MISSISSIPPI LEGISLATURE REGULAR SESSION 2002
By: Senator(s) Turner To: Judiciary

SENATE BILL NO. 2645

AN ACT TO AMEND SECTION 91-9-9, MISSISSIPPI CODE OF 1972, TO DELETE THE REPEALER ON THE POWER OF A FIDUCIARY TO PROMOTE COMPLIANCE WITH ENVIRONMENTAL LAWS; TO AMEND SECTIONS 91-7-47, 91-7-63, 91-9-107 AND 93-13-15, MISSISSIPPI CODE OF 1972, TO CONFORM; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 91-9-9, Mississippi Code of 1972, is amended as follows:

91-9-9. (1) In addition to powers, remedies and rights which may be set forth in any will, trust agreement or other document which is the source of authority, a trustee, executor, administrator, guardian, or one acting in any other fiduciary capacity, whether an individual, corporation or other entity ("fiduciary") shall have the following powers, rights and remedies whether or not set forth in the will, trust agreement or other document which is the source of authority:

(a) To inspect, investigate or cause to be inspected and investigated, property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with any environmental law affecting such property and to respond to any actual or potential violation of any environmental law affecting property held by the fiduciary;

(b) To take on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property
held by the fiduciary, either before or after the initiation of an
enforcement action by any governmental body;

(c) To refuse to accept property in trust if the
fiduciary determines that any property to be donated or conveyed
to the trust either is contaminated by any hazardous substance, or
is being used or has been used for any activity directly or
indirectly involving any hazardous substance, which could result
in liability to the trust or otherwise impair the value of the
assets held therein;

(d) To settle or compromise at any time any and all
claims against the trust or estate which may be asserted by any
governmental body or private party involving the alleged violation
of any environmental law affecting property held in trust or in an
estate;

(e) To disclaim any power granted by any document,
statute, or rule of law which, in the sole discretion of the
fiduciary, may cause the fiduciary to incur personal liability
under any environmental law;

(f) To decline to serve as a fiduciary, if the
fiduciary reasonably believes that there is or may be a conflict
of interest between the fiduciary in its or his fiduciary capacity
and in its or his individual capacity, because of potential claims
or liabilities which may be asserted against the fiduciary on
behalf of the trust or estate due to the type or condition of
assets held therein.

(2) An administrator, executor, guardian or conservator is
not relieved under this chapter from obtaining court approval for
any actions which otherwise are required to be approved by a
court.

(3) The fiduciary shall be entitled to charge the cost of
any inspection, investigation, review, abatement, response,
cleanup, or remedial action authorized herein against the income
or principal of the trust or estate. A fiduciary shall not be
personally liable to any beneficiary or other party for any
decrease in value of assets in trust or in an estate by reason of
the fiduciary's compliance or efforts to comply with any
environmental law, specifically including any reporting
requirement under such law. Neither the acceptance by the
fiduciary of property or a failure by the fiduciary to inspect or
investigate property shall be deemed to create any inference as to
whether there is or may be any liability under any environmental
law with respect to such property.

(4) For purposes of this section, "environmental law" means
any federal, state, or local law, rule, regulation, or ordinance
relating to protection of the environment or human health. For
purposes of this section, "hazardous substances" means any
substance defined as hazardous or toxic or otherwise regulated by
any environmental law.

(5) A fiduciary in its or his individual capacity shall not
be considered an owner or operator of any property of the trust or
estate for the purposes of any environmental law.

(6) Notwithstanding any other provision of this chapter, the
fiduciary is subject at all times to the provisions of the Prudent
Man Standard in all its dealings.

