DECANTING ISSUES MEMO

UNIFORM DECANTING DISTRIBUTIONS DRAFTING COMMITTEE

I. **Defining Decanting and the Middle Way**

A. **Decanting as an Exercise of a Fiduciary Power**. Decanting is an exercise of a fiduciary's discretionary distribution authority that permits the trustee to transfer the assets of a trust to a new trust (or to restate the terms of the trust). The decanting power may be created under common law because of the extent of discretionary distribution authority given to the trustee or may be created by statute. Decanting is distinct from judicial modification because decanting does not require court approval. Decanting is also distinct from modifications by agreement with the beneficiaries (and sometimes the settlor) because beneficiary consent is not required. Because decanting does not require beneficiary consent or court approval, adverse tax consequences may be avoided when making certain modifications. Section 102(6) of act.

B. **Decanting Is Not an Exercise of a Power of Appointment**. Although analogies to powers of appointment may be helpful in analyzing the tax consequences of decanting, decanting is not an exercise of a power of appointment. The Uniform Powers of Appointment Act defines a power of appointment as a nonfiduciary power. Although some statutes assert that the decanting authority should be considered a power of appointment (perhaps to create an argument for more favorable tax treatment and to coordinate with pre-existing rule against perpetuities statutes), this approach should be abandoned.

C. **Flexibility vs. Grantor's Intent**. Decanting creates flexibility to modify trusts without costly judicial proceedings. A balance should be achieved between the need for flexibility and respect for the grantor's intent. In addition, a uniform decanting statute should sufficiently restrict decanting so that decantings under the statute do not usually create income, gift, estate or GST issues. Given the absence of Treasury and IRS guidance on the tax consequences of decanting, we can only use our best judgment as to what Treasury and the IRS will find to be acceptable parameters for decanting.

D. **Adoptability**. Given that 21 states already have decanting statutes, a uniform decanting statute needs to be perceived as an improvement to a state's existing statute. A uniform statute that is too restrictive will not be adopted by states with permissive statutes. A state with a pre-existing permissive statute, however, may be willing to adopt a uniform statute that is slightly more restrictive if the uniform statute adds clarity or may be more likely to avoid adverse tax consequences.

II. **Discretionary Distribution Authority Required for Decanting**. Question 1 of Trust Decanting Policies in the States ("Decanting Policies"). Generally, the trustee must have the power to make discretionary distributions to decant. Some statutes require that the power be over principal, some require only a power over income or principal. Some statutes require that the power be an “absolute power” or that the trustee have “absolute discretion”; other statutes permit decanting even if the discretion is not absolute. This memo uses the term “expanded discretion” instead of “absolute discretion.”

A. **Expanded vs. Limited Discretion**. Limiting decanting to only situations in which there is expanded discretion makes decanting less useful for administrative modifications. On the other hand, permitting changes in beneficial interests when there is only limited discretion creates issues when a beneficiary is a trustee (which can be dealt with in different ways in the statute), and allows beneficial changes to the document when the grantor did not entrust the trustee with broad discretion. A bifurcated approach takes the middle way.

B. **Bifurcated Approach**. Some statutes have bifurcated standards that require expanded discretion for changes to beneficial interests but permit decanting for other purposes (e.g., administrative modifications) when the trustee has limited discretion. This approach is taken by six states including the new Illinois statute and the newly amended New York and Alaska statutes, and may be the middle way.

C. **Discretion Over Principal vs. Discretion Over Income or Principal**. The states are about evenly split on whether decanting is permitted if there is only discretionary power over income. At least with respect to changes in beneficial interests, a trust that gives a trustee expanded discretion over principal, and not just income, indicates a level of grantor confidence in the trustee’s judgment that would support permitting changes in beneficial interests. While in theory one could limit a trustee’s power to decant only to the income interest in cases where the trustee’s discretion is limited to income, it may be difficult to define the boundaries of what may be done within the scope of such a restriction.

III. **Trustee Who May Decant**. Question 2 of Decanting Policies. If changes to beneficial interests are permitted even when there is only limited discretion, it is necessary to prevent an interested trustee from decanting or to limit the interested trustee’s decanting power to an ascertainable standard. If changes to beneficial interests are permitted only when there is expanded discretion, it is probably unnecessary to have special rules for interested trustees.

