

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2489

BY DELEGATE FOSTER

[Introduced February 15, 2021; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §16-5-10 of the Code of West Virginia, 1931, as amended, relating
2 to, the preserving surnaming of children in accordance with the long-standing custom and
3 tradition of the patronymic surnaming convention of children as recognized in common
4 law case precedent; and titling this act as “The Genealogical Record Integrity Act of 2020”.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. VITAL STATISTICS.

§16-5-10. Birth registration acknowledgment and rescission of paternity.

1 (a) A certificate of birth for each live birth which occurs in this state shall be filed with the
2 section of vital statistics, or as otherwise directed by the State Registrar, within seven days after
3 the birth and shall be registered if it has been completed and filed in accordance with this section.

4 (b) When a birth occurs in transit to or in an institution, the person in charge of the
5 institution or his or her authorized designee shall obtain all data required by the certificate, prepare
6 the certificate, certify either by signature or by an approved electronic process that the child was
7 born alive at the place and time and on the date stated, and file the certificate as directed in
8 subsection (a) of this section. The physician or other person in attendance, or any person
9 providing prenatal care shall provide the medical information required by the certificate within 72
10 hours after the birth.

11 (c) When a birth occurs other than in transit to or in an institution, the certificate shall be
12 prepared and filed by one of the following persons in the indicated order of priority in accordance
13 with legislative rule:

14 (1) The physician in attendance at or immediately after the birth;

15 (2) Any other person in attendance at or immediately after the birth;

16 (3) The father or the mother, or, in the absence of the father and the inability of the mother,
17 the person in charge of the premises where the birth occurred; or

18 (4) Any other person qualified by the department by rule to establish the facts of birth.

19 (d) When a birth occurs on a moving conveyance within the United States and the child is

20 first removed from the conveyance in this state, the birth shall be registered in this state, and the
21 place where it is first removed shall be considered the place of birth. When a birth occurs on a
22 moving conveyance while in international waters or air space or in a foreign country or its air
23 space and the child is first removed from the conveyance in this state, the birth shall be registered
24 in this state, but the certificate shall show the actual place of birth insofar as can be determined.

25 (e) For the purposes of birth registration, the woman who gives birth to the child is
26 presumed to be the mother, unless otherwise specifically provided by state law or determined by
27 a court of competent jurisdiction prior to the filing of the certificate of birth.

28 (f) (1) Except as set forth in paragraphs (A) through (G) of this subsection, if the mother
29 was married at the time of either conception or birth, or between conception and birth, the name
30 of the most recent husband shall be entered on the certificate as the father of the child. unless To
31 codify the long-held West Virginia common law precedent recognizing the long-standing tradition
32 and social convention that a child's surname follows that of their father, and that fathers who
33 express an intention to maintain a relationship with and support for their child have a protectable
34 interest in their child bearing the father's surname, the surname of the most recent husband shall
35 be entered as the child's surname, unless:

36 (A) The father has abandoned the mother and has made no expression of interest in the
37 child or in the child having the father's surname; and

38 (i) The mother has made good faith efforts to ascertain the father's wishes concerning the
39 child's surname; and

40 (ii) There is no founded risk to the mother's physical safety that communicating with father
41 would pose: *Provided*, That any founded such risk made by the mother, as supported by evidence
42 determined by court after an adversarial hearing on the record at which both parties have the right
43 to present witnesses and evidence, is grounds for dispensing with the requirement that the mother
44 make good faith efforts to ascertain the father's wishes concerning the child's surname: *Provided*,
45 however, That the mother may not unilaterally cut off communication with the child's father

46 concerning the surnaming of the child, nor prevent the father and any siblings or half-siblings of
47 the child from being present at the birth, nor may the mother unilaterally attempt to give the child
48 a surname other than that of the father, except as set forth in this subdivision: *Provided further,*
49 That any attempt by the mother to unilaterally refuse to discuss the surnaming of the child with
50 the father, to preclude father and siblings or half-siblings from being present at the birth, or to
51 unilaterally give the child a different surname, is *prima facie* evidence of the mother's intent to
52 alienate the father from his child, and the father may petition the court that such behavior by the
53 mother, in the absence of founded risk to her physical safety, to be limiting factors in future
54 custody and parenting time allocations as set forth in §48-9-206(A)(9) and §48-9-209(a)(4) of this
55 code. Any alternate surnaming of the child resulting therefrom may not be relied upon for a finding
56 by any court that that the child maintaining the alternate surname is in the best interests of the
57 child.

