b(7) to 26b(9) of the Michigan Law on Notarial Acts, MCL 55.286b(7) to 55.286b(9).

   (c) The individual seeking the notary's services and any required witnesses, if not personally known to the notary, must present satisfactory evidence of identity (e.g., a valid state-issued photo identification) to the notary during the video conference, not merely transmit it prior to or after the transaction, to satisfy the requirements of the Michigan Law on Notarial Acts, MCL 55.261 et seq., and any other applicable law.

   (d) The individual seeking the notary's services must affirmatively represent either that the individual is physically situated in this state, or that the individual is physically located outside the geographic boundaries of this state and that either:

(1) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

(2) The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

If an individual is physically located outside of the geographic boundaries of this state, the notary must have no actual knowledge that the individual's act of making the statement or signing the document is prohibited by the laws of the jurisdiction in which the individual is physically located.

(e) The individual seeking the notary's services, any required witnesses, and the notary must be able to affix their signatures to the document in a manner that renders any subsequent change or modification of the remote online notarial act to be tamper evident.

(f) The individual seeking the notary's services or the individual's designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the notary on the same date it was signed. This requirement shall apply regardless of the manner in which the document is signed.

(g) Once the notary has received a legible copy of the document with all necessary signatures, the notary may notarize the document and transmit the notarized document back to the individual seeking the notary's services.

(h) The official date and time of the notarization shall be the date and time when the notary witnesses the signature via two-way real-time audiovisual technology as required under this section.

6. Any requirement under Michigan law that an in-person witness attest to or acknowledge an instrument, document, or deed may be satisfied by the use of two-way real-time audiovisual technology, provided that all of the following conditions are met:

(a) The two-way real-time audiovisual technology must allow direct, contemporaneous interaction by sight and sound between the individual signing the document (the "signatory") and the witness(es).

(b) The interaction between the signatory and the witness(es) must be recorded and preserved by the signatory or the signatory's designee for a period of at least three years, unless a law of this state requires a different period of retention.

(c) The signatory must affirmatively represent either that the signatory is physically situated in this state, or that the signatory is physically located outside the geographic boundaries of this state and that either of the following apply:

(1) The document is intended for filing with or relates to a matter before a court, governmental entity, public official, or other entity subject to the jurisdiction of this state; or

(2) The document involves property located in the territorial jurisdiction of this state or a transaction substantially connected to this state.

(d) The signatory must affirmatively state during their interaction with the witness(es) on the two-way real-time audiovisual technology what document they are executing.

(e) Each title page and signature page of the document being witnessed must be shown to the witness(es) on the two-way real-time audiovisual technology in a manner clearly legible to the witness(es), and every page of the document must be numbered to reflect both the page number of the document and the total number of pages of the document.

(f) Each act of signing the document must be captured sufficiently up close on the two-way real-time audiovisual technology for the witness(es) to observe.

(g) The signatory or the signatory's designee must transmit by fax, mail, or electronic means a legible copy of the entire signed document directly to the witness(es) within 72 hours of when it is executed.

(h) Within 72 hours of receipt, the witness(es) must sign the transmitted copy of the document as a witness and return the signed copy of the document to the signatory or the signatory's designee by fax, mail, or electronic means.

7. Notwithstanding any law or regulation of this state to the contrary, absent an express prohibition in the document against signing in counterparts, any document signed under this order may be signed in counterparts.

8. A guardian, guardian ad litem, or visitor may satisfy any requirement concerning a visit with a person, including but not limited to a visit in the physical presence of a person under the Estates and Protected Individuals Code, 1998 PA 386, as amended, MCL 700.1101 et seq., by instead conferring with that person via two-way real-time audiovisual technology that allows direct, contemporaneous interaction by sight and sound between the person being visited and the guardian, guardian ad litem, or visitor.

9. Any law of this state requiring an individual to appear personally before or be in the presence of either a notary at the time of a notarization or a witness at the time of attestation or acknowledgment shall be satisfied if the individual, the witness(es), and/or the notary are not in the physical presence of each other but can communicate simultaneously by sight and sound via two-way real-time audiovisual technology at the time of the notarization, attestation, or acknowledgment.

10. For the duration of this order and any order that may follow from it, financial

institutions and registers of deeds must not refuse to record a tangible copy of an electronic record on the ground that it does not bear the original signature of a person, witness, or notary, if the notary before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

11. Strict compliance with section 9(2) of the Michigan Law on Notarial Acts, as amended, MCL 55.269(2), is temporarily suspended to the extent necessary to extend until September 30, 2020 the validity of a notarial commission that expired or is set to expire between March 1, 2020 and September 30, 2020.

12. For purposes of the "verified user agreement" requirement of section 4 of the URPERA, MCL 565.844(4), a county recording office must deem all financial institutions and all licensed title insurers or their employed or contracted settlement agents as covered by a verified user agreement for the duration of this order and any order that may follow from it. The recorder may ask the financial institution or title insurance company for verification of a notary's employment or contractual association.

13. As used in this order:

    (a) "Electronic," "electronic record," "electronic signature," "governmental agency," "person," and "transaction" mean those terms as defined under section 2 of the UETA, MCL 450.832.

    (b) "Financial institution" means that term as defined in section 4(c) of the Michigan Strategic Fund Act, 1984 PA 270, as amended, MCL 125.2004(c).

14. Executive Order 2020-158 is rescinded.

15. This order is effective immediately and continues through September 30, 2020 at 11:59 pm.

Given under my hand and the Great Seal of the State of Michigan.

Date: August 28, 2020

Time: 3:13 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE