

First[?] Amendment to the [Name] Trust

Recitals:

1. On [Date], settlors Sally Smith (“Sally”) and Marc B. Hankin (“Marc”) (hereinafter collectively “Settlors”) executed the [Name] Trust (“the Trust”) as settlors and as co-trustees.
2. The Trust’s provisions do not address incompetence to the settlors’ satisfaction.

Amendments:

A new Paragraph “How Incapacity Is Determined” is added to the Trust as follows, and it governs the Trust notwithstanding any provisions to the contrary in the Trust:

**I. COMPETENCE AND INCAPACITY:
HOW INCAPACITY IS DETERMINED**

1. DETERMINATION OF INCAPACITY– WHEN AND HOW: A settlor shall immediately and conclusively be deemed “Substantially Impaired” when two (2) Qualified Signatories have signed statements (“Incapacity Statements”) substantially in the format indicated in **Exhibit 1** attached hereto, stating that the settlor in question is “Substantially Impaired.”
 - a. The term “Substantially Impaired” means that, in the opinions of the persons signing the Incapacity Statements:
 - (1) The settlor in question (“Questioned Settlor”) has suffered a deterioration in the Questioned Settlor’s mental status or mental function integrity (hereinafter a “Mood, Cognitive or Executive Function Decline”), such that the Questioned Settlor is unable to handle the Questioned Settlor’s affairs reliably in a sensible and efficient manner, and that the Questioned Settlor’s interests would be best served if the Questioned Settlor were to cease acting as a trustee; and
 - (2) There is a substantial risk that, due to a Mood, Cognitive or Executive Function Decline, the Questioned Settlor will jeopardize the Questioned Settlor’s financial resources, or the estate plan that the Questioned Settlor formulated prior to the Questioned Settlor’s Mood, Cognitive Or Executive Function Decline.
 - b. Settlors believe that a person who is Substantially Impaired is of unsound mind within the meaning of that term as employed in California Civil Code § 40, and is substantially unable to manage his or her resources or to resist fraud or undue influence.

2. QUALIFIED SIGNATORIES -- WHO MAY SIGN AN INCAPACITY STATEMENT: The Incapacity Statements may be signed by the following persons (“Qualified Signatories”):
- a. Any two (2) members of the Questioned Settlor’s “Competence Committee,” (identified in **Paragraph 4** below); or
 - b. One of the members of the Questioned Settlor’s Competence Committee and a psychiatrist board certified in geriatric psychiatry in the State of California (or in such other State where the Questioned Settlor is then residing, provided that the members of the Questioned Settlor’s Competence Committee agree by majority vote in writing that either: [i] the Questioned Settlor was competent to change the Questioned Settlor’s residence to the State where the Questioned Settlor is then residing, or [ii] the Questioned Settlor’s residence was changed for the Questioned Settlor by a person who had the authority to change the Questioned Settlor’s place of residence, or [iii] that it is in the Questioned Settlor’s best interests to allow a psychiatrist not licensed in California to opine about the Questioned Settlor’s capacity).
 - c. **AVOIDANCE AS EVIDENCE OF INCAPACITY.** Any member of the Questioned Settlor’s Competence Committee may feel free to conclude that the Questioned Settlor is “Substantially Impaired” as defined in Paragraph 1 above, if that member of the Questioned Settlor’s Competence Committee concludes that it is more likely than not that the Questioned Settlor has avoided and continues to avoid meeting with:
 - (1) That member or talking with that member, so as to reduce the likelihood that that member would be able to assess the Questioned Settlor’s mental functioning; and/or
 - (2) A physician, psychiatrist or psychologist, who has been asked by a member of the Questioned Settlor’s Competence Committee, to examine the Questioned Settlor to ascertain the Questioned Settlor’s physical and mental health.
3. EFFECT OF A DETERMINATION THAT THE QUESTIONED SETTLOR IS “SUBSTANTIALLY IMPAIRED”: When two (2) Qualified Signatories have signed Incapacity Statements:
- a. The Questioned Settlor shall cease to be a trustee, and shall be deemed conclusively to lack the capacity to revoke or amend the Trust or to exercise any power under the Trust except through an agent under a durable power of attorney, a conservatorship, or through a Probate Code § 3101(a) proceeding, or some other proceeding for incompetent persons; and
 - b. The Successor Trustee(s) designated in the Trust shall be deemed conclusively to have the power to act as Successor Trustee(s) under the Trust, as indicated in Paragraph 5.1 of the Trust.