A. **Prohibiting Interested Trustee from Decanting**. Some statutes prohibit interested trustees from decanting. If only interested trustees are acting, decanting may be prohibited. In a few states, if all trustees are beneficiaries, the court may appoint a special fiduciary with authority to decant.

B. **Limiting Decanting by Interested Trustees**. Other statutes address the potential adverse tax consequences of an interested trustee modifying a trust by limiting the types of modifications that can be made by an interested trustee. For example, see the South Dakota statute, which restricts certain changes to the beneficial interests of a beneficiary acting as trustee or of a trustee who may be removed by a beneficiary. Texas provides that an interested trustee may decant only in accordance with the ascertainable standard applicable to the interested trustee. It seems difficult to make determinations of when a change of beneficial interests falls within an exercise of an ascertainable standard. Question 14 of Decanting Policies.

C. **Bifurcated Approach**. A statute that requires that a trustee have expanded discretion to decant, or a bifurcated statute that requires that a trustee have expanded discretion to make a beneficial change, may not need to include a restriction on an interested trustee decanting. Typically trusts will not give an interested trustee expanded discretion over discretionary distributions because such discretion would create gift and estate tax issues. In the unusual event that a trust does give an interested trustee expanded discretion, the trustee will incur the tax effects of holding a general power of appointment whether or not the trustee also has a decanting power. With a bifurcated approach, an interested trustee may decant to make administrative changes.

IV. Extent to Which a Beneficial Interest May Be Modified

A. **Beneficiaries**. Section 302 of act. Question 5 of Decanting Policies. The decanting statutes do not permit a new beneficiary to be added directly. Generally, statutes requiring a trustee to have expanded discretion to decant will not require that all of the beneficiaries of the old trust be beneficiaries of the new trust, thus allowing beneficiaries to be eliminated. Some state statutes implicitly permit a beneficiary to be eliminated by permitting the decanting power to be exercised in favor of "one or more of" the existing beneficiaries. A few states explicitly require that the new and old beneficiaries remain the same. Generally in the bifurcated states, if the trustee does not have expanded discretion the beneficiaries must remain the same.

B. **Grant or Modification of Power of Appointment**. Section 302(2) - (4) of act. Questions 9 and 10 of Decanting Policies. Commonly, decanting statutes explicitly permit the trustee to grant a power of appointment to one or more of the beneficiaries. Generally, this power of appointment may be a special or general power of appointment and may permit appointment to anyone, including persons who are not trust beneficiaries.

C. **Current and Remainder Beneficiaries**

1. **Limiting Decanting to Current Beneficiaries**. Question 6 of Decanting Policies. The narrowest theory of decanting, adopted by a minority of states, permits decanting only to a trust for the benefit of the current beneficiaries (those who could receive a discretionary distribution) of the old trust. Under such a statute, the remainder beneficiaries who are not also current beneficiaries must be deprived of their interest if the trust is decanted. This restriction may be mitigated in states that have a "boomerang provision." A "boomerang provision" permits the new trust

to provide that at some future time the beneficial provisions of the new trust revert to the beneficial provisions of the old trust, including the provisions regarding remainder beneficiaries. In a majority of states, remainder beneficiaries of the old trust may be, or under some statutes must be, beneficiaries of the new trust.

2. **Acceleration of Remainder Interest**. Question 7 of Decanting Policies. In states that do not restrict the beneficiaries of the new trust to current beneficiaries of the old trust, can decanting accelerate a remainder interest in the old trust to a current interest in the new trust? In a few states it appears that decanting can be used to accelerate a remainder interest in the old trust to a present interest. Other states explicitly prohibit an acceleration of a remainder interest. Some statutes are silent about the acceleration of a future interest. (The issue of accelerating a remainder interest does not arise in states that permit only current beneficiaries of the old trust to be beneficiaries of the new trust or that only permit remainder beneficiaries of the old trust to be beneficiaries of the new trust under a boomerang provision.)

