

CLI RECOMMENDATION NO. 10

Adopt a Model Executive Order Establishing an Office of Legal Guardian for Future Generations* and Provide for the Training and Certification of Legal Guardians**

A. Executive Orders

Executive orders are directives issued by mayors, governors, tribal leaders, presidents, or other administrative officers acting in their capacity as heads of state or government. Typically they command agencies within the Executive Branch to take a course of action they are authorized to undertake by law. To the extent of that authorization, they do not require ratification by the Legislative Branch to be enforced (although executive orders may be overturned through legislation). Several governors have issued executive orders concerning climate change. Also, the President of the United States and several U.S. governors have issued executive orders concerning environmental justice and children's environmental health. This recommendation proposes the following Model Executive Order that a mayor, governor, tribal leader, president, or other administrative officer can use to designate a legal guardian for future generations, and to do so in a manner that fulfills the constitutional and statutory intent of CLI Recommendations Nos. 2 and 3 in this CLI Policy Paper.¹

Model Executive Order: Establishing the Office of Legal Guardian for Future Generations

Whereas a responsibility of this government is to serve as trustee of the environment to ensure that a clean, healthy, ecologically balanced, and sustainable environment (hereinafter “healthy and sustainable environment” and including but not limited to clean air, pure water, undefiled scenic lands, freedom from unwanted toxic chemicals and other contaminants, and a secure climate) is passed on to future generations; and

Whereas maintaining and improving the ecological health and sustainability of the environment for future generations requires long-term assessment, goal-setting, and planning; and

Whereas the people within this jurisdiction possess the creativity and technical skill to maintain and improve the ecological health and sustainability of the environment for the benefit of themselves and of generations to come;

NOW, THEREFORE, I, _____, of the _____ of _____

by virtue of the authority vested in me by the Constitution and the laws of the (Municipality, County, State, Tribe, or United States) of _____, do hereby ORDER and DIRECT the establishment of the Office of the Legal Guardian for Future Generations.

Section 1. Definitions. The following definitions shall apply to this order.

1-101 “Future Generations” means all people descended from the current generation.

* This recommendation was authored by Carolyn Raffensperger and Joseph H. Guth, respectively Director and Legal Director of the Science and Environmental Health Network (SEHN).

** This recommendation was authored by Carolyn Raffensperger, Director of the Science and Environmental Health Network (SEHN), in association with Burns H. Weston, Director of the Climate Legacy Initiative.

¹ Additionally, see CLI Background Paper No. 14 in Appendix A of this CLI Policy Paper upon which these recommendations are based in part.

1-102 The “environment” is the totality within this jurisdiction of physical substances and conditions (including all living organisms in the biotic community, air, water, land, natural resources, and climate) that affect the ability of all life forms to grow, survive, and reproduce. The “environment” includes both natural and human-created substances and conditions.

1-103 “Ecological health and sustainability” of the environment is the capacity for self-renewal and self-maintenance of the soils, waters, air, people, plants, animals, and other species that collectively comprise the environment. Human health is included as one aspect of the ecological health of the environment.

Section 2. Office of Legal Guardian for Future Generations.

2-101 There is hereby established the Office of Legal Guardian for Future Generations.

2-102 The Office of the Legal Guardian for Future Generations shall be comprised of a cabinet level or equivalent appointment of a Legal Guardian and of an Ombudsperson for Future Generations appointed from each agency.

Section 3. Functions of the Office of Legal Guardian of Future Generations.

3-301 The Legal Guardian shall:

- (a) Prepare an audit of the ecological health of the environment within one year of the date of this Executive Order and every two years thereafter;
- (b) Identify and assess all threats, including any presented by government decisions and actions, to the ecological health and sustainability of the environment for future generation;
- (c) Evaluate alternatives to all government decisions and actions that may present a threat to the ecological health and sustainability of the environment for future generations and identify those that provide the least threat and those that improve the ecological health and sustainability of the environment;
- (d) Propose goals and actions, including those that can be taken by agencies, that to the extent allowed by law will best protect and improve the ecological health and sustainability of the environment for future generations.
- (e) Ensure, together with the Ombudspersons, that to the extent allowed by law this government including all executive agencies carries out the proposed actions and achieves the proposed goals identified by the Legal Guardian for best protecting and improving the ecological health and sustainability of the environment for future generations.