4. COMPETENCE COMMITTEES

a. SETTLORS' INTENT IN ESTABLISHING COMPETENCE COMMITTEES

By establishing Competence Committees, Settlers intend to facilitate and enhance the process by which Settlers and their fiduciaries may be determined to be incapacitated. Settlers wish to entrust the decision of whether they are incapacitated to trusted people who know the Settlers intimately, instead of entrusting that decision to the judiciary. Settlers also are mindful of cases in which individuals (with a high premorbid level of intellectual functioning) suffering from the early stages of dementia, or suffering from behavioral variant frontotemporal dementia have been found to be competent by judicial officers (who made incorrect determinations), and the individuals have gone on to make very imprudent and disastrous decisions. Settlers wish to prevent such a tragedy from occurring in their case.

b. COMPETENCE COMMITTEE MEMBERS SHALL BE HELD HARMLESS.

Settlers waive any liability that the Competence Committee members may have for acting or for not acting under this instrument, and agree to hold them harmless for any liability that they might otherwise have for acting under this instrument.

c. LIST OF MARC'S NAMED COMPETENCE COMMITTEE MEMBERS. The members of "Marc's Competence Committee" include the people named below in this paragraph 4.c *and* people who are subsequently appointed (under paragraph 4.e, below) by members of Marc's Competence Committee. The term "Marc's Named Competence Committee Members" refers to the persons whose names are set forth in this paragraph 4.c, on the date of the execution of this instrument, to wit:

Steven McAlexander	Harvey Walstock
Lester Dawn	Sally Smith

d. LIST OF SALLY'S NAMED COMPETENCE COMMITTEE MEMBERS. The members of "Sally's Competence Committee" include the people named below in this paragraph 4.d *and* people who are subsequently appointed (under paragraph 4.e, below) by members of Sally's Competence Committee. The term "Sally's Named Competence Committee Members" refers to the persons whose names are set forth in this paragraph 4.d, on the date of the execution of this instrument, to wit:

Marc B. Hankin	Laurie Corn
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e. AUTHORITY TO APPOINT ADDITIONAL MEMBERS OF A SETTLOR'S COMPETENCE COMMITTEE. A majority of not less than two members of each

settlor's Competence Committee shall have the power in the members' discretion to appoint additional members of that settlor's Competence Committee. Such appointment(s) shall be in writing, shall be acknowledged by a notary, and shall be effective when delivered to the other members of that settlor's Competence Committee. Any such appointment(s) shall be final, binding and controlling, and may only be rescinded by a court based on a finding by a court, by proof beyond a reasonable doubt, that the appointments are inconsistent with that settlor's wishes (as formulated before the date that that settlor became Substantially Impaired). The date that that settlor became Substantially Impaired means the date as of which the settlor became Substantially Impaired according to the Competence Committee's determination.

f. AUTHORITY OF EACH SETTLOR'S COMPETENCE COMMITTEE

- (1) **AUTHORITY TO VOID OR RESCIND A REVOCATION OR AMENDMENT BY THE PRINCIPAL.** Each settlor's Competence Committee has the authority to determine by majority vote whether any purported revocation, amendment of the Trust by the settlor is void, voidable or valid, and/or whether it should be deemed to be invalid, by reason of incompetence or the exercise of undue influence, or mistake, or fraud or any other related reason.
- (2) **AUTHORITY TO DETERMINE THAT THE SETTLOR IS COMPETENT FOR ONE OR MORE OR ALL PURPOSES, NOTWITHSTANDING MENTAL FUNCTION IMPAIRMENTS, AND NOTWITHSTANDING A PRIOR PERIOD OF INCAPACITY.** Each settlor's Competence Committee has the authority to determine by majority vote, that that settlor is competent for one or more or all purposes, notwithstanding that settlor's mental function impairments or a prior period of incapacity. In the case of a tie vote (i.e., an equal number of members voting for and against), that settlor shall be deemed to be Substantially Impaired.
- (3) **AUTHORITY TO MONITOR EACH OTHER'S FITNESS TO SERVE.** A majority of the members of each settlor's Competence Committee has the power in the members' discretion to determine that any member of that settlor's Competence Committee has become unfit to serve as a member of that settlor's Competence Committee (e.g., due to the majority's perception that the person deemed to be unfit has suffered a Mood, Cognitive or Executive Function Decline). Such determination(s) shall be in writing, shall be acknowledged by a notary, and shall be delivered to all the members of that settlor's Competence Committee. In the case of a tie vote (i.e., an equal number of members voting for and against), the member shall be deemed to be Substantially Impaired.
- (4) **COMPETENCE COMMITTEE'S DECISION IS BINDING.** The authority of each settlor's Competence Committee to make any decision shall be construed broadly. Unless otherwise specified herein, any decision of each settlor's Competence Committee shall be final, binding and