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SECTION 2. Section 91-7-47, Mississippi Code of 1972, is
amended as follows:

91-7-47. (1) Every executor or administrator with the will
annexed, who has qualified, shall have the right to the possession
of all the personal estate of the deceased, unless otherwise
directed in the will; and he shall take all proper steps to
acquire possession of any part thereof that may be withheld from
him, and shall manage the same for the best interest of those
concerned, consistently with the will, and according to law. He
shall have the proper appraisements made, return true and complete
inventories except as otherwise provided by law, shall collect all
debts due the estate as speedily as may be, pay all debts that may
be due from it which are properly probated and registered, so far
as the means in his hands will allow, shall settle his accounts as
often as the law may require, pay all the legacies and bequests as
far as the estate may be sufficient, and shall well and truly
execute the will if the law permit. He shall also have a right to
the possession of the real estate so far as may be necessary to
execute the will, and may have proper remedy therefor.

(2) In addition to the rights and duties contained in this
section, he shall also have those rights, powers and remedies as
set forth in Section 91-9-9. * * *

SECTION 3. Section 91-7-63, Mississippi Code of 1972, is
amended as follows:

91-7-63. (1) Letters of administration shall be granted by
the chancery court of the county in which the intestate had, at
the time of his death, a fixed place of residence; but if the
intestate did not have a fixed place of residence, then by the
chancery court of the county where the intestate died, or that in
which his personal property or some part of it may be. The court
shall grant letters of administration to the relative who may
apply, preferring first the husband or wife and then such others
as may be next entitled to distribution if not disqualified,
selecting amongst those who may stand in equal right the person or
persons best calculated to manage the estate; or the court may
select a stranger, a trust company organized under the laws of
this state, or of a national bank doing business in this state, if
the kindred be incompetent. If such person does not apply for
administration within thirty (30) days from the death of an
intestate, the court may grant administration to a creditor or to
any other suitable person.

(2) In addition to the rights and duties of the
administrator contained in this chapter, he shall also have those
rights, powers and remedies as set forth in Section 91-9-9. * * *
SECTION 4. Section 91-9-107, Mississippi Code of 1972, is amended as follows:

91-9-107. (1) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust, including but not limited to:

(a) The powers specified in subsection (3) of this section, and
(b) Those powers, rights and remedies set forth in Section 91-9-9, related to compliance with environmental laws affecting property held by fiduciaries.

(2) In the exercise of his powers, including the powers granted by this article, a trustee has a duty to act with due regard to his obligation as a fiduciary.

(3) A trustee has the power, subject to subsections (1) and (2):

(a) To collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;
(b) To receive additions to the assets of the trust;
(c) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;
(d) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;
(e) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;
(f) To deposit trust funds in a bank, including a bank operated by the trustee;
(g) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;
(h) To make ordinary or extraordinary repairs or alterations in buildings, improvements or other structures; to demolish any improvements; to raze existing or erect new party walls, buildings or improvements;
(i) To subdivide, develop or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;
(j) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;
(k) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources, or enter into a pooling or unitization agreement;
(l) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;
(m) To vote a security, in person or by general or limited proxy;
(n) To pay calls, assessments and any other sums chargeable or accruing against or on account of securities;
(o) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger,
dissolution or liquidation of a corporation or other business

(p) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(q) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(r) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust and for all expenses, losses and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(s) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(t) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration and protection of the trust;

(u) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties;

(v) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by using same for his benefit or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative or to an adult person with whom beneficiary is residing, who is believed to be reliable by trustee;
(w) To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(x) To employ persons, including attorneys, auditors, investment advisors or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(y) To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(z) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

(4) If a trustee has determined that either (a) the market value of a trust is less than One Hundred Fifty Thousand Dollars ($150,000.00) and that, in relation to the costs of administration of the trust, the continuance of the trust pursuant to its existing terms will defeat or substantially impair the accomplishment of the purposes of the trust; or (b) the trust no longer has a legitimate purpose or that its purpose is being thwarted with respect to any trust in any amount; then the trustee may seek court approval to terminate the trust and the court, in its discretion, may approve such termination. In such a case, the court may provide for the distribution of trust property, including principal and undistributed income, to the beneficiaries in a manner which conforms as nearly as possible to the intention of the settlor and the court shall make appropriate provisions for the appointment of a guardian in the case of a minor beneficiary.

