

## Appendix 2

# Sample Language Regarding Addiction

**M**odel Language for Family Governance Documents for Substance Use Disorders and/or Mental Health Concerns, from William Messinger, *The Trustee's Handbook for Addressing Addiction in Beneficiaries* (all rights reserved, used with permission).

Suggested Language Restricting Access to Principal and Income When a Beneficiary or Family Member May Have Problems with Alcohol, Drugs, Other Behaviors, and Activities or Mental Health Concerns

### **Trustee Authority Regarding Substance Use Disorders, Other Disorders, and Mental Health Concerns in a Beneficiary**

1. Sole Discretion of Trustee to Withhold Income or Principal, Notwithstanding Any Other Provision of This Trust Agreement

- a. Notwithstanding the foregoing as to distributions of income and principal, the Trustee in his/her sole discretion, shall withhold distributions of principal, income, or other withdrawals from any Beneficiary who has or may have: a substance use disorder(s), (addiction), other disorders, compulsive or destructive behaviors, mental health conditions or concerns, or any combination of the foregoing, as defined in paragraph 9, below.
- b. Such principal, income, or specified withdrawals shall be retained and held by the Trustee until such time as the Trustee determines, in his or her sole discretion, that the Beneficiary is in recovery (as defined below in paragraph 6) from a substance use disorder(s), (addictions), other disorders, compulsive or destructive behaviors, mental health conditions or concerns or any combination of the foregoing, as defined in paragraph 9, below. Any amounts so withheld and accumulated may be retained in the Trust rather than distributed, at the Trustee's sole discretion. However, the Trustee is authorized to expend income and principal for the purposes set forth in this appendix.
- c. If the Beneficiary dies before mandatory distributions or rights of withdrawal are resumed, the remaining balance of the mandatory distributions that were suspended will be distributed to the alternate beneficiaries of the Beneficiary's share as provided herein.
- d. While mandatory distributions are suspended, the trust will be administered as a discretionary trust to provide for the Beneficiary according to the provisions of the trust providing for discretionary distributions in the Independent Trustee's sole and absolute discretion and as mandated by the appendix.

2. Authorization to Hire and Rely on Professional Expertise to Implement This Appendix

- a. The Trustee is authorized to employ and retain experts on: substance use disorder (addictions), other disorders, compulsive or destructive behaviors, mental health conditions or concerns, and resultant family conflict or any combination of the foregoing, as defined in paragraph 9 below, to advise him/her regarding any matters, issues, or determinations in this appendix. The Trustee may designate such experts to receive information or perform tasks on his/her behalf in order to implement this appendix.

Further, the Trustee may employ experts to recommend comprehensive treatment and posttreatment recovery programs (meeting the standards in subparagraphs b and c below) and to oversee and implement such programs. The Trustee is also authorized to use the recovery programs for addicted pilots and physicians as part of an oversight program for the Beneficiary (or similar programs in the event the pilot or physician program is unavailable).

In addition, the Trustee is authorized to employ and be advised by experts regarding entering into and preparing agreements (Recovery Contracts) between the Beneficiary and Trustee specifying recovery activities by the Beneficiary, including such activities that are funded directly or indirectly by the trust.

- b. The Trustee is further authorized to utilize and rely on the professional judgment of a reputable treatment center, utilizing an abstinence-based chemical dependency treatment model and recognized by the Joint Commission on Accreditation of Health Care Organizations, for evaluations, recommendations, and treatment regarding the Beneficiary's suspected or actual substance use disorders (alcohol/drug dependence and abuse). The

Trustee is similarly authorized regarding any other disorders, compulsive or destructive behaviors, mental health conditions or concerns or any combination of the foregoing, as defined in paragraph 9 below.

- c. The Trustee has sole discretion regarding the employ and use of any such treatment centers or other resources such as supervised living facilities, halfway houses, sober homes, and wilderness programs as needed; however, all such resources shall be licensed or credentialed as per applicable state guidelines and standards described in the preceding paragraph. Any experts utilized by the trustee shall be licensed and credential as per applicable state standards and guidelines, with any professional authorized to prescribe medications certified by ASAM (Society of Addiction Medicine) or under the direct supervision and direction of an ASAM certified professional.
3. Authorization Regarding the Expenditure of Funds for Intervention, Treatment, and Recovery Activities

The Trustee has full authority and discretion to expend funds for advice regarding implementation of this appendix, to develop and implement plans for intervention in the event the Beneficiary may have a substance use disorder (dependent on or abusing alcohol or drugs) or may be actively using alcohol or drugs after treatment (relapse). Such authority includes expending funds for evaluations, treatment and all related costs, for posttreatment recovery programs, and any and all related matters deemed appropriate by the Trustee in his/her sole discretion. This paragraph (3) is fully applicable to other disorders, compulsive or destructive behaviors, mental health conditions or concerns, or any combination of the foregoing, as defined in paragraph 9 below, including noncompliant behavior with treatment plans and behavioral relapses.