3-302 The Legal Guardian shall be empowered to represent in court the interests of future generations when the ecological health and sustainability of the environment is threatened.

Section 4. Terms of the Legal Guardians and Ombudspersons for Future Generations.

4-401 The Legal Guardian shall be appointed for a 10-year term. Ombudspersons shall be appointed by agency directors. The term length of the Ombudspersons shall be at the discretion of the agency directors.

B. Training and Certification of Legal Guardians

Whether appointed at all levels of executive government or any other setting, persons designated as legal guardians to represent future generations will require training and certification in a specialized knowledge and ethic unique to the fields of guardianship and intergenerational justice so that they may serve the interests of their unborn clients well—a specialized knowledge and ethic that cuts across law, science, and economics. Once trained and certified, graduates can be empowered to serve as Legal Guardians for Future Generations and, in this capacity, be appointed as officials of the executive branch of government, as special masters in court, as advisors to legislators, or as commissioners or rapporteurs in United Nations or regional intergovernmental organizations and agencies.²

The training and certification of Legal Guardians of Future Generations can be offered: (1) as a special track in law schools, including a law clinic experience; (2) as a recognized specialty within a state bar of law pertinent to future generations and as a requirement for continuing education; (3) through specialized 1-2 week programs for lawyers sponsored by bar associations and law schools; and (4) through associations such as the National Guardianship Association.³ At a minimum, the certification should represent a Legal Guardian's assent to a code of ethics, an understanding of scientific uncertainty as well as the ability to make wise decisions in the absence of certainty, and a capacity to interpret and use economic as well as legal theory and practice in the best interests of future generations.

1. Code of Ethics

The National Guardianship Association promotes a model code of ethics that can serve as a starting point for a code of ethics for Guardians of Future Generations.⁴ It contains general principles for decision-making, guidance on the relationship between the guardian and the ward, custody of the ward, responsibility for providing informed consent on behalf of the ward, and management of the ward's estate. This code can be tailored to fit Legal Guardians of Future Generations since the guardian will, with few exceptions, serve in a capacity similar to a guardian of a child or a handicapped person. The differences between a guardian of an existing child or a handicapped adult and a Legal Guardian of Future Generations are that a guardian of future generations is working with a much longer temporal horizon, represents a group rather than an individual, and focuses primarily on environmental or ecological matters. Otherwise, their functions are essentially the same.

2. Science

Legal Guardians of Future Generations will need a deep understanding of ecology and of the dependence of living beings on healthy, functioning ecological systems. Additionally, they will need familiarity with decision-making in the face of scientific uncertainty and, accordingly, deep grounding in the precautionary principle.⁵ Certification programs should include a module on the philosophy of science that includes, among other things, analysis of Type 1, Type 2, and Type 3 errors (i.e., false positives and negatives and asking the wrong questions), induction and deduction, holism and reductionism, and methods for reversing the burden of proof. Further, elements of precautionary principle decision

² Certification of persons to represent future generations can apply to, among others, ombudspersons and trustees as well as legal guardians.

³ For details, see the website of the National Guardianship Association at <http://www.guardianship.org/>.

⁴ See National Guardianship Association, *A Model Code of Ethics for Guardians* (1988), available at <http://www.guardianship.org/pdf/codeEthics.pdf>.

⁵ The precautionary principle is discussed and explained at length in CLI Background Paper No. 13 in Appendix A of this CLI Policy Paper.

strategies—heeding early warnings, goal setting, identifying and choosing the best alternative, reversing the burden of proof and, being the voice of future generations in democratic proceedings—must be central to the certification training.

3. Economics

Guardians of future generations must be trained to review budgets and financial matters to determine their impact on future generations. Accordingly, certification of Legal Guardians of Future Generations must include significant information about economics and its role in policy. In addition, they must include basic economic principles about, for example, discounting and the commons.⁶ Understanding and putting into practice these and related principles and strategies increase the likelihood that future generations will have at least a sporting chance of inheriting a habitable

⁶ Discounting is discussed in CLI Policy Paper Chapter 5 and in CLI Background Paper No. 9 in Appendix A of this CLI Policy Paper. The commons is considered in CLI Recommendation No 1 in this Appendix B.