

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 575

By Senator Takubo

[Introduced January 26, 2024; referred
to the Committee on Health and Human Resources;
and then to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §16-67-1, §16-67-2, §16-67-3, §16-67-4, §16-67-5, §16-67-6, §16-67-7, §16-
3 67-8, §16-67-9, §16-67-10, §16-67-11, §16-67-12, §16-67-13, §16-67-14, §16-67-15, §16-
4 67-16, and §16-67-17, all relating to assisted reproduction; defining terms; setting forth
5 criteria to enter into gestational or genetic surrogacy agreement; requiring surrogacy
6 agreement to be executed; setting forth process for agreement; setting forth content of
7 agreement; setting forth effect of subsequent change in marital status in the agreement;
8 setting forth exclusive and continuing jurisdiction of the court; providing for termination of
9 the surrogacy agreement; providing for parentage of the gestational surrogacy agreement;
10 providing for parentage of deceased intended parent; providing for order of parentage;
11 providing for the effect of the gestational surrogacy agreement; providing for the
12 requirements to validate a genetic surrogacy agreement; providing for termination of a
13 genetic surrogacy agreement; providing for parentage under a validated genetic surrogacy
14 agreement; providing for the effect of a non-validated genetic surrogacy agreement;
15 providing for the parentage of the child in the event of a deceased parent in a genetic
16 surrogacy agreement; and providing for breach of a genetic surrogacy agreement.

Be it enacted by the Legislature of West Virginia:

ARTICLE 67. ASSISTED REPRODUCTION ACT.

§16-67-1. Definitions.

1 "Genetic surrogate" means a woman who is not an intended parent and who agrees to
2 become pregnant through assisted reproduction using her own gamete, under a gestational
3 surrogacy agreement as provided in this article.

4 "Gestational surrogacy" means a woman who is not an intended parent and who agrees to
5 become pregnant through assisted reproduction using gametes that are not her own, under a
6 gestational surrogacy agreement as provided in this article.

7 "Surrogacy agreement" means an agreement between one or more intended parents and
8 a woman who is not an intended parent in which the woman agrees to become pregnant through
9 assisted reproduction, and which provides that each parent is a parent of a child conceived under
10 the agreement. Unless otherwise specified, the term refers to both a gestational surrogacy
11 agreement and a genetic surrogacy agreement.

§16-67-2. Eligibility to enter into gestational or genetic surrogacy agreement.

1 (a) To execute an agreement to act as a gestational or generic surrogate, a woman must:

- 2 (1) Have attained 21 years of age;
- 3 (2) Previously have given birth to at least one child;
- 4 (3) Complete a medical evaluation related to the surrogacy arrangement by a licensed
5 medical doctor;
- 6 (4) Complete a mental health consultation by a licensed medical professional; and
- 7 (5) Have independent legal representation of her choice throughout the surrogacy
8 arrangement regarding the terms of the surrogacy agreement and the potential legal
9 consequences of the agreement.

10 (b) To execute a surrogacy agreement, each intended parent, whether or not genetically
11 related to the child, must:

- 12 (1) Have attained 21 years of age;
- 13 (2) Complete a medical evaluation related to the surrogacy arrangement by a licensed
14 medical doctor;
- 15 (3) Complete a mental health consultation by a licensed mental health professional;
16 and
- 17 (4) Have independent legal representation of the intended parent's choice throughout the
18 surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal
19 consequences of the agreement.

§16-67-3. Requirements of gestational or genetic surrogacy agreements: process.

1 A surrogacy agreement must be executed in compliance with the following rules:

2 (1) At least one party must be a resident of this state, if no party is a resident of this state, at
3 least one medical evaluation or procedure or mental health consultation under the agreement
4 must occur in this state.

5 (2) A surrogate and each intended parent must meet the requirements of this article;

6 (3) Each intended parent, the surrogate, and the surrogate's spouse, if any, must be
7 parties to the agreement;

8 (4) The agreement must be in a record signed by each part listed in this section;

9 (5) The surrogate and each intended parent must acknowledge in a record receipt of a
10 copy of the agreement.