controlling. A court of competent jurisdiction may rescind a decision of each settlor's Competence Committee only if the court determines that there is proof beyond a reasonable doubt:

1. Of fraud or malice on the part of a member of that settlor's Competence Committee in the making of the decision in question, and
2. That the majority of that settlor's Competence Committee, if the majority were implementing that settlor's wishes, would not have made the decision in question if the fraud or malice had been revealed to the majority.

g. NOTICE TO EACH SETTLOR'S COMPETENCE COMMITTEE OF A REVOCATION OR AMENDMENT BY THE SETTLOR; AND RELEVANT AUTHORITY OF EACH SETTLOR'S COMPETENCE COMMITTEE.

(1) REVOCATION AND/OR AMENDMENT NOT EFFECTIVE WITHOUT A QUALIFIED SERVICE. Notwithstanding anything to the contrary, except as provided in Paragraph 4.g.(2) below (on page 5):

1. Every revocation and amendment of the Trust shall be subject to rescission by the relevant settlor's Competence Committee until a Qualified Notice Period of Time has elapsed after all Qualified Notice Recipients have been given a Qualified Service of a Qualified Notice.
2. Until a Qualified Notice Period of Time has elapsed after all Qualified Notice Recipients have been given a Qualified Service of a Qualified Notice, each settlor's Competence Committee has the authority to determine by majority vote whether any purported revocation or amendment of this Trust by that settlor is void, voidable or valid, by reason of Substantial Impairment or the exercise of undue influence or fraud. By majority vote, the settlor's Competence Committee may rescind any revocation or amendment if the Competence Committee determines that the settlor in question was Substantially Impaired (or the that the settlor's revocation or amendment was due to the exercise of undue influence or fraud) when the purported revocation or amendment was executed.

(2) WAIVER OF THE QUALIFIED NOTICE. The persons entitled to the Qualified Notice required by paragraph 4.g.(1) above (on page 5), may ratify or otherwise cause a revocation or amendment by a settlor to be final (i.e., not subject to rescission by the relevant settlor's Competence Committee) before or after a Qualified Notice Period of Time has elapsed, by waiving such notice or waiving any portion of the time period up to the entire period of time; e.g., waiving X days and agreeing that a particular revocation or amendment is final, binding and controlling as of the moment it was signed by the settlor in question.