   Obviously, a statute that permits the acceleration of a remainder interest to a present interest has more flexibility. There may be, however, an income tax risk with respect to trusts that are not intended to be grantor trusts. Several of the exceptions to the grantor trust rules do not apply if the trustee has the ability to add a beneficiary. See, e.g., Internal Revenue Code ("Code") section 674(b)(5), (b)(6), (b)(7); Code section 674(c); Code section 674(d). Under the grantor trust rules, the power to add a beneficiary includes the power to make a remainder beneficiary a current beneficiary. Treasury Regulation section 1.674(d)-(2)(b) provides that the "exceptions described in Section 674(b)(5), (6) and (7), (c) and (d) are not applicable if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where the action is to provide for after-born or after-adopted children." (Note that the power to add beneficiaries refers to a power to add to the class of beneficiaries who can receive "income or corpus.") It is possible to construct an argument that if the trustee of the trust has the power to decant, and if the trustee by decanting could accelerate a remainder interest to a present interest, then the trustee has a power to add beneficiaries within the meaning of the grantor trust rules. Under the grantor trust rules, the mere fact that a trustee holds this power, whether or not ever exercised, is sufficient to make the trust a grantor trust (or more precisely, to make certain exceptions to the grantor trust rules inapplicable). Thus the possible risk is that the mere existence of a decanting statute that permits the acceleration of a future interest to a present interest causes trusts potentially subject to such statute to unintentionally become grantor trusts.

V. Restrictions

A. **Currently Existing Mandatory Distribution Rights**. Section 304(1) of act. Question 3 of Decanting Policies. The majority view is that an already effective mandatory right to an income, unitrust or annuity distribution cannot be reduced or eliminated by decanting. Other states do not have such a prohibition. South Dakota prohibits eliminating mandatory rights with respect to marital trusts, charitable trusts and GRATs. South Carolina prohibits eliminating a right to an income, interest or annuity interest if it would have disqualified the trust for a tax benefit.

B. **Currently Existing Withdrawal Rights**. Section 304(1) of the act. Question 4 of Decanting Policies. The majority of states prohibit reducing or limiting an already existing right of withdrawal. This respects "vested" rights and avoids fiduciary issues that might arise if a trustee could eliminate an existing right. Many states, however, would permit a future distribution or withdrawal right to be eliminated or restricted. Thus, for example, in these states a trust that is to be distributed when a beneficiary attains age 30 could be decanted to a trust that does not require distribution until a later age (or no age at all) if the beneficiary has not yet attained age 30.

C. **Restrictions on Trustee Benefitting Self**

1. **Increasing Trustee Commission**. Section 304(2) of act. The New York statute provides that unless a court otherwise directs, the decanting power may not be exercised to change the provisions regarding the determination of the compensation of any trustee. The Ohio statute permits a change in trustee compensation either with court approval or with the consent of all persons who are current beneficiaries of the second trust. See also Michigan § 700.7820a. The Illinois statute prohibits decanting solely to change the provisions regarding trustee compensation but permits decanting "in conjunction with other valid and reasonable purposes to bring the trustee's compensation in accord with reasonable limits in accord with Illinois law in effect at the time of the exercise." Such a restriction may help prevent "self-dealing."

2. **Liability**. Section 304(3) of act. Question 19 Decanting Policies. Several states prohibit a trustee from decreasing its liability or increasing exoneration or indemnification. Such a provision can prevent a trustee from decanting to benefit itself. While such a prohibition may be implicit in general fiduciary duties, a clearly stated prohibition may be desirable.

3. **Removal**. Section 304(4) of act. Question 19 Decanting Policies. Several states prohibit decanting to get rid of a trustee remover.

D. **Tax Related Limitations**

1. **Marital Deduction**. Section 305(1) of act. Question 12 of Decanting Policies. With the exception of Wyoming, all of the statutes prohibit decanting in a manner that would disqualify a trust for the marital deduction if it was intended to so qualify. The Ohio statute explicitly addresses state estate, gift and inheritance tax marital deductions as well as the federal deduction. The Arizona and South Carolina statutes and Michigan's § 700.7820a do not have a specific provision addressing the marital deduction, but do include a catch-all tax savings provision.

2. **Charitable Deduction**. Section 305(1) of act. Question 13 of Decanting Policies. Similarly, the vast majority of states provide that the trustee may not decant in a way that would disqualify the trust for a charitable deduction or reduce the amount of the deduction.

3. **Gift Tax Annual Exclusion**. Section 305(2) of act. Code section 2503(b) grants a gift tax annual exclusion for gifts of a "present interest." Present interests are often created in trusts by granting the beneficiary a Crummey right of withdrawal over contributions to the trust. If a trustee could decant in a manner that prematurely terminated a beneficiary's existing Crummey right of withdrawal over a prior contribution to the trust, then arguably the contribution would not qualify for the gift tax annual exclusion. Most of the states have such a tax restriction.

