MISSISSIPPI LEGISLATURE REGULAR SESSION 2001

By: Representative Smith (39th)

To: Judiciary A

HOUSE BILL NO. 1168

AN ACT TO AMEND SECTION 91-9-107, MISSISSIPPI CODE OF 1972, TO INCLUDE IN THE UNIFORM TRUSTEES' POWERS THE SPECIFIC POWER TO SEGREGATE OR CONSOLIDATE TRUSTS; TO REDUCE POTENTIAL GENERATION-SKIPPING TAX LIABILITY; AND FOR RELATED PURPOSES.

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

SECTION 1. 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. The provisions of this paragraph (b) shall stand repealed from and after July 1, 2002.

(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 enterprise;

(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 Twenty-five Thousand Dollars ($25,000.00) 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 2. This act shall take effect and be in force from and after July 1, 2001.