



# Concurrent Jurisdiction and 50 Years of Michigan's "One Court of Justice"

By Adam D. Pavlik

## FAST FACTS

Trial courts are being encouraged to enact concurrent jurisdiction plans, but questions remain about the constitutionality of some aspects of concurrent jurisdiction.

Concurrent jurisdiction plans will often require trial courts to reexamine their relationship with their funding units, but the exact nature of the constitutional relationship between courts and funding units can sometimes be unclear.

In negotiating with their funding units as part of the concurrent jurisdiction process, courts should be aware of these issues and prepare to address them.

Recently, Governor Rick Snyder signed into law legislation requiring all trial courts in Michigan to either adopt concurrent jurisdiction plans or affirmatively vote against implementing them.<sup>1</sup> Before, trial courts were *permitted* to enter into concurrent jurisdiction plans; now, they are *required* to adopt one "unless a majority of all of the judges of the trial courts in that judicial circuit vote not to have a plan of concurrent jurisdiction."<sup>2</sup> Although trial courts retain the authority to vote against forming a concurrent jurisdiction plan, the law seems intended to nudge the courts toward concurrent jurisdiction.<sup>3</sup> Judges and court staffs across the state are working toward this goal.

The goals of concurrent jurisdiction are laudable. Who is opposed to more efficient and responsible use of taxpayer dollars? However, the statewide efforts toward concurrent jurisdiction may run up against problems, or at least reasons for concern, in the Michigan Constitution. Now is the time for Michigan's legal community to reevaluate our Constitution on this issue and consider whether reform is needed as we celebrate its 50th anniversary.

## The History of the Problem

In its judicial article (article 6), the 1963 Michigan Constitution declares that "[t]he judicial power of the state is vested exclusively in one court of justice."<sup>4</sup> However, that "one court" is then,

in the very same sentence, “divided into” . . . well, into several different courts: “one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, [and] one probate court.”<sup>5</sup> Moreover, the Constitution declares that we have “one trial court of general jurisdiction” and “one probate court,” yet this obviously uses the word “one” in a very different sense than in the phrases “one supreme court” and “one court of appeals.”<sup>6</sup> The constitutional provision emphasizes that the judicial power is vested “exclusively” in “one court of justice,” which seems like a belt-and-suspenders solution in light of the Constitution’s express commitment elsewhere to separation of powers.<sup>7</sup> How many Michigan lawyers could explain to a nonlawyer the rationale for these seeming contradictions, or even understand it themselves?

The history of the peculiar language “one court of justice” in the judicial article suggests it was intended to be a change in emphasis from prior constitutions. The Address to the People, which was the 1961–1962 Constitutional Convention’s official declaration of purpose, explains that the language “incorporat[es] the concept that the state has a single court with several divisions, each devoting its attention to a certain level of judicial administration.”<sup>8</sup> The arguments in favor of this particular language seem to have been somewhat less specific than for other provisions of the Constitution. For example, in arguing against the language, one delegate suggested his disagreement with the notion that “the only good court system was one where somebody at the top was cracking the whip and the courts down below were dancing.”<sup>9</sup> He objected to “interjecting into the circuit court system a great degree of dictation, control and domination by the Supreme Court of the State of Michigan”<sup>10</sup> Yet the means by which today’s Supreme Court exercises administrative authority over the lower courts is through its general superintending control—which it has possessed since at least 1850.<sup>11</sup> The convention debate, in other words, seemed to be more about signaling that the Supreme Court should be more assertive in exercising its superintending control than about any substantive change in the law. I am, moreover, unaware of any specific rationale for the Constitution’s assertion that we have but one circuit or probate court in Michigan, which contradicts the practical reality that each circuit, probate, or district court is its own entity.

Although not directly considered at the convention, the judicial article poses another problem: a constitutional specification for various lower courts. This differs from the United States Constitution, which creates only the federal Supreme Court, leaving it up to Congress to create lower courts as it sees fit.<sup>12</sup> Our original Michigan Constitution appeared to vest similar discretion in the legislature, but also specified that a probate court was to be established in each county.<sup>13</sup> This constitutionalization of the lower courts was extended in the Constitution of 1850<sup>14</sup> and may have been an unexamined assumption of constitutional design at the 1961 convention.<sup>15</sup> The Address to the People seemed most concerned with “remov[ing] the constitutional status of the justice of the peace system and enabl[ing] the legislature to create a flexible and modern local court of limited jurisdiction to meet the differing needs of large and small counties and communities.”<sup>16</sup>

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It did not seem to feel the need to justify specifically creating the circuit and probate courts as constitutional courts, with the lack of legislative flexibility that arguably implies.

