

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Committee Substitute

for

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for

Senate Bill Number 575

By Senator Takubo

[Originating in the Committee on the Judiciary;

reported February 23, 2024]

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, §16-67-8,
3 §16-67-9, §16-67-10, §16-67-11, §16-67-12, §16-67-13, §16-67-14, §16-67-15, §16-67-16, §16-
4 67-17, §16-67-18, and §16-67-19, all relating to assisted reproduction; defining terms; setting forth
5 criteria to enter into gestational or genetic surrogacy agreement; requiring surrogacy agreement to
6 be executed; setting forth process for agreement; setting forth content of agreement; setting forth
7 effect of subsequent change in marital status in the agreement; setting forth exclusive and
8 continuing jurisdiction of the court; providing for termination of the surrogacy agreement; providing
9 for parentage as provided under the gestational surrogacy agreement; providing for inspection of
10 documents; providing for parentage of deceased intended parent; providing for order of
11 parentage; 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 genetic
13 surrogacy agreement; providing for parentage under a validated genetic surrogacy agreement;
14 providing for the effect of a non-validated genetic surrogacy agreement; providing for the
15 parentage of the child in the event of a deceased parent in a genetic surrogacy agreement;
16 providing for breach of a genetic surrogacy agreement; and declaring that the state will honor
17 surrogacy agreements entered into in other jurisdictions and apply the law of that jurisdiction;
18 creating the criminal offense of commercial surrogate brokering and establishing criminal
19 penalties.

Be it enacted by the Legislature of West Virginia:

ARTICLE 67. ASSISTED REPRODUCTION ACT.

§16-67-1. Definitions.

As used in this article:

1 (1) "Assisted reproduction" means a method of causing pregnancy other than sexual
2 intercourse. The term includes:

3 (A) Intrauterine or intracervical insemination;

4 (B) Donation of gametes.

5 (C) Donation of embryos.

6 (D) In vitro fertilization and transfer of embryos; and

7 (E) Intracytoplasmic sperm injection.

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

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

14 (4) "Intended parent" means an individual, married or unmarried, who manifests an intent
15 to be legally bound as a parent of a child conceived by assisted reproduction.

16 (5) "Surrogacy agreement" means an agreement between one or more intended parents
17 and a woman who is not an intended parent in which the woman agrees to become pregnant
18 through assisted reproduction, and which provides that each parent is a parent of a child
19 conceived under the agreement. Unless otherwise specified, the term refers to both a gestational
20 surrogacy agreement and a genetic surrogacy agreement.

21 (6) "Transfer" means a procedure for assisted reproduction by which an embryo or sperm
22 is placed in the body of a woman who will give birth to the child.

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

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

24 (1) Have attained 21 years of age;

25 (2) Previously have given birth to at least one child;

26 (3) Undergo a medical evaluation related to the surrogacy arrangement by a licensed
27 medical doctor and be deemed to be an appropriate person to serve as a surrogate;

28 (4) Undergo a mental health consultation by a licensed medical professional and be
29 deemed to be an appropriate person to serve as a surrogate; and

30 (5) Have independent legal representation of her choice throughout the surrogacy
31 arrangement regarding the terms of the surrogacy agreement and the potential legal
32 consequences of the agreement.

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

35 (1) Have attained 21 years of age;

36 (2) Undergo a medical evaluation related to the surrogacy arrangement by a licensed
37 medical doctor and be deemed to be an appropriate person to serve as an intended parent;

38 (3) Undergo a mental health consultation by a licensed mental health professional and
39 be deemed to be an appropriate person to serve as an intended parent; and

40 (4) Have independent legal representation of the intended parent's choice throughout the
41 surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal
42 consequences of the agreement.

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

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

2 (1) At least one party must be a resident of this state;

3 (2) A surrogate, surrogate's spouse, if any, and each intended parent shall meet the
4 requirements of this article;

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

7 (4) The agreement shall be of record and signed by each party listed in this section;

8 (5) The surrogate, surrogate's spouse, and each intended parent must acknowledge in a
9 record receipt of a copy of the agreement;

10 (6) The signature of each party to the agreement must be attested to by a notary public;

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

15 (8) The intended parent or parents must pay for independent legal services for the
16 surrogate; and

17 (9) The agreement must be executed before a medical procedure occurs related to the
18 surrogacy agreement, other than the medical evaluation and mental health consultation required
19 by §16-67-2.

§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 parent jointly and severally, immediately on birth, will be the exclusive
10 parent or parents of the child, regardless of the number of children born, the sex of the child or
11 children, or the physical or medical condition of the child or children.

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
14 responsibility for the financial support of the child, regardless of the number of children born, or
15 gender, or physical or medical 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 subdivision;

24 (7) The agreement must permit the surrogate to make all health and welfare decisions
25 regarding herself and the pregnancy consistent with West Virginia law, including, but not limited to,
26 the provisions of §16-2R-1 et seq. of this code; and

27 (8) The agreement must include information about each party's rights or lack of rights
28 under this article to terminate the surrogacy agreement.

29 (b) A surrogacy agreement may provide for:

30 (1) Payment of consideration and reasonable expenses; and

31 (2) Reimbursement of specific expenses if the agreement is terminated under this article.

32 (c) A right created under a surrogacy agreement is not assignable and there is not a third-
33 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, unless such spouse was a party to the surrogacy agreement as an intended parent;
6 and

7 (2) The divorce, dissolution, annulment, declaration of invalidity, legal separation, or
8 separate maintenance of the surrogate after the agreement is signed by all parties does not affect
9 the validity of the agreement.