4. Authorization to Receive Reports/Beneficiary's Consent to Release Information
  - a. In making determinations as to whether the Beneficiary is participating in, has successfully completed an approved and applicable treatment program and/or is engaged in an active recovery program, the Trustee (and/or her/his designee) is authorized to receive reports from counselors and staff from treatment programs of any kind, sponsors, and all health care professionals or others providing assistance to the Beneficiary.
  - b. In addition, the Beneficiary must fully comply with all recommendations of treatment programs and health care professionals, as approved by the Trustee (and/or his/her designee). The Beneficiary must sign consents for full release of information to the Trustee (and/or his/her designee) in order to be in compliance with this paragraph (4). Failure to sign all requested authorizations means the Beneficiary is not in "recovery" as that term is used in paragraph 6.
5. Alcohol and Drug Testing
  - a. The Trustee (and/or her/his designee) shall utilize the services of a reliable and licensed drug testing company to randomly drug test the Beneficiary during the first two years of recovery (as defined in paragraph 6 above), and/or if the Beneficiary may be disputing whether he/she is using alcohol or drugs. The Trustee (and her/his designee) is authorized to require continued drug testing for as long as the Trustee deems such testing to be advisable, regardless of any other provision in this appendix. Full disclosure of results from such tests shall be made in a timely manner to the Trustee (and/or her/his designee).
  - b. Such tests must be conducted under the observation of personnel from the drug testing service or their designee,

and may include but not be limited to laboratory tests of hair, tissue, or bodily fluids. The physician in charge of the Physician's Health Program is the preferred resource for such testing.

- c. The Trustee, in the exercise of sole and absolute discretion, may totally or partially suspend all distributions otherwise required or permitted to be made to the Beneficiary until the Beneficiary consents to the examination and complies with full disclosure of the results to the Trustee.

#### 6. **Recovery—Two-Year Minimum**

- a. **Recovery**, as used herein, is defined as no less than a minimum of two years of continuous sobriety (including abstention from narcotic prescription medicine, drugs, alcohol, or other addictive or compulsive behaviors or use disorders) and/or two years' continuous adherence to treatment plans in the case of mental health conditions. Only medications prescribed and approved by ASAM certified prescribers and consistent with the Beneficiary's **Recovery Program** will be considered as meeting the foregoing definition.

The definition of **Recovery** also includes, but is not limited to, ongoing participation in a **Recovery Program**, as determined by the Trustee or his designee: Activities addressing issues relating to substance use disorders (addiction), other disorders, compulsive or destructive behaviors, mental health conditions or concerns, or any combination of the foregoing, as defined in paragraph 9 below. (Examples: attending 12-step or other self-help groups, therapy, case management meetings; avoiding high-risk relapse environments; and adhering to recovery plans, recommendations, or agreements).

- b. The two-year minimum shall be extended if the Beneficiary has a history of relapse, is not compliant with

treatment plans, or fails to actively engaged in a recovery program, with such time extension(s) determined at the sole discretion of the Trustee.

- c. In the event the Beneficiary has not completed the two-year minimum of recovery or extensions thereof, the Trustee has the discretion to disburse income and/or principal on behalf of the Beneficiary in amounts to support the Beneficiary's recovery program. Conversely, the Trustee shall not disburse funds for activities that might lead to relapse. The Trustee is authorized to rely on the advice of experts in implementing this Section 6 and otherwise exercising discretion as permitted in this appendix.

#### 7. Date When Recovery Begins

The commencement of any time period of recovery begins after the Beneficiary has successfully completed chemical dependency inpatient primary treatment (or other addiction or mental health-related treatment) and any subsequent long-term, halfway, sober house, or wilderness program. (Such time does not commence upon entering treatment, but when successfully completing outpatient treatment or leaving a supervised or otherwise restrictive environment.) Successful completion of any such program is determined by the treatment provider and as approved by the trustee, who may rely on the advice and opinion or experts independent of any treatment center.

#### 8. Distribution to Spouse, Children, or Other Family Members

In the event of withholding of or restriction on distributions to the Beneficiary, the Trustee is authorized to make distributions for the benefit of the Beneficiary, including those owed a duty of support by the Beneficiary, such as the Beneficiary's spouse, ex-spouse, children, or other family members.

The Trustee is authorized to make arrangements for the support of such individuals through distributions by

alternative means, as the Trustee determines in his/her sole discretion, with the intent to maintain such individuals' lifestyle, including paying support staff and third-party vendors.

In the event any such individual meets the definition in paragraph 9, the trustee is authorized to provide services as set forth in this appendix herein. In the event any such individuals are in need of therapy, treatment or other forms of assistance due to the conduct of a Beneficiary meeting the definition in paragraph 9, the Trustee is authorized to provide services as set forth in this appendix.