Notwithstanding these observations, the Constitution as written is what was proposed to and ratified by the voters. The convention specifically voted down an amendment that would have stricken the language “one court of justice” and simply listed the courts it intended to create.<sup>17</sup> There is meaning in these acts that we are duty-bound to honor. But court opinions often put quotation marks around the phrase “one court of justice”—perhaps a tacit acknowledgment of its counterintuitive nature. The wording arguably obscures more than illuminates the intended meaning. Certainly, the fact that Dean Roscoe Pound and the American Bar Association recommended similar language in the early 1960s<sup>18</sup> seems like a weak foundation for such confusing wording.

### **Why It Matters**

One could argue, however, that none of this matters. What harm is there in the judicial article using unusual wording if everyone knows how it works? However, the current constitutional language may cause problems down the road—particularly for local courts working through concurrent jurisdiction planning.

First, there are inherent problems when the law does not express itself clearly. Section 1 of the Michigan Constitution’s judicial article would not likely win any awards from this magazine’s Plain Language column. Every time we rely on a legal fiction or some other constructed reading of the text, it introduces friction into the law. Sometimes, it even leads to errors, as when the Court of Appeals held that *forum non conveniens* could not be applied in suits involving Michigan-based parties because it “would be contrary to this state’s concept of one court of justice.”<sup>19</sup> Although this incorrect statement of the law was eventually overruled, it took eight years<sup>20</sup> and in the meantime led to an unknown number of improper outcomes and imposed costs on litigants and courts in applying or distinguishing it.

Next, there are unresolved questions about the constitutionality of the concurrent jurisdiction legislation. When the original concurrent jurisdiction legislation was being considered, Justice Markman raised a series of questions about the constitutionality of the proposal in a letter to the legislature.<sup>21</sup> He reiterated and elaborated on those questions when the Supreme Court denied the legislature’s request for an advisory opinion on the constitutionality of the law.<sup>22</sup> He raised his concerns again when the Supreme Court approved its first concurrent jurisdiction plans,<sup>23</sup> and

he repeated them several more times.<sup>24</sup> The Supreme Court has not yet answered these questions.

While concurrent jurisdiction seems like a good idea on its face, these questions are troubling. The concurrent jurisdiction law allows "[t]he probate court and 1 or more probate judges [to] exercise the power and jurisdiction of the circuit court" (and vice-versa);<sup>25</sup> is this consistent with the constitutional requirement that those courts be "divided"? If a probate judge or court can "exercise the power and jurisdiction of the circuit court," are there not then two trial courts of general jurisdiction, even though the Constitution creates only "one trial court of general jurisdiction"? Can the practice of standing cross-assignments be reconciled with the Supreme Court's power to authorize "judges to perform judicial duties for limited periods or specific assignments"?<sup>26</sup> Of course, one might argue that the Constitution provides that "[t]he jurisdiction, powers and duties of the probate court and of the judges thereof shall be provided by law."<sup>27</sup> However, using this as a constitutional vehicle to expand the probate court's jurisdiction to all circuit court matters eliminates the constitutional requirement that the circuit and probate courts be "divided" (whatever that means). It is possible to support concurrent jurisdiction as a matter of policy and still see that the current law may be on thin constitutional ice—even if that says more about our Constitution's need for reform than the wisdom of concurrent jurisdiction. Constitutional reform could dispel the cloud hovering over the concurrent jurisdiction efforts of local courts across Michigan.

Another problem to which the Constitution contributes is confusion about state-local relations. The unification of employee policies is a goal of some concurrent jurisdiction plans.<sup>28</sup> Changes to employee policies implicate a court's relationship with its funding unit because the Supreme Court requires that "the chief judge must adopt personnel policies consistent with the written employment policies of the local funding unit" (albeit only "[t]o the extent possible, consistent with the effective operation of the court").<sup>29</sup> Another potential goal of concurrent jurisdiction plans might be to unify jury management or to create a common records-management policy.<sup>30</sup> Those policies implicate local courts' relationship with each other and with funding unit departments with their own elected officers—especially the county clerk, who is designated by the Constitution as a county officer but given

responsibilities to the circuit court.<sup>31</sup> Imagine a series of local courts including a circuit court that want to have a "one stop shop" for filing court documents. First, each court must agree to a common vision of how pleadings and other papers are to be filed. Second, while the county clerk is constitutionally obliged to be the clerk of the circuit court, to centralize the process across other courts, the county clerk would also need to agree to provide the services usually offered by the district court clerk<sup>32</sup> and probate register<sup>33</sup>—responsibilities the county clerk may not care to assume.<sup>34</sup> Changes to a court's information technology infrastructure also are intimately connected with the funding unit, its information technology staff, and the funding unit's governing body.