- (3) **QUALIFIED NOTICE.** The term “Qualified Notice” (with respect to a purported revocation or amendment by Principal) means delivery of a copy of a purported revocation or amendment by the settlor in question.
- (4) **QUALIFIED NOTICE RECIPIENTS.** The term “Qualified Notice Recipients” means and includes any person who is a member of either settlor’s Competence Committee, or is named or appointed as a Successor Trustee. This includes but is not limited to all successor trustees and all members of either settlor’s Competence Committee who are appointed under paragraph 4.e, commencing on page 4.
- (5) **QUALIFIED SERVICE OF A QUALIFIED NOTICE OF EXERCISE OF PRINCIPAL’S POWER.** The term “Qualified Service” of a Qualified Notice of a revocation or amendment by a settlor means service of a Qualified Notice by any method of service satisfying the requirements of this paragraph 4.g.(5) (commencing on page 6).
1. **Method of Service.** Service may be by:
 - a. Certified or registered mail;
 - b. Express Mail or Federal Express or some other equivalent service;
 - c. Personal service;
 - d. Service by any means, including fax and email, if the recipient signs and delivers to the sender an acknowledgment of service.
 2. **When a Qualified Service is Complete.** A Qualified Service upon a person entitled to a Qualified Notice is complete, in the case of:
 - a. Certified or registered mail, five days after it is deposited in a mailbox or at a post office;
 - b. Express Mail or Federal Express or some other equivalent service, two days after it is deposited in a mailbox (or in the case of Federal Express, Overnight Express, etc., when deposited in one of such company’s drop boxes [akin to mailboxes]) or at a post office (or in the case of Federal Express, Overnight Express, etc., when deposited at one of such company’s drop-off offices);
 - c. Personal service, when received.
 - d. Service by any means, when the recipient signs an acknowledgment of service.
- (6) **QUALIFIED NOTICE PERIOD OF TIME.** A Qualified Notice Period of Time is the date and time when the following statements are all true, with respect to service of a Qualified Notice on all Qualified Notice Recipients:
- a. Twenty (20) days after a Qualified Notice is complete in accordance with paragraph 4.g.(5)a (on page 6) or paragraph 4.g.(5)b (on page 6).

- b. Fifteen days (15) days after a Qualified Notice is complete in accordance with paragraph 4.g.(5).2.c (on page 6) and paragraph 4.g.(5).2.d (on page 6).

5. STANDARD TO APPLY IN THE ABSENCE OF A DETERMINATION BY A COMPETENCE COMMITTEE.

In the absence of a determination of competence by a Competence Committee, if a court is called upon to determine whether a person is competent for any purpose, the test shall be whether the person is substantially unable to manage his or her financial resources or to resist fraud or undue influence.

CAUTION – WARNING: Do not use this document as a template without seeking the advice of a lawyer, who reviews the document with you before you sign it.

Dated: _____

Signed: _____

Sally Smith
Settlor

Dated: _____

Signed: _____

Marc B. Hankin
Settlor

Accepted:

Dated: May 20, 2015

Signed: _____

Sally Smith
Trustee

Dated: May 20, 2015

Signed: _____

Marc B. Hankin
Trustee

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Exhibit 1 to Trust Amendment
STATEMENT OF INCAPACITY FOR A SETTLOR OF
THE WE LOVE YOU KIDS TRUST

I, the undersigned, declare:

1) I have known [Settlor's Name:] _____ (“Settlor”), for [NUMBER] _____ years (and _____ months), and I am related to the Settlor in the following manner (*e.g.* “I am a friend, doctor, spouse, son of the Settlor”):

I believe that I am qualified to make a judgment about whether Settlor is incapacitated and unable to handle his/her affairs in a sensible and efficient manner, for the reasons set forth below, (Check if continued on attached page, which may *include* Exhibit 2) which are my opinions.

2) I believe that the Settlor is in such a condition that Settlor's interests would be best served if a successor trustee were to act under the We Love You Kids Trust.

3) I believe that Settlor is “Substantially Impaired” within the meaning of the term as defined in the We Love You Kids Trust, and is unable to handle Settlor's affairs in a consistently sensible and efficient manner because, **in my opinion**:

CHECK ONE OR MORE OF THE FOLLOWING:

Settlor has suffered a deterioration in mental status or mental function integrity (“Mood, Cognitive or Executive Function Decline”), such that Settlor is unable to handle Settlor's affairs reliably in a sensible and efficient manner, and Settlor's interests would be best served if a trustee were to act for Settlor under this Durable Power; and there is a substantial risk that, due to a Mood, Cognitive or Executive Function Decline, Settlor will jeopardize Settlor's financial resources, or the estate plan that Settlor formulated prior to Settlor's mood, cognitive or executive function decline.

Check As Many of the Following As Apply:

Settlor cannot handle his/her affairs in a sensible and efficient manner because of an impairment in Settlor's mental functioning;

Settlor is substantially unable to manage his/her own financial resources or to resist fraud or undue influence;

Settlor is unable to consistently understand and **appreciate**, to the extent relevant:

- 1) The rights, duties and responsibilities that might be created by or affected by changes in his/her estate plan or by contracts (collectively referred hereinafter to as “Decisions”) including such contracts as the purchase of a home, or an automobile, or commonly used investments (such as limited partnerships, CDs, U.S. Treasury Bills, mutual funds, bank accounts, *etc.* [hereinafter “Investments”]),
- 2) The probable consequences for Settlor and persons affected by the Decisions, and
- 3) The significant risks, benefits and reasonable alternatives involved in the Decisions.

