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Joint Committee on Finance

Paper #415

GPS Tracking Grant Program for Individuals Subject to Domestic Abuse or Harassment Restraining Orders or Injunctions (Justice -- Victim and Witness Programs)

[LFB 2013-15 Budget Summary: Page 290, #1]

CURRENT LAW

If a person seeks either a temporary restraining order or a permanent injunction on grounds of domestic abuse or harassment, the individual must file a petition alleging: (a) the individual's name and that the individual is the alleged victim (petitioner); (b) the name of the individual who would be subject to the temporary restraining order or permanent injunction (respondent); (c) in cases of alleged domestic abuse, that the respondent engaged in, or based on prior interactions of the couple may engage in, domestic abuse of the petitioner; and (d) in cases of alleged harassment, that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

A court may issue a domestic abuse temporary restraining order or injunction if the court finds reasonable grounds to believe that the respondent has engaged in, or based on prior interactions of the couple may engage in, domestic abuse of the petitioner. In determining whether to issue a domestic abuse temporary restraining order or injunction, the court must consider the potential danger posed to the petitioner and the pattern of abusive conduct of the respondent, but may not base the decision solely on the length of time since the last domestic abuse or the length of time since the relationship ended.

Likewise, a court may issue a harassment temporary restraining order or injunction if the court finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

Under 2011 Act 266, if a person knowingly violates a domestic abuse or harassment temporary restraining order or injunction, in addition to other penalties, a court may report the

violation to the Department of Corrections immediately upon the person's conviction and may order the person to submit to global positioning system (GPS) tracking by Corrections. However, this first applies to violations of domestic abuse or harassment temporary restraining orders or injunctions occurring on or after January 1, 2014.

Current law does not provide for the GPS tracking of individuals subject to domestic abuse or harassment restraining orders or injunctions who have not violated the terms of the applicable restraining order or injunction.

GOVERNOR

Provide \$1,000,000 GPR in 2013-14, and \$2,000,000 GPR in 2014-15, to a new GPR annual GPS tracking appropriation under the Department of Justice (DOJ) to fund grants to eligible local units of government, law enforcement agencies, or tribal law enforcement agencies to initiate GPS tracking of individuals subject to a domestic abuse or harassment restraining order or injunction, regardless of whether the individual has violated the terms of the relevant restraining order or injunction.

Provide that a local unit of government, a law enforcement agency, or a tribal law enforcement agency could establish a GPS tracking program for persons subject to a domestic abuse or harassment restraining order or injunction. These eligible governmental agencies could apply for a grant to DOJ to establish and administer such a GPS tracking program. Any such GPS tracking program would have to comply with the guidelines for such programs established by DOJ, regardless of whether the program received grant funding from DOJ.

Authorize DOJ to provide grants to any eligible local unit of government, law enforcement agency, or tribal law enforcement agency whose plan for expending the grant moneys to fund a GPS tracking program for persons who are subject to domestic abuse or harassment restraining orders or injunctions is approved. Provide that DOJ must develop criteria, which need not be promulgated as administrative rules: (a) as guidelines to be followed by a local unit of government, law enforcement agency or tribal law enforcement agency which establishes a GPS tracking program; and (b) for use in awarding GPS program grants to eligible governmental agencies.

Provide that an individual could not be GPS tracked under the DOJ grant program by any eligible local unit of government, law enforcement agency, or tribal law enforcement agency unless the court ordering GPS tracking found that the person is more likely than not to cause serious bodily harm to the person who petitioned for the restraining order or injunction, weighing the following required factors: (a) whether the person has allegedly caused physical injury, intentionally abused pets or damaged property, or committed sexual assault, an act of strangulation or forcible entry to gain access to the petitioner (alleged victim); (b) whether the person has threatened any individual, including the petitioner, with harm; (c) whether the person has a history of improperly using or threatening to use a firearm or other dangerous weapon; (d) whether the person has expressed suicidal thoughts; (e) whether the person has exhibited obsessive or controlling behavior toward the petitioner or any member of the petitioner's family,

including stalking, surveillance, or isolation of the petitioner or any member of the petitioner's family; (f) the person's mental history; and (g) whether the person has a history of abusing alcohol or a controlled substance.