The relationship of Michigan courts to their funding units is complex and at times unclear, however. For example, a funding unit, not the state, pays the salary of most trial court employees. Most trial court employees are issued e-mail addresses and have other aspects of their work lives controlled by the funding unit, rather than the state or the local court. The Supreme Court requires the personnel policies of local courts be "consistent with the written employment policies of the local funding unit." Yet judicial employees are said not to be funding unit employees.<sup>35</sup> The Supreme Court acknowledged this tension when it observed that, "[d]espite the fact that the courts have always been regarded as part of state government, they have operated historically on local funds and resources."<sup>36</sup> The best explanation for this state of affairs is simply that "the expenses of justice are... only charged against the counties in accordance with old usage, as a proper method of distributing the burden."<sup>37</sup>

Despite this seeming clarification of the law, however, questions remain. For more than 40 years, Michigan trial courts and their funding units have had to debate the extent of the "inherent power" courts have to compel funding by local units.<sup>38</sup> The boundaries of this doctrine are uncertain, but its development was prompted in part by the localized way in which our trial courts are financed. A series of federal employment cases have also explored the relationship between courts and their funding units. The United States Court of Appeals for the Sixth Circuit held that Michigan's trial courts are part of the state, not the funding unit, for the purpose of sovereign immunity under the Sixth Circuit's multifactor test, *even though* the state may not face "potential liability" for a judgment.<sup>39</sup>

While this decision seems consistent with Michigan jurisprudence that conceptually separates courts from local funding units, the fact that it took an appeal from and reversal of the federal district court to reach that conclusion is telling: even in 2010, questions remained about our "old usage." One federal judge recently entertained the notion that the county may be a



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“co-employer” of a probate register, rather than the probate court being the exclusive employer.<sup>40</sup>

Courts working through concurrent jurisdiction plans will need to be thoroughly aware of the lines of authority and responsibility when developing concurrent jurisdiction plans. When push comes to shove, who can insist on what? To what extent do court policies expose funding units to liability? During the concurrent jurisdiction process, courts must be ready to answer these questions in asserting their prerogatives.

### Conclusion

For 50 years, the Michigan Constitution has insisted that the judicial power is vested in “one court of justice.” The concurrent jurisdiction process, however, is exposing tensions within this paradigm. As a practical matter, we no more have “one court of justice” than the Court of Appeals has one judge. The “oneness” of our circuit and probate courts is a strange abstraction appearing only in the Constitution. The judicial article prescribes the creation of distinct trial courts, which concurrent jurisdiction arguably allows us to disregard. Despite efforts on the part of the Supreme Court to clarify the legal status of trial courts vis-à-vis their funding units, litigation continues. “[M]uch of the problem stems from the existing hodge-podge of statutes dealing with court personnel. A major legislative overhaul is indicated.”<sup>41</sup> Perhaps another solution is needed: constitutional reform. ■



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### ENDNOTES

- 2012 PA 338, amending, among other things, MCL 600.401(1). The act also amended MCL 600.406 through 600.408 to provide special rules to coordinate the enactment of a concurrent jurisdiction plan in counties with third-class district courts (i.e., courts whose funding unit is a political subdivision within a county rather than the county itself).
- MCL 600.401(1).
- See House Legislative Analysis, HB 5124, May 29, 2012, available at <<http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-5124-3.pdf>>, p. 1. All websites cited in this article were accessed June 20, 2013.
- Const 1963, art 6, § 1.