I have read this document and understand the contents of it. The assertions in it are true, and are based on based on my own knowledge, except for assertions which are stated on information and belief. I also believe the latter assertion(s) to be true.

Exhibit 1 to Trust Amendment

Check if applicable: I have completed the optional form attached hereto as **Exhibit 2** (entitled, "Impressions of Mental Function Impairments").

I declare under the penalties of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed this day, (month)_____ (day)____, 20____.

Signature: _____

Printed Name: _____

Exhibit 2

Impressions of Mental Function Impairments

Name of Physician or other Declarant: _____ Date: _____

Instructions: Answer Questions by circling the appropriate category below:

a = No apparent impairment; b = Mild impairment; c = Major impairment;

d = So impaired as to be incapable of being assessed.

Cognition:

- a b c d e Alertness (low levels, lethargic, responds only to vigorous and persistent stimulation, stupor)
- a b c d e Orientation (person, time [day, date, month, season, year], place [address, town, state], situation [why here?])
- a b c d e Attention (impaired ability to attend to examiner, repeat serial sevens, stay with a train of thought, and shift appropriately)
- a b c d e Concentration (inability to spell words backward, give detailed answers from memory)
- a b c d e Memory (immediate recall [forgets question before answering, repetitive], recent memory [cannot recall events of past 24 hours], remote memory [cannot recall names of relatives, significant dates, names of past presidents] recognition (fails to recognize familiar, faces, objects, other)
- a b c d e Receptive language (cannot comprehend questions, follow instructions)
- a b c d e Expressive language (cannot use words correctly or name objects, uses nonsense words)
- a b c d e Temporal organization of behavior & Judgment (cannot carry out actions [in own rational self interest] requiring several steps, or describe steps; impulse control)
- a b c d e Fund of information impaired (does not know information patient should know)

Higher cognitive functions: Impaired ability to:

- a b c d e Perform calculations,
- a b c d e Correctly use abstract concepts, grasp abstract aspects of his/her situation,
- a b c d e Reason logically,
- a b c d e Give abstract interpretations of proverbs,
- a b c d e Know similarities [apple-banana, painting-statue],
- a b c d e Reasonably and reliably assess value, risks & benefits of actions [Judgment]

Mood, affect and thought disorders:

- a b c d e Displays pervasive or abnormally intense feelings [e.g., euphoria, anger, anxiety, fear, panic, sadness, depression] or expresses profoundly negative feelings [e.g. hopelessness, helplessness, worthlessness, profound negativism, or pessimism, loss of interest in-life, "better off dead", suicidal ideation, suicidal plan]
- a b c d e Impaired reality testing (hallucinates, delusional beliefs, severely disorganized thinking [behaves bizarrely])
- a b c d e Reveals impaired insight into the nature, severity, or consequences of his/her mental or emotional impairment or other disorders.
- a b c d e Describes unwanted repetitive or intrusive thoughts or displays compulsive behaviors.

Physical Symptoms:

- a b c d e Poor neurovegetative function (emaciated, dehydrated, poor hygiene)
- a b c d e Impaired psychomotor behavior (speech slurred, gait stooped, movements slowed, pacing, handwringing)

Consent to Medical Treatment: (Check all that apply)

The patient cannot rationally understand and appreciate medical information (with reasonable consistency), and therefore cannot give informed consent to:

any medical treatments]

medical treatments identified in the paragraph entitled "Other Relevant Observations"].

Other Relevant Observations.

Feel free to indicate your impressions of (a) **frequency, severity & length** of periods of impairment, and (b) [suspected] diagnoses (e.g. Alzheimer's, CVA, etc.) responsible for the mental incapacity. Feel free to a paper and to write whatever you suspect would be useful information.

Exhibit 2

See attachment for more information.

Verification

I declare under the penalties of perjury under the laws of the State of California that the foregoing is a true and correct representation of my impressions (as distinguished from a formal rating) of the patient's mental functioning.

Date: _____

Signature: _____

Printed Name: _____