Increase the penalty for violating a harassment restraining order or injunction from not more than \$1,000, or imprisonment not more than 90 days, or both, to a fine of not more than \$1,000, or imprisonment not more than nine months, or both. As a result, the penalty for violating a harassment temporary restraining order or injunction would be the same as the penalty for violating a domestic abuse temporary restraining order or injunction.

Provide that these provisions would first take effect on January 1, 2014. Similarly, provide that these provisions would first apply to a person subject to a domestic abuse or harassment temporary restraining order or injunction on or after January 1, 2014.

DISCUSSION POINTS

1. A court may issue a domestic abuse temporary restraining order or injunction if the court finds reasonable grounds to believe that the individual who would be subject to the order or injunction, the respondent, has engaged in, or based on prior interactions of the couple may engage in, domestic abuse of the alleged victim (petitioner). Domestic abuse includes: (a) intentional infliction of physical pain, physical injury or illness; (b) intentional impairment of physical condition; (c) first, second, or third-degree sexual assault; (d) damage to property; and (e) a threat to engage in conduct described under (a) through (d). In determining whether to issue a domestic abuse temporary restraining order or injunction, the court must consider the potential danger posed to the petitioner and the pattern of abusive conduct of the respondent, but may not base the decision solely on the length of time since the last domestic abuse or the length of time since the relationship ended. Any individual violating a domestic abuse temporary restraining order or injunction must be fined not more than \$1,000, or imprisoned not more than nine months, or both.

2. A court may issue a harassment temporary restraining order or injunction if the court finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner. Any individual violating a harassment temporary restraining order or injunction must be fined not more than \$1,000, or imprisoned not more than 90 days, or both.

3. In calendar year 2010 (the last year for which this office has data), there were 663 misdemeanor convictions and 79 felony convictions for violating a domestic abuse or harassment temporary restraining order or injunction. In calendar year 2010, there were 7,388 domestic abuse temporary restraining order cases and an additional 7,333 harassment temporary restraining order cases disposed of in circuit court. Most of these cases were either dismissed before trial or a default/uncontested judgment was entered in the case. In calendar year 2010 there were 2,868 default/uncontested judgments entered in domestic abuse temporary restraining order cases and an additional 2,995 default/uncontested judgments entered in harassment temporary restraining order cases. While this caseload snapshot suggests that many respondents may not violate the terms of their temporary restraining orders or injunctions, what is not clear is to what extent this snapshot is

due to any underreporting of violations by those individuals (petitioners) who seek these temporary restraining orders or injunctions, or to any difficulty in prosecuting such cases.

4. Under 2011 Act 266, for violations of domestic abuse or harassment temporary restraining orders or injunctions occurring on or after January 1, 2014, if a person knowingly violates a domestic abuse or harassment temporary restraining order or injunction, in addition to other penalties, a court may report the violation to the Department of Corrections immediately upon the person's conviction, and may order the person to submit to global positioning system (GPS) tracking by Corrections.

5. The provisions of AB 40 would increase the penalty for violating a harassment restraining order or injunction from not more than \$1,000 or imprisonment not more than 90 days, or both, to a fine of not more than \$1,000, or imprisonment not more than nine months, or both. As a result, the penalty for violating a harassment temporary restraining order or injunction would be the same as the penalty for violating a domestic abuse temporary restraining order or injunction.

6. The provisions of AB 40 would also provide that individuals (respondents) subject to a domestic abuse or harassment temporary restraining order or injunction could be GPS tracked even if the individual had not violated the terms of the restraining order or injunction. In this context, it may be worth noting that under current law most temporary restraining order cases are resolved either through case dismissal, or through a default/uncontested judgment being entered against the respondent. If respondents could now be GPS tracked even if they had not violated the terms of the temporary restraining order, it could change the nature of these cases. More respondents might now decide to contest such cases, increasing the costs of such cases to petitioners and the courts. In addition, it could prove more difficult for petitioners to have temporary restraining orders issued against respondents if increasing numbers of individuals contested such proceedings due to the possibility of being GPS tracked.