   Code section 2503(c) permits a gift tax annual exclusion for a gift to a trust for an individual under age 21 provided that the property and its income may be expended for the benefit of the donee before attaining age 21 and would to the extent not so expended pass to the donee upon attaining age 21, and, in the event the donee dies before attaining age 21, will be payable to the estate of the donee or pursuant to a general power of appointment. Michigan § 556.115a specifically contains a tax restriction for Code section 2503(c) (but no restriction for 2503(b)). Other statutes contain restrictions that apply expressly to 2503(b) and 2503(c).

4. **GST Annual Exclusion**. Section 302(4) of act. Code section 2642(c) grants a GST annual exclusion to gifts that qualify for the gift tax annual exclusion but imposes two additional requirements for gifts to trusts. First, the trust must be only for a single individual and second, if the individual dies before the termination of the trust, the assets of the trust must be included in the gross estate of such individual. The 2642(c) restriction requiring a trust be for a single individual could be violated through decanting if the statute permitted accelerating a remainder interest to a current interest. The requirement that the trust be included in the gross estate of the individual could perhaps be violated by decanting to a trust that was not includible in the beneficiary's gross estate. The Illinois,

New York and Ohio statutes contain explicit restrictions on decanting to protect the GST annual exclusion.

5. **GRATs (Code Section 2702)**. The Missouri and South Dakota statutes specifically prohibit a decanting that would reduce the income interest of an income beneficiary of a GRAT. Arguably, if a trustee could decant in a way that would reduce the annuity interest of the beneficiary of a GRAT, the value of such annuity interest would not reduce the value of the gift. This restriction is not necessary if a trustee cannot reduce an annuity interest.

6. **Minimum Distribution Rules (Code Section 401(a)(9))**. Section 305(5) of act. Complicated rules determine when the life expectancy of a trust beneficiary can be considered in determining the required minimum distribution rules when a trust is the beneficiary of a qualified retirement plan or IRA. Under these rules, only trusts with certain provisions and restrictions permit the life expectancy of the beneficiary to be used to determine required minimum distributions. If a trustee could decant to a trust that would not meet these requirements, then arguably the old trust would not qualify from the inception to use the life expectancy of the beneficiary.

7. **Subchapter S Qualification**. Section 305(3) of act.

   a. *QSSTs*. In order for a trust to qualify as a QSST, (a) the terms of the trust must require that during the life of the current income beneficiary there shall be only one income beneficiary and (b) all of the income must be distributed to such beneficiary. Code section 1361(d)(3). Thus it may be important that a trust intended to qualify as a QSST not be permitted to be decanted into a trust that would not qualify as a QSST. The Kentucky and Ohio statutes would prevent a QSST from being decanted into a non-QSST. The Missouri statute prohibits reducing the income interest of a beneficiary of a QSST, but does not necessarily prevent other changes, such as granting the beneficiary a lifetime power of appointment, that could threaten QSST qualification. Although the Illinois statute prohibits decanting from a trust that qualifies as an S corporation shareholder trust to one that does not if the trust owns S corporation stock, it does not expressly prohibit decanting from a QSST to another type of trust that qualifies as an S corporation shareholder.

   b. *ESBTs*. A trust that has made an ESBT election is not required to distribute all income to the beneficiary. Thus no special restriction should be needed to protect ESBTs.

c. *Protecting S Election*. There is a risk that a trustee might inadvertently decant from a trust that qualified as an S corporation shareholder to a trust that does not so qualify. The Illinois and Kentucky statutes appear to prevent an inadvertent decanting from a qualified S corporation shareholder to a trust that does not qualify as an S corporation shareholder. The Ohio statute also protects the S election but is overly restrictive in that it requires that the new trust qualify as an S corporation shareholder under the same provision as the old trust. Thus the Ohio statute would not permit an ESBT to be decanted to a grantor trust or to a QSST, or a grantor trust to be decanted to a QSST or ESBT.

8. **Catch-all Provisions**. Section 305(6) of act. Several states, anticipating the difficulty of identifying all tax benefits that might possibly be adversely affected by a decanting power, have inserted catch-all tax-savings provisions in their statutes. This may be a wise precaution.