11 (6) The signature of each party to the agreement must be attested to by a notarial officer or
12 witnessed;

13 (7) The surrogate and the intended parent or parents must have independent legal
14 representation throughout the surrogacy arrangement regarding the terms of the surrogacy
15 agreement and the potential legal consequences of the agreement, and each counsel must be
16 identified in the surrogacy agreement;

17 (8) The intended parent or parents must pay for independent legal consequences for the
18 surrogate;

19 (9) The agreement must be executed before a medical procedure occurs related to the
20 surrogacy agreement, other than the medical evaluation and mental health consultation required
21 by this section.

§16-67-4. Requirements of gestational or genetic surrogacy agreements: content.

1 (a) A surrogacy agreement must comply with the following requirements:

2 (1) A surrogate agrees to attempt to become pregnant by means of assisted reproduction.

3 (2) Except as otherwise provided in this article, the surrogate and the surrogate's spouse
4 or former spouse, if any have no claim to parentage of a child conceived by assisted reproduction
5 under the agreement.

6 (3) The surrogate's spouse, if any must acknowledge and agree to comply with the
7 obligations imposed on the surrogate by the agreement.

8 (4) Except as otherwise provided in this article the intended parent or, if there are two
9 intended parents, each one jointly and severally, immediately on birth will be the exclusive parent
10 or parents of the child, regardless of number of children born or gender or physical condition of
11 each child.

12 (5) Except as otherwise provided in this article, the intended parent or, if there are two
13 intended parents, each parent jointly and severally, immediately on birth will assume responsibility
14 for the financial support of the child, regardless of the number of children born or gender or
15 physical condition of each child.

16 (6) The agreement must include information disclosing how each intended parent will
17 cover the surrogacy-related expenses of the surrogate and the medical expenses of the child. If
18 health care coverage is used to cover medical expenses, the disclosure must include a summary
19 of the health care policy provisions related to coverage for surrogate pregnancy, including any
20 possible liability of the surrogate, third-party liens, other insurance coverage, and any notice
21 requirement that could affect coverage or liability of the surrogate. Unless the agreement
22 expressly provides otherwise, the review and disclosure do not constitute legal advice. If the
23 extent of coverage is uncertain, a statement of that fact is sufficient to comply with this paragraph.

24 (7) The agreement must permit the surrogate to make all health and welfare decisions
25 regarding herself and the pregnancy.

26 (8) The agreement must include information about each party's right under this article to
27 terminate the surrogacy agreement.

28 (b) A surrogacy agreement may provide for:

- 29 (1) Payment of consideration and reasonable expenses; and
- 30 (2) Reimbursement of specific expenses if the agreement is terminated under this article.
- 31 (c) A right created under a surrogacy agreement is not assignable and there is not a third-
- 32 party beneficiary of the agreement other than the child.

§16-67-5. Surrogacy agreement: Effect of subsequent change of marital status.

- 1 (a) Unless a surrogacy agreement expressly provides otherwise:
- 2 (1) The marriage of a surrogate after the agreement is signed by all parties does not affect
- 3 the validity of the agreement, her spouse's consent to the agreement is not required, and her
- 4 spouse is not a presumed parent of a child conceived by assisted reproduction under the
- 5 agreement; and
- 6 (2) The divorce, dissolution, annulment, declaration of invalidity, legal separation, or
- 7 separate maintenance of the surrogate after the agreement is signed by all parties does not affect
- 8 the validity of the agreement.
- 9 (b) Unless a surrogacy agreement expressly provides otherwise:
- 10 (1) The marriage of an intended parent after the agreement is signed by all parties does
- 11 not affect the validity of a surrogacy agreement, the consent of the spouse of the intended parent is
- 12 not required, and the spouse of the intended parent is not, based on the agreement, a parent of a
- 13 child conceived by assisted reproduction under the agreement; and
- 14 (2) The divorce, dissolution, annulment, declaration of invalidity, legal separation, or
- 15 separate maintenance of an intended parent after the agreement is signed by all parties does not
- 16 affect the validity of the agreement and, except as otherwise provided in this article, the intended
- 17 parents of the child.