7. However, as with individuals GPS tracked under the Corrections program, such individuals could only be GPS tracked if the court ordering GPS tracking found that the person would be more likely than not to cause serious bodily harm to the person who petitioned for the restraining order or injunction, weighing the following factors: (a) whether the person had allegedly caused physical injury, intentionally abused pets or damaged property, or committed sexual assault, an act of strangulation or forcible entry to gain access to the petitioner (alleged victim); (b) whether the person had threatened any individual, including the petitioner, with harm; (c) whether the person had a history of improperly using or threatening to use a firearm or other dangerous weapon; (d) whether the person had expressed suicidal thoughts; (e) whether the person had exhibited obsessive or controlling behavior toward the petitioner or any member of the petitioner's family, including stalking, surveillance, or isolation of the petitioner or any member of the petitioner's family; (f) the person's mental history; and (g) whether the person had a history of abusing alcohol or a controlled substance.

8. Under AB 40, a grant program would be created under DOJ funded with \$1,000,000 GPR in 2013-14, and \$2,000,000 GPR in 2014-15, to fund grants to eligible local units of government, law enforcement agencies, or tribal law enforcement agencies to initiate GPS tracking of individuals subject to a domestic abuse or harassment temporary restraining order or injunction,

regardless of whether the individual had violated the terms of the relevant restraining order or injunction. Any such program would have to comply with the guidelines for such programs established by DOJ, regardless of whether the program received grant funding from DOJ. The Department of Justice would be required to develop criteria, which would not have to be promulgated as administrative rules: (a) as guidelines to be followed by a local unit of government, law enforcement agency or tribal law enforcement agency which established a GPS tracking program; and (b) for use in awarding GPS program grants to eligible governmental agencies. Grant funding would be reduced in 2013-14, as these provisions would not take effect until January 1, 2014.

9. The administration indicates that the level of funding for the new program was arrived at "in a balance of funds sufficient enough to establish a new program with available GPR funds." It is unknown at this time what administrative costs may be incurred to operate the program, and what local administrative costs may be paid for from DOJ grant funds. The administration anticipates that variance in program structures based on local processes or needs may lead to variable levels of administrative expenses from grant recipient to grant recipient. "Also costs will vary if a local government/law enforcement agency chooses to contract out for administration of their program or run the program themselves."

10. At this time it is unknown how many individuals might be tracked under the program under recommended funding levels during 2013-15. The administration indicates that, "We anticipate that local units of government/law enforcement agencies that implement a GPS tracking program will have differing structures based on local processes and needs. Also, as it is unknown who will apply for and receive funds and the population of the covered areas, it is difficult to estimate potential populations of those who would be tracked." In addition, variable administrative costs from program to program will also have an impact on the number of individuals that may ultimately be tracked under the program.

11. Under AB 40, individuals subject to a domestic abuse or harassment temporary restraining order or injunction could be GPS tracked even if the individual had not violated the terms of the restraining order or injunction. In addressing possible constitutional issues associated with these GPS tracking provisions under AB 40, Legislative Council staff indicated that:

"Based upon current court holdings relating to domestic abuse and harassment restraining orders, it appears unlikely that the provision authorizing GPS tracking under the conditions set forth in the bill would be found to be unconstitutional on its face. However, it may be subject to as-applied challenges that it is unconstitutional as applied to a particular person under a claim that tracking violates an individual's constitutional rights to due process and to be free from unreasonable search and seizure.

GPS tracking affects a person's liberty in that it enables the government to know the location of the person. In addition, depending upon the size of the tracking equipment, other people, such as employers, may determine that the person is being tracked. Finally, depending upon the reliability of the tracking equipment, the person may be subject to additional police encounters due to false alarms that the person has violated his or her injunction or restraining order.