9. **Conversion of Grantor Trust to Non-Grantor Trust**. Section 305(7) of act. Presumably, generally a trustee may decant a trust in a manner that converts a grantor trust to a non-grantor trust either as an incidental result of changing the terms of such trust (for example, to eliminate the interest of a spouse as a beneficiary) or as a primary purpose of the decanting. The question can arise, however, in states that have catch-all tax savings provisions as to whether the catch-all provision would prohibit a decanting that would eliminate the grantor trust treatment. Thus this issue should be directly addressed in the act. Although there may be income tax consequences of terminating grantor trust treatment during the grantor's life, permitting such a decanting can be helpful in situations where the first trust does not contain a mechanism to turn off the grantor trust treatment and the income tax liability has become burdensome to the grantor.

10. **Conversion of Non-Grantor Trust to Grantor Trust**. Section 305(7) of act. A decanting statute that permits the conversion of a non-grantor trust to a grantor trust can be extremely useful where the grantor is willing to incur the income tax burden for the trust, but the trust was not drafted as a grantor trust. While such a power may appear troubling because it allows a trustee to impose on the grantor of the trust a tax liability that the grantor did not voluntarily accept and that the grantor may not have the ability to eliminate, the duty of the trustee to decant only in accordance with the purposes of the trust provides some comfort.

E. **Rule Against Perpetuities Period**. Section 306 of act.

1. **RAP**. Question 17 of Decanting Policies. An exercise of a decanting power could inadvertently violate a rule against perpetuities period applicable to the first trust if the second trust does not comply with the same rule against perpetuities period. Even in states that have abolished

the rule against perpetuities, the trust being decanted may still be subject to a rule against perpetuities under prior law or may be subject to a rule against perpetuities under the law of a different state. Further, if a trust is grandfathered from generation-skipping transfer ("GST") tax or has an exclusion ratio less than one, decanting to a trust that does not comply with the same rule against perpetuities period (or a federal rule against perpetuities period) may have adverse GST consequences. Most of the decanting statutes expressly state that the decanting power may not be exercised in a manner that violates the rule against perpetuities period and/or the restriction against alienation that applied to the old trust. Presumably, the new trust could adopt a shorter rule against perpetuities term and possibly could select a different class of measuring lives so long as they were in existence at the time the rule against perpetuities period began under the old trust.

2. **Delaware Tax Trap**. Question 15 of Decanting Policies. The Delaware tax trap could be triggered if the new trust conferred upon a beneficiary a power of appointment that could be exercised in a manner that violated the rule against perpetuities period of the original trust. A number of the decanting statutes expressly require that any power of appointment granted to a beneficiary is subject to the original rule against perpetuities.

VI. **Fiduciary Duty and Remedies**. Trustees may be reluctant to decant even when it would clearly further the purposes of the trust unless they are adequately protected from liability when acting in good faith. Without adequate liability protection, trustees may require beneficiary consent, notwithstanding the potential adverse tax consequences, or court approval, notwithstanding the additional costs to the trust.

A. **Beneficiary Challenges**. Section 501 of act. If decanting is an exercise of a fiduciary's discretionary distribution powers, arguably a beneficiary should have the same remedy as would apply to any other claim that the trustee breached its fiduciary duty in making a discretionary distribution. Nonetheless, given the special nature of decanting, including a specific remedy provision and a special statute of limitations period may be desirable. Section 501 of act.

B. **What Happens If It Is Later Determined that a Decanting Was Partially Invalid?** It may be helpful to include a "severability" provision providing that if a decanting is in part invalid (e.g., the decanting violated a tax restriction) the rest of the decanting is valid unless otherwise provided in the decanting record.

C. **Fiduciary Standard**. Section 503 of act. Question 23 of Decanting Policies. Unless otherwise provided in the statute, the exercise of a trustee's power to decant is subject to all of the fiduciary duties that otherwise govern the trustee's administration of the trust whether imposed by the trust instrument or by governing law. A few of the decanting statutes make this explicit. For example, the Missouri statute states that the exercise of the decanting power is subject to all fiduciary duties otherwise imposed under the trust instrument or Missouri law.