§16-67-6. Inspection of documents.

18 Unless the court orders otherwise, a petition and any other document related to a

19 surrogacy agreement filed with the court under this article are not open to inspection by any

20 individual other than the parties to the proceeding, a child conceived by assisted reproduction

21 under the agreement, their attorneys, and the relevant state agency. A court may not authorize an
22 individual to inspect a document related to the agreement, unless required by exigent
23 circumstances. The individual seeking to inspect the document may be required by pay the
24 expense of preparing a copy of the document to be inspected.

§16-67-7. Inspection of documents.

1 During the period after the execution of a surrogacy agreement until 90 days after the birth
2 a child conceived by assisted reproduction under the agreement, a court of this state conducting a
3 proceeding under this article has exclusive, continuing jurisdiction over all matters arising out of
4 the agreement. This section does not give the court jurisdiction over a child custody or child
5 support proceeding if jurisdiction is not otherwise authorized by law of this sate other than this
6 article.

§16-67-8. Termination of gestational surrogacy agreement.

1 (a) A party to a gestational surrogacy agreement may terminate the agreement, at any
2 time before an embryo transfer, by giving notice of termination in a record to all other parties. If an
3 embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time
4 before a subsequent embryo transfer.

5 (b) Unless a gestational surrogacy agreement provides otherwise, on termination of the
6 agreement under this section, the parties are released from the agreement, except that each
7 intended parent remains responsible for expenses that are reimbursable under the agreement and
8 incurred by the gestational surrogate through the date of termination.

9 (c) Except in a case involving fraud, neither a gestational surrogate not the surrogate's
10 spouse or former spouse, if any is liable to the intended parent or parents for a penalty or
11 liquidated damages, for terminating a gestational surrogacy agreement under this section.

§16-67-9. Termination of gestational surrogacy agreement.

1 (a) Notwithstanding any other provision to the contrary and except as otherwise provided
2 this article, on birth of a child conceived by assisted reproduction under a gestational surrogacy
3 agreement, each intended parent is, by operation of law, a parent of the child.

4 (b) Except as otherwise provided in this article, neither a gestational surrogate nor the
5 surrogate's spouse or former spouse, if any, is a parent of the child.

6 (c) If a child is alleged to be a genetic child of the woman who agreed to be a gestational
7 surrogate, the court shall order genetic testing of the child. If the child is a genetic child of the
8 woman who agreed to be a gestational surrogate, parentage must be determined based upon
9 other provisions of applicable law.

10 (d) Except as otherwise provided in this article, if due to a clinical or laboratory error, a child
11 conceived by assisted reproduction under a gestational surrogacy agreement is not genetically
12 related to an intended parent or a donor who donated to the intended parent or parents, each
13 intended parent, and not the gestational surrogate and the surrogate's spouse or former spouse, if
14 any, is a parent of the child, subject to any other claim of parentage.

§16-67-10. Gestational surrogacy agreement: parentage or deceased intended parent.

1 (a) §16-67-9 of this code applies to an intended parent even if the intended parent died
2 during the period between the transfer of a gamete or embryo and the birth of the child;

3 (b) Except as provided otherwise in §16-67-9 of this code, an intended parent is not a
4 parent of a child conceived by assisted reproduction under a gestational surrogacy agreement if
5 the intended parent dies before the transfer of a gamete or embryo unless:

6 (1) The agreement provides otherwise; and

7 (2) The transfer of a gamete or embryo occurs not later than 36 months after the death of
8 the intended parent of birth of the child occurs not later than 45 months after the death of the
9 intended _____ parent.

§16-67-11. Gestational surrogacy agreement: order of parentage.

7 agreement was a spouse of a party to the agreement has standing to maintain a proceeding to
8 adjudicate an issue related to the enforcement of the agreement.