Thus far, conditions imposed in domestic abuse or harassment restraining orders or injunctions that are alleged to violate a constitutionally protected interest have been challenged as violating the due process rights of the person who is subject to the restraining order or injunction. In these challenges, the statutes permitting these orders have been found to be facially constitutional, but there are instances in which the laws have been found to be unconstitutional as applied to a specific person. [*Blazel v. Bradley*, 698 F.Supp 756 (1988) and *Schramek v. Bohren*, 145 Wis. 2d 695 (1988).] Domestic abuse and harassment restraining orders and injunctions are civil orders. Like any other type of injunction, they must be “narrowly tailored to the necessities of the particular case.” In addition, “because injunctive relief is preventive, not punitive, the relief ordered may not be broader than equitably necessary.” [*State v. Siegel*, 472 N.W.2d 584, 592, 163 Wis. 2d 871 (1991).] Therefore, a requirement to submit to GPS tracking as a condition of a restraining order or injunction could be found to be overbroad based upon the individual circumstances and, therefore, impermissible on the grounds that it violates the due process rights of the person who is subject to order or injunction.

Because the bill introduces governmental surveillance as a potential condition of a restraining order or injunction, it is also possible that a person subject to GPS tracking would challenge the condition as an unreasonable search or seizure under the Fourth Amendment of the U.S. Constitution and Article I, section 11 of the Wisconsin Constitution. The primary objective of the Fourth Amendment is the protection of privacy against governmental intrusions. [*State v. Dixon*, 177 Wis. 2d 461, 467, 501 N.W.2d 442, 445 (1993).] To determine whether one’s right to privacy has been violated, courts examine both: (1) whether the individual has a subjective expectation of privacy in the object of the challenged search, and (2) whether society is willing to recognize that expectation as reasonable. [*Id.* at 468; *Kyllo v. United States*, 533 U.S. 27, 33 (2001).] Therefore, “application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy.’” *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Certain persons have a diminished expectation of privacy, such as those under correctional supervision or who are released from custody awaiting trial on a criminal charge, so a tracking program applicable to this population may be more likely to withstand a challenge. The constitutionality of the tracking may also depend upon whether the tracking provides the government with information about the person’s presence in a location that society would view as private, such as his or her home. In any case, the likelihood that GPS tracking administered by the government would be found to be a justifiable intrusion on an individual’s privacy would depend upon the extent to which the government could demonstrate that tracking the individual, based upon the risk he or she presents, is necessary for protection of the public. Thus, it appears that the GPS tracking provision is not likely to be found to violate the Fourth Amendment on its face but could be found to violate a person’s right to be free from unreasonable search and seizure as applied to a particular individual. "

12. In describing why the DOJ GPS grant program under the bill would extend to tracking individuals who had not violated the temporary restraining order or injunction, DOJ staff indicated that, "The purpose of the pilot program is to be able to identify when an injunction is being violated and therefore enable swift law enforcement response to protect the life of the person who has obtained the injunction." In order to provide this additional level of protection to petitioners who seek domestic abuse or harassment temporary restraining orders or injunctions

under circumstances in which a court has determined that the respondent is more likely than not to cause serious bodily harm to the petitioner, the Committee could approve the creation of the recommended GPS grant program under DOJ. [Alternative 1]

13. Given the unknowns as to how administrative costs will be addressed under any approved GPS grant program and how DOJ criteria may address any constitutional concerns associated with the program, the Committee could consider requiring that DOJ issue its criteria for the program as administrative rules. Department staff have expressed the concern that requiring administrative rules would not permit DOJ to have the grant program up and running by January 1, 2014. If the Committee would nonetheless conclude that it is important for the Legislature to have more oversight over the development of this new grant program, the Committee could consider: (a) requiring that DOJ criteria for the program be issued as administrative rules; (b) delaying the effective date of the program and its associated provisions from January 1, 2014, to July 1, 2014; and (c) deleting \$1,000,000 GPR provided under AB 40 for the program in 2013-14. [Alternative 2] The Committee could also limit the funding provided to the program until more is known as to the administrative costs being incurred under the program, and the number of individuals being tracked under the program with available grant funding. As a result, the Committee could consider reducing second year funding under the program to \$1,000,000 GPR. [Alternative 3]

14. If the Committee elects to exempt DOJ from issuing its criteria for the GPS grant program as administrative rules, but still desires to limit initial funding for the GPS grant program until more is known as to the administrative costs being incurred under the program, and the number of individuals being tracked under the program with available grant funding, the Committee could elect to reduce funding to the program by \$500,000 GPR in 2013-14, and by \$1,000,000 GPR in 2014-15. [Alternative 4]