58 (iii) Any father whose child has been given a surname other than the father's where the
59 mother has engaged in alienating acts as set forth in this subdivision has a right to petition to
60 change the child's surname, regardless of prior denial of any name change petition, pursuant to
61 the Genealogical Record Integrity Act of 2021: *Provided,* That the father is not disqualified by the
62 exceptions set forth in this subdivision;

63 (B) Both mother and father expressly agree in notarized writing that the child shall bear a
64 surname different from that of the legal father;

65 (C) The child is the result of conception caused by rape;

66 (D) There has been shown by clear and convincing evidence determined by a court after
67 an adversarial hearing on the record at which both parties have the right to present witnesses and
68 evidence, that the use of the father's surname would cause a risk of ongoing public scandal to, or
69 ostracization of, the child due to notoriety of the father's surname for reasons of some grave public
70 matter related to father;

71 (4) (E) Paternity has been determined otherwise by a court of competent jurisdiction

72 pursuant to the provisions of §48-24-101 *et seq.* of this code or other applicable law, in which
73 case the name of the father as determined by the court shall be entered on the certificate; or

74 ~~(2)~~ (F) Genetic testing shows that the alleged father is the biological father of the child
75 pursuant to the following guidelines:

76 ~~(A)~~ (i) The tests show that the inherited characteristics including, but not limited to, blood
77 types, have been determined by appropriate testing procedures at a hospital, independent
78 medical institution or independent medical laboratory duly licensed under the laws of this state,
79 or any other state, and an expert qualified as an examiner of genetic markers has analyzed,
80 interpreted and reported on the results; and

81 ~~(B)~~ (ii) The blood or tissue or other genetic test results show a statistical probability of
82 paternity of more than 98 percent; or

83 ~~(3)~~ (G) The mother, her husband, and an alleged father acknowledge that the husband is
84 not the biological father and that the alleged father is the true biological father: *Provided*, That the
85 conditions set forth in ~~paragraphs (A) through (D)~~ (i) through (iv) of this paragraph are met:

86 ~~(A)~~ (i) The mother executes an affidavit of nonpaternity attesting that her husband is not
87 the biological father of the child and that another man is the biological father; and

88 ~~(B)~~ (ii) The man named as the alleged biological father executes an affidavit of paternity
89 attesting that he or she is the biological father; and

90 ~~(C)~~ (iii) The husband executes an affidavit of nonpaternity attesting that he or she is not
91 the biological father; and

92 ~~(D)~~ (iv) Affidavits executed pursuant to the provisions of this subdivision may be joint or
93 individual or a combination thereof, and each signature shall be individually notarized. If one of
94 the parties is an unemancipated minor, his or her parent or legal guardian must also sign the
95 respective affidavit.

96 ~~(4)~~ (2) If the affidavits are executed as specified in ~~subdivision (3)~~ paragraph (G) of this
97 ~~section~~ subdivision or genetic tests as specified in ~~subdivision (2)~~ paragraph (F) of this ~~section~~

98 subdivision verify that the alleged father is the biological father, the alleged father shall be shown
99 as the father on the certificate of live birth. Paternity established pursuant to ~~subdivision (2) or (3)~~
100 paragraph (F) or (G) of this ~~section~~ subdivision establishes the father for all legal purposes
101 including, but not limited to, the establishment and enforcement of child support orders, and may
102 be rescinded only by court order upon a showing of fraud, duress or material mistake of fact.

103 ~~(5) (3)~~ Paternity may be established pursuant to ~~subdivision (2) or (3)~~ paragraph (F) or (G)
104 subdivision (2) of this ~~section~~ subsection only when the husband's name does not appear as the
105 father of a child on a registered and filed certificate of live birth and the affidavits or genetic tests
106 are completed and submitted to the section of vital statistics within one year of the date of birth of
107 the child.

108 (g) If the mother was not married at the time of either conception or birth, or between
109 conception and birth, the name of the father ~~shall~~ may not be entered on the certificate of birth
110 without an affidavit of paternity signed by the mother and the person to be named as the father.
111 The affidavit may be joint or individual and each signature shall be individually notarized.

112 (h) A notarized affidavit of paternity, signed by the mother and the man to be named as
113 the father, acknowledging that the man is the father of the child, legally establishes the man as
114 the father of the child for all purposes, and child support may be established pursuant to the
115 provisions of ~~chapter forty-eight~~ §48-11-101 et seq. of this code.

116 (1) The notarized affidavit of paternity shall include filing instructions, the parties' Social
117 Security number and addresses and a statement that parties were given notice of the alternatives
118 to, the legal consequences of, and the rights and obligations of acknowledging paternity,
119 including, but not limited to, the duty to support a child. If either of the parents is a minor, the
120 statement shall include an explanation of any rights that may be afforded due to the minority
121 status. An unmarried father's assumption of such rights and obligations of acknowledging
122 paternity by notarized affidavit entitles the unmarried father to the same protectable interest in his
123 child or children bearing the father's surname, and subject to the same applicable conditions and

124 exceptions, set forth in subdivision (1), subsection (f) of this section.