9 (c) Except as expressly provided in a gestational surrogacy agreement or this section, if
10 the agreement is breached by the gestational surrogate or one or more intended parents, the non-
11 breaching party is entitled to the remedies available at law or in equity.

12 (d) Specific performance is not a remedy available for breach by a gestational surrogate of
13 a provision in the agreement that the gestational surrogate be impregnated or submit to a medical
14 procedure.

15 (e) Except as otherwise provided in this section, if an intended parent is determined to be a
16 parent of a child, specific performance is a remedy available for:

17 (1) Breach of the agreement by a gestational surrogate which prevents the intended
18 parent from exercising immediately on birth of the child the full rights of parentage; or

19 (2) Breach by the intended parent which prevents the intended parent's acceptance,
20 immediately on birth of the child conceived by assisted reproduction under the agreement, of the
21 duties _____ of _____ parentage.

§16-67-13. Requirements to validate genetic surrogacy agreement.

1 (a) Except as otherwise provided in this article, to be enforceable a genetic surrogacy
2 agreement must be validated by the designated court. A proceeding to validate the agreement
3 must be commenced before assisted reproduction related to the surrogacy agreement.

4 (b) The court shall issue an order validating a genetic surrogacy agreement if the court
5 finds that:

6 (1) The requirements of this article are satisfied; and

7 (2) All parties entered into the agreement voluntarily and understand its terms.

8 (c) An individual who terminates under this article a genetic surrogacy agreement shall file
9 notice of the termination with the court. On receipt of the notice, the court shall vacate any order

10 issued under this section. An individual who does not notify the court of the termination of the
11 agreement is subject to sanctions.

§16-67-14. Termination of genetic surrogacy agreement.

1 (a) A party to a genetic surrogacy agreement may terminate the agreement as follows:

2 (1) An intended parent who is a party to the agreement may terminate the agreement at
3 any time before a gamete or embryo transfer by giving notice of termination in a record to all
4 parties. If a gamete or embryo transfer does not result in a pregnancy, a party may terminate the
5 agreement at any time before a subsequent gamete or embryo transfer. The notice of termination
6 must be attested by a notarial officer or witness.

7 (2) A genetic surrogate who is a party to the agreement may withdraw consent to the
8 agreement any time before 72 hours after the birth of a child conceived by assisted reproduction
9 under the agreement. To withdraw consent, the genetic surrogate must execute a notice of
10 termination in a record stating the surrogate's intent to terminate the agreement. The notice of
11 termination must be attested by a notarial officer or witnesses and be delivered to each intended
12 parent any time before 72 hours after the birth of the child.

13 (b) On termination of the genetic surrogacy agreement under this section, the parties are
14 released from all obligations under the agreement except that each intended parent remains
15 responsible for all expenses incurred by the surrogate through the date of termination which are
16 reimbursable under the agreement. Unless the agreement provides otherwise, the surrogate is not
17 entitled to any non-expense related compensation paid for serving as surrogate.

18 (c) Except in a case involving fraud, neither a genetic surrogate nor the surrogate's spouse
19 or former spouse, if any, is liable to the intended parent or parents for a penalty or liquidated
20 damages, for terminating a genetic surrogacy agreement under this section.

§16-67-15. Parentage under validated genetic surrogacy agreement.

2 (a) Unless a genetic surrogacy exercises the right under this article to terminate a genetic
3 surrogacy agreement, each intended parent is a parent of a child conceived by assisted
4 reproduction under an agreement validated under this article.

5 (b) Unless a genetic surrogate exercises the right under this article to terminate the genetic
6 surrogacy agreement, on proof of a court order issued under this article validating the agreement,
7 the court shall make an order:

8 (1) Declaring that each intended parent is a parent of a child conceived by assisted
9 reproduction under the agreement and ordering that parental rights and duties vest exclusively in
10 each intended parent;

11 (2) Declaring that the genetic surrogate and the surrogate's spouse or former spouse, if
12 any, are not parents of the child;

13 (3) Designating the contents of the birth certificate in accordance with §16-5-1 et seq. of
14 this code and directing the Vital Registration Office to designate each intended parent as a parent
15 of the child;

16 (4) To protect the privacy of the child and the parties, declaring that this court record is not
17 open to inspection except as provided in this article;

18 (5) If necessary, that that the child be surrendered to the intended parent or parents; and

19 (6) For other relief the court determines necessary and proper.