- Id.* These are the constitutional courts. There are also statutory courts, but they are less relevant to this discussion.
- See also Const 1963, art 6, § 15, which requires that “[i]n each county organized for judicial purposes there shall be a probate court.” (Emphasis added.) Note the use of the indefinite article, which seems inconsistent with the statement that there is only “one probate court.”
- Const 1963, art 3, § 2. By contrast, the concept of separation of powers at the federal level is implied from the vesting clause of each constitutional article creating a branch of government.
- 2 Official Record, Constitutional Convention 1961, p 3384.
- 1 Official Record, Constitutional Convention 1961, p 1242.
- Id.* at 1243.
- Compare Const 1963, art 6, § 4, with Const 1908, art 7, § 4, and Const 1850, art 6, § 3.
- US Const, art III, § 1; see also US Const, art I, § 8, cl 9 (Congress empowered to establish lower federal courts).
- Compare Const 1835, art 6, § 1, with Const 1835, art 6, §§ 3 and 4.
- Const 1850, art 6, § 1 (“The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace.”).
- Cf. Citizens Research Council, *Michigan Constitutional Issues: Article VI—Judicial Branch* (No. 360-09, June 2010) <<http://www.crcmich.org/PUBLICAT/2010s/2010/rpt36009.pdf>>, pp 2–3 (acknowledging problem with multiple trial courts but not discussing any rationale at the convention for Michigan’s system).
- 2 Official Record, Constitutional Convention 1961, p 3384.
- 1 Official Record, Constitutional Convention 1961, p 1250.
- Id.* at 1241.
- Duyck v Int’l Playtex, Inc.*, 144 Mich App 595, 602–603; 375 NW2d 769 (1985).
- See *Russell v Chrysler Corp.*, 443 Mich 617, 621; 505 NW2d 263 (1993).
- House Legislative Analysis, HB 6260, January 15, 2003, available at <<http://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/pdf/2001-HLA-6260-b.pdf>>, pp 4–5 (quoting Justice Markman’s letter).
- In re Request for Advisory Opinion Regarding Constitutionality of 2002 PA 678*, 468 Mich 1213, 1214–1216; 658 NW2d 124 (2003) (Markman, J, dissenting).
- Administrative Order No. 2004-2 (Markman, J, concurring).
- Administrative Order Nos. 2007-4, 2006-9, 2006-4, 2005-3, 2005-1, 2004-7, 2004-4 (Markman, J, concurring).
- MCL 600.401(2)(a) and (c).
- Const 1963, art 6, § 23.
- Const 1963, art 6, § 15.
- Booth & Inloes, *Concurrent jurisdiction: A local approach to court reform*, 91 Mich B J 26, 28 (November 2012).
- Administrative Order No. 1998-5, § VI.
- See MCL 600.420, which puts in place a default records-management rule in the event that no other policy is adopted.
- Compare Const 1963, art 6, § 14 (providing that the county clerk is clerk of the circuit court), with Const 1963, art 7, § 4 (providing that the county clerk is a county official).
- MCL 600.8281(3).
- MCL 600.879 to 600.880c. Note that it is not clear whether this would be legal; MCL 600.833(1) requires that the probate register file a bond and oath with the county clerk, which could be interpreted to require that they remain distinct offices.
- See CRC, *Michigan Constitutional Issues*, n 15 *supra*, p 3 (“While the [county] clerks are surely equally interested [as judges] in achieving efficiencies, they are independently elected and may have separate ideas about how efficiencies can best be achieved.”).
- See *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 299; 586 NW2d 894 (1998).
- Grand Traverse Co v Michigan*, 450 Mich 457, 474; 538 NW2d 1 (1995).
- Stowell v Jackson Co Bd of Supervisors*, 57 Mich 31, 34; 23 NW 557 (1885).
- See *46th Circuit Court v Crawford Co*, 476 Mich 131, 140–149; 719 NW2d 553 (2006), for a history of caselaw in this area.
- Pucci v Nineteenth Dist Court*, 628 F3d 752, 760–764 (CA 6, 2010), rev’g 565 F Supp 2d 792 (ED Mich, 2008); see also *Dolan v Ann Arbor*, 666 F Supp 2d 754 (ED Mich, 2009), aff’d 407 F Appx 45 (CA 6, 2011).
- Turppa v Montmorency Co*, 724 F Supp 2d 783 (ED Mich, 2010). The case was ultimately decided on other grounds. See *Turppa v Montmorency Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 26, 2011 (Docket No. 09-12974-BC).
- Third Circuit Judges v Wayne Co*, 386 Mich 1, 33; 190 NW2d 228 (1971) (Adams, J, dissenting).