125 (2) The failure or refusal to include all information required by subdivision (1) of this
126 subsection ~~shall~~ does not affect the validity of the affidavit of paternity, in the absence of a finding
127 by a court of competent jurisdiction that it was obtained by fraud, duress or material mistake of
128 fact, as provided in subdivision (4) of this subsection.

129 (3) The original notarized affidavit of paternity shall be filed with the State Registrar. If a
130 certificate of birth for the child has been previously issued which is incorrect or incomplete, a new
131 certificate of birth will be created and placed on file. The new certificate of birth ~~will~~ may not be
132 marked "Amended".

133 (4) Upon receipt of any notarized affidavit of paternity executed pursuant to this section,
134 the State Registrar shall forward a copy to the Bureau for Child Support Enforcement.

135 (5) An acknowledgment executed under the provisions of this subsection may be
136 rescinded as follows:

137 (A) The parent wishing to rescind the acknowledgment shall file with the clerk of the circuit
138 court of the county in which the child resides a verified complaint stating the name of the child,
139 the name of the other parent, the date of the birth of the child, the date of the signing of the affidavit
140 of paternity, and a statement that he or she wishes to rescind the acknowledgment of the paternity.
141 If the complaint is filed more than 60 days from the date of execution of the affidavit of paternity
142 or the date of an administrative or judicial proceeding relating to the child in which the signatory
143 of the affidavit of paternity is a party, the complaint shall include specific allegations concerning
144 the elements of fraud, duress or material mistake of fact.

145 (B) The complaint shall be served upon the other parent as provided in Rule 4 of the West
146 Virginia Rules of Civil Procedure.

147 (C) The family court judge shall hold a hearing within 60 days of the service of process
148 upon the other parent.

149 (D) If the complaint was filed within 60 days of the date the affidavit of paternity was

150 executed, the court shall order the acknowledgment to be rescinded without any requirement of
151 a showing of fraud, duress, or material mistake of fact.

152 (E) If the complaint was filed more than 60 days from the date of execution of the affidavit
153 of paternity or the date of an administrative or judicial proceeding relating to the child in which the
154 signatory of the affidavit of paternity is a party, the court may set aside the acknowledgment only
155 upon a finding, by clear and convincing evidence, that the affidavit of paternity was executed
156 under circumstances of fraud, duress or material mistake of fact.

157 (F) The circuit clerk shall forward a copy of any order entered pursuant to this proceeding
158 to the State Registrar by certified mail. The order shall state all changes to be made, if any, to the
159 certificate of birth. The certificate of birth may not be marked "Amended."

160 (i) In any case in which paternity of a child is determined by a court of competent
161 jurisdiction pursuant to the provisions of §48-24-101 *et seq.* of this code or other applicable law,
162 the name of the father and surname of the child shall be entered on the certificate of birth in
163 accordance with the finding and order of the court.

164 (j) If the father is not named on the certificate of birth, no other information about the father
165 may be entered on the certificate.

166 (k) In order to permit the filing of the certificate of birth within the seven days prescribed in
167 subsection (a) of this section, one of the parents of the child must verify the accuracy of the
168 personal data to be entered on the certificate. Certificates of birth filed after seven days, but within
169 one year from the date of birth, ~~will~~ shall be registered on the standard form of the certificate of
170 birth and ~~will~~ may not be marked "Delayed." The State Registrar may require additional evidence
171 in support of the facts of birth for certificates filed after seven days from the date of birth.

172 (l) In addition to the personal data furnished for the certificate of birth issued for a live birth
173 in accordance with the provisions of this section, a person whose name is to appear on the
174 certificate of birth as a parent shall contemporaneously furnish to the person preparing and filing
175 the certificate of birth the Social Security number or numbers issued to the parent. A record of the

176 Social Security number or numbers shall be filed with the local registrar of the district in which the
177 birth occurs within seven days after the birth, and the local registrar shall transmit the number or
178 numbers to the State Registrar in the same manner as other personal data is transmitted to the
179 State Registrar.

180 (m) The local registrar shall transmit by mail or an approved electronic process each month
181 to the county clerk of each county the copies of the certificates of all births occurring in the county
182 or the data extracted therefrom, from which copies the clerk shall compile records of the births
183 and shall create an index to the birth records that shall be a matter of public record. The State
184 Registrar shall prescribe the form of the index of births.

NOTE: The purpose of this bill is to enact the Genealogical Record Integrity Act of 2021 to preserve the long-standing custom and tradition of patronymic surnaming convention of children in accordance with and as recognized in common law case precedent.

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