15. Grant programs often require that the recipient provide match funding for the grant received under the program. Match requirements increase the available funding to operate the program and are a way of encouraging buy-in by the grant recipients. The Committee could consider creating a 25% match requirement for funds received by grant recipients under the recommended GPS tracking grant program. [Alternative 5]

16. On the other hand, the Committee could choose to narrow funding for GPS tracking to those individuals who have violated a domestic abuse or harassment temporary restraining order or injunction, and delete the recommended GPS tracking grant program under DOJ. Under this alternative, the state would focus resources on the Corrections program which GPS tracks individuals who have violated a domestic abuse or harassment temporary restraining order or injunction. [Alternative 6]

17. Regardless of what the Committee decides in regards to the creation of the recommended GPS grant program at DOJ, the Committee could choose to increase the penalty for violating a harassment restraining order or injunction from not more than \$1,000, or imprisonment not more than 90 days, or both, to a fine of not more than \$1,000, or imprisonment not more than nine months, or both. As a result, the penalty for violating a harassment temporary restraining order or injunction would be the same as the penalty for violating a domestic abuse temporary restraining order or injunction. [Alternative 1]

18. On the other hand, as there are likely reasons why current law developed separate penalties for the violation of harassment verses domestic abuse temporary restraining orders or injunctions (including a consideration of dangerous under domestic abuse temporary restraining orders or injunctions that does not have a parallel under harassment restraining orders or injunctions), the Committee could maintain current law and re-visit the sanctions for the violation of harassment restraining orders or injunctions through separate legislation. [Alternative 7]

ALTERNATIVES

1. Provide \$1,000,000 GPR in 2013-14, and \$2,000,000 GPR in 2014-15, to a new GPR annual global positioning system (GPS) tracking appropriation under the Department of Justice (DOJ) to fund grants to eligible local units of government, law enforcement agencies, or tribal law enforcement agencies to initiate GPS tracking of individuals subject to a domestic abuse or harassment restraining order or injunction. Adopt the recommended statutory language to implement the GPS grant program at DOJ. Increase the penalty for violating a harassment restraining order or injunction from not more than \$1,000, or imprisonment not more than 90 days, or both, to a fine of not more than \$1,000, or imprisonment not more than nine months, or both.

2. Modify the Governor's recommendation by: (a) requiring that DOJ criteria for the program be issued as administrative rules; (b) delaying the effective date of the program and its associated provisions from January 1, 2014, to July 1, 2014; and (c) deleting \$1,000,000 GPR provided under AB 40 for the program in 2013-14.

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|--------------|-----------------------------------|
| ALT 2 | Change to Bill Funding |
| GPR | - \$1,000,000 |

3. Modify the Governor's recommendation by deleting \$1,000,000 GPR provided under AB 40 for the program in 2014-15.

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|--------------|-----------------------------------|
| ALT 3 | Change to Bill Funding |
| GPR | - \$1,000,000 |

4. *This alternative may not be adopted with Alternative 2.* Modify the Governor's recommendation by deleting \$500,000 GPR in 2013-14, and \$1,000,000 GPR in 2014-15, provided to the program under AB 40. [If this alternative were adopted with Alternative 3, the program would be provided funding totaling \$500,000 GPR in 2013-14 only.]

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|--------------|-----------------------|
| ALT 4 | Change to Bill |
| | Funding |
| GPR | - \$1,500,000 |

5. Require grant recipients to provide a 25% match for any grant funds received under the DOJ GPS tracking grant program.

6. Delete the funding, appropriation, and associated statutory language for a GPS tracking grant program at DOJ. Delete \$1,000,000 GPR in 2013-14, and \$2,000,000 GPR in 2014-15, provided under AB 40 to fund the grant program.

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|--------------|-----------------------|
| ALT 6 | Change to Bill |
| | Funding |
| GPR | - \$3,000,000 |

7. Delete the provision amending the penalties for violating a harassment temporary restraining order or injunction. [This alternative would maintain current law which provides that the penalty for violating a harassment temporary restraining order or injunction is a fine of not more than \$1,000, imprisonment not more than 90 days, or both.]

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