10 (b) Unless a surrogacy agreement expressly provides otherwise:

11 (1) The marriage of an intended parent after the agreement is signed by all parties does
12 not affect the validity of a surrogacy agreement, the consent of the spouse of the intended parent is
13 not required, and the spouse of the intended parent is not, based on the agreement, a parent of a
14 child conceived by assisted reproduction under the agreement, unless such spouse was a party to
15 the surrogacy agreement as an intended parent; and

16 (2) The divorce, dissolution, annulment, declaration of invalidity, legal separation, or
17 separate maintenance of an intended parent after the agreement is signed by all parties does not
18 affect the validity of the agreement.

§16-67-6. Inspection of documents.

19 Unless the court orders otherwise, a petition and any other document related to a
20 surrogacy agreement filed with the court under this article are not open to inspection by any
21 individual other than the parties to the proceeding, a child conceived by assisted reproduction
22 under the agreement, their attorneys, and the Vital Registration Office. A court may not authorize
23 an individual not a party to the agreement to inspect a document related to the agreement unless
24 disclosure is in the interests of justice. The individual seeking to inspect the document may be
25 required to pay the expense of preparing a copy of the document to be inspected.

§16-67-7. Exclusive, Continuing Jurisdiction.

1 During the period after the execution of a surrogacy agreement until 90 days after the birth
2 of a child conceived by assisted reproduction under the agreement, a court of this state conducting
3 a 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

4 support proceeding if jurisdiction is not otherwise authorized by law of this state other than this
5 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 written notice of termination 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 nor 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. Parentage under gestational surrogacy agreement.

1 (a) Notwithstanding any other provision to the contrary, and except as otherwise provided
2 in 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 and the agreement is deemed to be breached.

10 (d) Except as otherwise provided in this article, if, due to a clinical or laboratory error, a
11 child conceived by assisted reproduction under a gestational surrogacy agreement is not

12 genetically related to an intended parent or a donor who donated to the intended parent or parents,
13 each intended parent, and not the gestational surrogate and the surrogate's spouse or former
14 spouse, if 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, or the 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.

1 (a) Except as otherwise provided in this article before, on, or after the birth of a child
2 conceived by assisted reproduction under a gestational surrogacy agreement, a party to the
3 agreement may commence a proceeding in the circuit courts of this state in the county where a
4 gestational surrogate resides, or in the county where the medical facility that the gestational
5 surrogate intends to deliver the child resides, for an order of judgement;

6 (1) Declaring that each intended parent is a parent of the child and ordering that parental
7 rights and duties vest immediately on the birth of the child exclusively in each intended parent;

8 (2) Declaring that the gestational surrogate and the surrogate's spouse or former spouse,
9 if any, are not the parents of the child;

10 (3) Designating the content of the birth record in accordance with §16-5-1 *et seq.* of this
11 code and directing the Vital Registration Office to designate each intended parent as a parent of
12 the child;

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 a circuit court in the county where either the genetic surrogate
3 resides, or alternatively in the county where the intended delivery hospital is located. A proceeding
4 to validate the agreement must be commenced before assisted reproduction related to the
5 surrogacy agreement.

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

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

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

10 (c) An individual who terminates under this article a genetic surrogacy agreement shall file
11 notice of the termination with the court. On receipt of the notice, the court shall vacate any order
12 issued under this section. An individual who does not notify the court of the termination of the
13 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 writing to all parties.

4 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 writing 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.

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

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

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

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

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

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

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

18 (6) Granting any other relief the court determines necessary and proper.

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

22 (d) If a child born to a genetic surrogate is alleged to not have been conceived by assisted
23 reproduction, the court shall order genetic testing to determine the genetic parentage of the child.
24 If the child was not conceived by assisted reproduction, parentage must be determined under
25 other provisions of applicable law. Unless the genetic surrogacy agreement provides otherwise, if
26 the child was not conceived by assisted reproduction, the genetic surrogate is not entitled to any
27 non-expense related to the compensation paid for serving as a genetic surrogate.

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

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

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

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

4 (1) The agreement provides otherwise; and

5 (2) The transfer of the gamete or embryo occurs not later than 36 months after the death of
6 the intended parent, or the birth of the child occurs not later than 45 months after the death of the
7 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.

§16-67-18 Treatment of agreements entered into in other states.

14 Should a person who is a surrogate under an agreement entered into in another
15 jurisdiction within the United States give birth to the child in this state, the law of the state in which
16 the agreement was entered into shall apply.

§16-67-19 Prohibition against commercial surrogate brokering; exceptions; penalties.

1 (a) Any person or entity in this state acting as a commercial surrogate broker is guilty of a
2 misdemeanor and upon conviction, shall be fined not more than \$10,000 or confined in jail for not
3 more than one year or both fined and confined.

(b) As used in this section "commercial surrogate broker" means a person, firm,
corporation, partnership or other entity that accepts compensation for recruiting or procuring
surrogates or which accepts compensation for otherwise arranging or inducing intended parents
and surrogates to enter into surrogacy contracts or surrogacy agreements.

(c) The provisions of subsection (a) of this section do not apply to a surrogate seeking,
accepting, or receiving compensation for acting as a surrogate, nor do they apply to an attorney
representing a surrogate or intended parent in the surrogacy process.