The Delaware statute is even more explicit in stating that the standard of care for decanting is the same as the standard of care when making outright distributions. Because of the expansive nature of the decanting power, however, it may be advisable to expressly state that decanting does not violate a trustee's duty of impartiality so long as it is done in good faith and in accordance with the purposes of the trust.

D. **No Duty to Decant**. Section 502 of act. Question 24 of Decanting Policies. Some of the statutes expressly state that the trustee has no duty to decant. Some statutes further state that a trustee has no duty to even consider decanting.

VII. Notice and Court Approval

A. **No Beneficiary Consent (Generally)**. Question 21 of Decanting Policies. Permitting a beneficiary to block decanting without going to court and proving an abuse of fiduciary discretion is inconsistent with the philosophy that decanting is an exercise of fiduciary discretion (and not a nonjudicial modification by agreement) and may create tax problems. In most states an objection by a beneficiary does not prevent the trustee from decanting. The New York statute explicitly states this. Other statutes merely fail to give any effect to a beneficiary objection. Illinois and Kentucky provide that a beneficiary objection prohibits the trustee from decanting without court approval. Illinois may amend its statute to change this.

B. **Generally Court Approval Should Not Be Required**. Question 22 of Decanting Policies. Requiring court approval of decanting is inconsistent with the philosophy that decanting is an exercise of fiduciary discretion and not a court modification. Court approval should only be required where the trustee has a conflict of interest, for example in modifying trustee compensation provisions. Requiring court approval may result in tax issues.

C. **Court Approval May Be Permitted**. Section 202 of act. Question 22 of Decanting Policies. The states permit the trustee to seek court approval. A trustee may be particularly inclined to seek court approval when making changes to the beneficial provisions, when the trustee knows that some beneficiaries do not like the modifications, or when there may be an extended period of time during which beneficiaries might be able to challenge the decanting.

D. **Notice**. Section 201 of act. Question 20 of Decanting Policies.

1. **No Notice**. A large number of states do not require the trustee to provide notice to the beneficiaries of the old trust before decanting. This is consistent with the theory that decanting is an exercise of a fiduciary power and that notice is not generally required to be given to beneficiaries before the exercise of a fiduciary power.

2. **Notice Required**. Other states require notice to certain parties a certain number of days prior to decanting. States that have enacted the Uniform

Trust Code generally require notice to the qualified beneficiaries. This is consistent with the right of beneficiaries to know the terms of the trust so they can protect their interests. Where an unidentifiable charity is a beneficiary (for example, the trustee is to select a charity), the state's Attorney General may be authorized to receive notice on behalf of such charity.

VIII. **Supplemental Needs Trusts**. Question 11 of Decanting Policies. Two different concerns can arise around the intersection of supplemental needs trusts and decanting. The first is the risk that the existence of a decanting power could inadvertently affect the protection from governmental claims of an existing supplemental needs trust. The second concern is that under statutes that require expanded discretion in order to decant in a manner that restricts a beneficiary's interest, a trustee without expanded discretion might not have the power to decant to a supplemental needs trust even though such a decanting may be in a beneficiary's best interest.

A. **Existing Trust is a Supplemental Needs Trust**. The Rhode Island statute expressly protects existing supplemental needs trusts from any argument that the decanting power permits the trustee to change the provisions that make the trust a supplemental needs trust.

B. **Conversion to Supplemental Needs Trust**. Both Illinois and New York have bifurcated statutes that would not permit decanting in a manner that would alter a beneficial interest unless the trustee has expanded discretion. However, both the Illinois and New York statutes create exceptions to permit a trustee of a trust who does not have expanded discretion to decant into a supplemental needs trust under some circumstances. Virginia would permit a trustee of a trust who does not have expanded discretion to decant into a supplemental needs trust with court approval. The Illinois statute permits a trustee to decant a disabled beneficiary's interest to a supplemental needs trust if the trustee determines that to do so would be in the best interests of the disabled beneficiary, taking into consideration the financial impact to the disabled beneficiary's family. A supplemental needs trust is defined as a trust that would allow the disabled beneficiary to receive a greater degree of governmental benefits than the disabled beneficiary would receive if no distribution is made. The Illinois statute defines "disabled beneficiary" as a beneficiary who has a disability that substantially impairs the beneficiary's ability to provide for his or her own care and custody and that constitutes a substantial handicap whether or not the beneficiary has been adjudicated a "disabled person."