(5) (a) Unless expressly provided to the contrary in the trust instrument, a trustee may consolidate two (2) or more trusts
having substantially similar terms into a single trust; divide on
a fractional basis a single trust into two (2) or more separate
trusts for any reason; and may segregate by allocation to a
separate account or trust a specific amount from, a portion of, or
a specific asset included in the trust property of any trust to
reflect a disclaimer, to reflect or result in differences in
federal tax attributes, to satisfy any federal tax requirement, to
make federal tax elections, to reduce potential
generation-skipping transfer tax liability, or for any other tax
planning purposes or other reasons.

(b) A separate trust created by severance or
segregation must be treated as a separate trust for all purposes
from the effective date in which the severance or segregation is
effective. The effective date of the severance or segregation may
be retroactive. In managing, investing, administering and
distributing the trust property of any separate account or trust
and in making applicable tax elections, the trustee may consider
the differences in federal tax attributes and all other factors
the trustee believes pertinent and may make disproportionate
distributions from the separate trusts or accounts created.

(c) A trust or account created by consolidation,
severance or segregation under this subsection (5) must be held on
terms and conditions that are substantially equivalent to the
terms of the trust before consolidation, severance or segregation
so that the aggregate interests of each beneficiary are
substantially equivalent to the beneficiary's interests in the
trust or trusts before consolidation, severance or segregation.
In determining whether a beneficiary's aggregate interests are
substantially equivalent, the trustee shall consider the economic
value of those interests to the extent they can be valued,
considering actuarial factors as appropriate. If a beneficiary's
interest cannot be valued with any reasonable degree of certainty
because of the nature of the trust property, the terms of the
trust, or other reasons, the trustee shall base the determination
upon such other factors as are reasonable and appropriate under
the facts and circumstances applicable to that particular trust,
including the purposes of the trust. Provided, however, the terms
of any trust before consolidation, severance or segregation which
permit qualification of that trust for an applicable federal tax
deduction, exclusion, election, exemption, or other special
federal tax status must remain identical in the consolidated trust
or in each of the separate trusts or accounts created by severance
or segregation.

(d) A trustee who acts in good faith is not liable to
any person for taking into consideration differences in federal
tax attributes and other pertinent factors in administering trust
property of any separate account or trust, in making tax
elections, and making distributions pursuant to the terms of the
separate trust.

(e) Income earned on a consolidated or severed or
segregated amount, portion, or specific asset after the
consolidation or severance is effective passes with that amount,
portion or specific asset.

(f) This subsection (5) applies to all trusts whenever
created, whether before, on, or after July 1, 2001, and whether
such trusts are inter vivos or testamentary, are created by the
same or different instruments, by the same or different persons
and regardless of where created or administered.

(g) This subsection (5) does not limit the right of a
trustee acting in accordance with the applicable provisions of the
governing instrument to divide or consolidate trusts.

(h) Nothing contained in this subsection (5) shall be
construed as granting to any trustee a general power of
appointment over any trust not otherwise expressly granted in the
trust instrument.
SECTION 5. Section 93-13-15, Mississippi Code of 1972, is amended as follows:

93-13-15. (1) (a) Every guardian of any ward heretofore or who may be hereafter appointed by any chancery court or chancery clerk whose act is approved by the chancery court, or by any chancellor, is in fact a general guardian to the extent of his appointment according to the terms of the order or decree of appointment, such as: guardian of the estate of the ward is the general guardian of the ward and his estate; the guardian of the person and estate of a ward is the general guardian of the person and estate of such ward; the guardian of the person only of a ward is the general guardian of the ward named.

(b) In addition to the rights and duties of the guardian contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

(2) All orders and decrees now or hereafter made in which the word "general" is not used in conjunction with the word "guardian" shall be construed and applied as if the word "general" had been used in conjunction with the word "guardian."

(3) After May 5, 1960, all orders or decrees appointing any guardian or ward shall designate such guardian as "general guardian.

SECTION 6. This act shall take effect and be in force from and after June 30, 2002.