20 (c) If a genetic surrogate terminates under this article, a genetic surrogacy agreement,
21 parentage of the child conceived by assisted reproduction under the agreement must be
22 determined by other provisions of applicable law.

23 (d) If a child born to a genetic surrogate is alleged to not have been conceived by assisted
24 reproduction, the court shall order genetic testing to determine the genetic parentage of the child.
25 If the child was not conceived by assisted reproduction, parentage must be determined under
26 other provisions of applicable law. Unless the genetic surrogacy agreement provides otherwise, if

27 the child was not conceived by assisted reproduction the surrogate is not entitled to any non-
28 expense related to the compensation paid for serving as a surrogate.

29 (e) Unless a genetic surrogate exercises the right under this article to terminate the genetic
30 surrogacy agreement, if an intended parent fails to file a notice required under this article, the
31 genetic surrogate or the Department of Health may file with the court, not later than 60 days after
32 the birth of a child conceived by assisted reproduction under the agreement, notice that the child
33 has been born to the genetic surrogate, Unless the genetic surrogate has properly exercised the
34 right under this article to withdraw consent to the agreement, on proof of a court order issued under
35 this article validating the agreement, the court shall order that each intended parent is a parent of
36 the _____ child.

§16-67-16. Effect of non-validated genetic surrogacy agreement.

1 (a) Except as otherwise provided in this article, on birth of a child conceived by assisted
2 reproduction under a genetic surrogacy agreement, each intended parent is, by operation of law, a
3 parent of the child, notwithstanding the death of an intended parent during the period between the
4 transfer of a gamete or embryo and the birth of the child

5 (b) Except as otherwise provided in this article, an intended parent is not a parent of a child
6 conceived by assisted reproduction under a genetic surrogacy agreement if the intended parent
7 dies before the transfer of a gamete or embryo unless:

8 (1) The agreement provides otherwise; and

9 (2) The transfer of the gamete or embryo occurs not later than 36 months after the death or
10 the intended parent, or birth of the child occurs not later than 45 months after the death of the
11 intended parent.

§16-67-17. Breach of genetic surrogacy agreement.

1 (a) Subject to the provisions of this article, if a genetic surrogacy agreement is breached by
2 a genetic surrogate or one or more intended parents, the non-breaching party is entitled to the
3 remedies available at law or in equity.

4 (b) Specific performance is not a remedy available for breach by a genetic surrogate of a
5 requirement of a validated or non-validated genetic surrogacy agreement that the surrogate be
6 impregnated or submit to a medical procedure.

7 (c) Except as otherwise provided in this section, specific performance is a remedy
8 available for:

9 (1) Breach of a validated genetic surrogacy agreement by a genetic surrogate of a
10 requirement which prevents an intended parent from exercising the full rights of parentage 72
11 hours after the birth of the child; or

12 (2) Breach by an intended parent which prevents the intended parent's acceptance of
13 duties of parentage 72 hours after the birth of the child.

NOTE: The purpose of this bill is to set forth provisions for genetic and gestational surrogacy. The bill requires an agreement, sets forth requirements to enter the agreement, required terms, the process of the agreement, and the content of the agreement. The bill sets forth parentage under the bill and addresses subsequent marital status. The bill addresses how documents are handled and maintained and the jurisdiction of the court over the agreement. The bill addresses termination of the agreement. The bill addresses parentage under the agreement both for gestational surrogacy and genetic surrogacy and the various actions that can impact parentage, including but not limited to death of an intended parent and divorce of the surrogate. The bill provides for breach of an agreement.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.