9. Definition of Substance Use Disorder or Abuse and Other Addictions/Disorders

The phrase "Beneficiary who has or may have a **substance use disorder** (formerly dependent on and/or abusing drugs or alcohol), other disorders, compulsive or destructive behaviors, mental health conditions or concerns (including mental illness and mental disorders) or any combination of the foregoing," shall have meaning as defined in the DSM-V-TR (*Diagnostic and Statistical Manual of Mental Disorders*). The DSM-V criteria for "Alcohol Use Disorder" are at the end of this appendix. These definitions may be revised to reflect new medical information and/or credible research by recognized professionals, as defined in paragraph 2.

10. Indemnifications, Exoneration Provision, and Dual Capacity

- a. The Trustee (and any professional, adviser, assistant, or other person including their business entities, hired and/or retained by the Trustees) will be indemnified from the Trust Estate for any liability in exercising the Trustee's judgment and authority in this appendix, including any failure to request a Beneficiary to submit to medical examination and including a decision to distribute suspended amounts to a Beneficiary. This indemnification clause includes any allegations of any kind brought by the

- Beneficiary, or on behalf of the Beneficiary, directly or indirectly against the Trustee and those hired and/or retained by the Trustee. If such allegations occur, the respondent has the option of requesting the trust to provide the defense or asking the trust to pay to the respondent funds for his/her defense.
- b. It is not the Grantor's intention to make the Trustee (or any professional, adviser, assistant, or other person including their business entities, hired and/or retained by the Trustees) responsible or liable to anyone for a Beneficiary's actions or welfare.
  - c. The Trustee has no duty to inquire whether a Beneficiary uses drugs or other substance, but is expected to initiate the process specified in this appendix if circumstantial or direct evidence comes to the Trustee's attention that the Beneficiary is engaging in conduct specified in paragraph 1, to wit: the Beneficiary has a substance use disorder or may have other use disorders (addictions), compulsive or destructive behaviors, other disorders or mental health concerns or any combination of the above mentioned disorders, as defined above in paragraph 9.
  - d. A Trustee acting in the dual capacity as Trustee and family member is authorized to discuss with the Beneficiary and the Beneficiary's relatives, information the family member obtains in his capacity as Trustee, for the purpose of furthering the welfare of the Beneficiary.
11. Other Prohibitions during Withholding of Distributions
- a. If distributions to a Beneficiary are suspended or withheld as provided above in this appendix, then the Beneficiary shall automatically be disqualified from serving, and if applicable, shall immediately cease serving, as a Trustee, Trust Protector, or in any other capacity in

which the Beneficiary would serve as, or participate in, the removal or appointment of any Trustee or Trust Protector hereunder.

- b. The withholding or suspension of benefits to the Beneficiary is sufficient evidence to suspend or terminate the Beneficiary's role in other family positions or activities. If the Beneficiary contests such suspension or termination, the Trustee is authorized to release information relating to the Beneficiary's addiction to the appropriate family governing body or authority.

(This language can be modified for use in business, succession, management, real estate ownership, family office, and philanthropy governing documents.)

**Trust Protector Provision: It is advised to use a Trust Protector to permit this appendix to be modified due to changes in addiction treatment or as other conditions warrant.**

### **Alcohol Use Disorder DSM-V**

As defined in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM 5, p. 490)

#### **Diagnostic Criteria**

A problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:

1. Alcohol is often taken in larger amounts or over a longer period than was intended.
2. There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.
3. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects.
4. Craving, or a strong desire or urge to use alcohol.
5. Recurrent alcohol use resulting in a failure to fulfill major role obligations at work, school, or home.

6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol.
7. Important social, occupational, or recreational activities are given up or reduced because of alcohol use.
8. Recurrent alcohol use in situations in which it is physically hazardous.
9. Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol.
10. Tolerance, as defined by either of the following:
  - a. A need for markedly increased amounts of alcohol to achieve intoxication or desired effect.
  - b. A markedly diminished effect with continued use of the same amount of alcohol.
11. Withdrawal, as manifested by either of the following:
  - a. The characteristic withdrawal syndrome for alcohol (refer to Criteria A and B of the criteria set for alcohol withdrawal, pp. 499-500).
  - b. Alcohol (or a closely related substance, such as a benzodiazepine) is taken to relieve or avoid withdrawal symptoms.

*Specify if:*

*In early remission:* After full criteria for alcohol use disorder were previously met, none of the criteria for alcohol use disorder have been met for at least 3 months but for less than 12 months (with the exception that Criterion A4, “Craving, or a strong desire or urge to use alcohol,” may be met).

*In sustained remission:* After full criteria for alcohol use disorder were previously met, none of the criteria for alcohol use disorder have been met at any time during a period of 12 months or longer (with the exception that Criterion A4, “Craving, or a strong desire or urge to use alcohol,” may be met).

*Specify if:*

*In a controlled environment:* This additional specifier is used if the individual is in an environment where access to alcohol is restricted.

*Specify if:*

305.00 (F10.10) *Mild:* Presence of 2–3 symptoms.

303.90 (F10.20) *Moderate:* Presence of 4–5 symptoms.

303.90 (F10.20) *Severe:* Presence of 6 or more symptoms.

Because the first **12 months** following a Substance Use determination is a time of particularly high risk for relapse, this period is designated “Early Remission.”