MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 10, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:08 a.m. on Friday, May 10, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Assemblywoman Olivia Diaz, Assembly District No. 11
Assemblyman James Ohrenschall, Assembly District No. 12

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Chris Frey, Washoe County Public Defender's Office
Vanessa Spinazola, American Civil Liberties Union of Nevada
John Jones, Jr., Nevada District Attorneys Association
Christopher Laurent, Chief Deputy District Attorney, Clark County
A.J. Delap, Las Vegas Metropolitan Police Department

E. (Gino) Basilotta, Las Vegas Metropolitan Police Department
Eric Spratley, Lieutenant, Washoe County Sheriff's Department
Bill Ames, Sergeant, Washoe County Sheriff's Department
Terry Care
Kim Surratt, Nevada Justice Association
Katherine Provost
Kay Kindred, Ralph Denton Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; Uniform Law Commissioner

Chair Segerblom:
The hearing is open on Assembly Bill (A.B.) 313.

ASSEMBLY BILL 313 (1st Reprint): Prohibits the tracking of a mobile phone by an investigative or law enforcement officer without a court order in certain circumstances. (BDR 14-421)

Assemblywoman Olivia Diaz (Assembly District No. 11):
I am here on behalf of Assemblywoman Peggy Pierce, Assembly District No. 3. I will read from Assemblywoman Pierce's written statement (Exhibit C).

There is a proposed amendment (Exhibit D) submitted by the American Civil Liberties Union (ACLU). Assemblywoman Pierce considers Exhibit D a friendly amendment.

Chris Frey (Washoe County Public Defender's Office):
Exhibit D was sponsored by the ACLU, but it was developed in collaboration with the Washoe County Public Defender. Exhibit D makes three important revisions to A.B. 313.

First, the term "telecommunications device" replaces "mobile phone." This bill originated as a pen register trap and trace device and mobile tracking device bill in the Assembly. The bill passed in the Assembly as a cell phone tracking bill.

Chair Segerblom:
Is a tracking device a telecommunications device that one could place on a vehicle?

Mr. Frey:
Yes. The intent is that the terminology is broad enough to encompass tracking devices such as those that could be placed on the undercarriage of a vehicle. Devices such as an iPhone or laptop computer would also be considered telecommunications devices. Telecommunications device is a versatile term that will keep pace with technology. Mobile phones are not the only devices that emit geolocation data.

The second revision in Exhibit D subjects the request for geolocation devices to a warrant process. Under statute, a request for geolocation data requires a court order. That requirement relates to pen register trap and trace statutes. The federal efforts to legislate this matter contemplate a warrant process. This is referred to as the Geolocational Privacy and Surveillance Act. This Act has had its first hearing in the U.S. House Judiciary Committee. I do not know if there has been further action on this bill. The federal bill is the most cutting-edge effort to regulate in a cutting-edge area of law. The federal bill contemplates that procedures for accessing data would be governed under Rule 41 of the Federal Rules of Criminal Procedure, which contemplates a warrant process. The Geolocational Privacy and Surveillance Act contemplates a warrant process, and A.B. 313 contemplates a warrant process.

The third revision in Exhibit D is complementary. Because Exhibit D calls for a warrant process, probable cause should be required. The hybrid formulation in A.B. 313 borrows language from the pen register statute and grafts on probable cause terminology to that standard. We are favoring traditional formulation of probable cause. This is the formulation under which officers operate on a daily basis, and it is one with which courts are familiar. In addition, justices of the peace and State court judges who will be issuing warrants are familiar with this formulation.

The revisions in Exhibit D operate so that warrants are required. These revisions work in tandem with Senate Bill (S.B.) 268, which sets out the emergency circumstances under which geolocation data can be obtained. While S.B. 268 would be the exception, A.B. 313 would be the general rule. The two bills complement each other.

SENATE BILL 268 (1st Reprint): Requires a provider of wireless telecommunications to provide call location information to a law enforcement agency in certain emergency situations. (BDR 58-623)

Vanessa Spinazola (American Civil Liberties Union of Nevada):
The American Civil Liberties Union of Nevada supports A.B. 313. We believe that geolocation data deserves a heightened level of privacy. Geolocation data is not akin to tapping a phone and hearing a conversation in real time. Geolocation data shows where one has been. This information can reveal intimate facts about an individual. For example, District of Columbia Circuit Judge Douglas H. Ginsburg, in *U.S. v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), aff'd sub nom. *U.S. v. Jones*, 132 S.Ct. 945 (2012), stated:

> [A person who knows all of another's travels can deduce] whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

Because of public records requests, there is a patchwork across Nevada. Different counties are using different methods to obtain information. Some counties use subpoenas, grand jury subpoenas, warrants or orders. We support the bill in general because it creates a standard for the entire State. We believe this is forward-thinking legislation, and we are in support of Exhibit D.

Additional details in Exhibit D bring A.B. 313 in line with S.B. 268. Section 3, subsection 2, paragraph (b) has been amended to include serious "physical" harm. This corresponds to language in the Kelsey Smith Act.

Senator Jones:
How are other states addressing this issue?

Ms. Spinazola:
Texas is the only state considering legislation. Texas is also considering the probable cause standard. This bill will send a message to the federal government about what states are considering.

Senator Hutchison:
The premise of S.B. 268 was that cell phone companies were not releasing this information even during an emergency situation. The premise of A.B. 313 seems to be that the cell phone companies are releasing information too freely. Testimony today indicates there have not been abuses in Nevada. It has been

stated that police officers are trained not to obtain this information without a court order. Can you clarify what we have been told about these two bills?

Mr. Frey:
I cannot speak to the abuse issue. However, I can speak to the need for standardization. There is simply a patchwork of standards in the State. Law enforcement and private citizens need certainty. The bill standardizes the process and defines the legal standard.

Senator Hutchison:
Why do you want to change from the court order standard to the warrant standard?

Mr. Frey:
It is ex parte if it is a court order, and it is ex parte if it is a warrant. The process looks functionally the same, and it is not adversarial. The warrant language updates the standard and puts Nevada in line with the federal efforts in this matter. In addition, Rule 41 mandates a warrant for mobile tracking devices. A mobile tracking device is a traditional tracking device such as a global positioning system (GPS) installed on the undercarriage of a vehicle. There is no persuasive distinction between installing a GPS or a law enforcement officer converting a phone surreptitiously for purposes of monitoring the movements of a person. This bill standardizes the process.

Senator Hutchison:
Is this bill the functional equivalent of the current court order process?

Mr. Frey:
Yes.

Senator Ford:
Is the language in section 5, subsection 1 a recitation of the probable cause standard?

Mr. Frey:
The language is a formulation of the probable cause standard that bears a close relationship to the standard that law enforcement uses on a day-to-day basis. The probable cause statement in the current bill is a hybrid of the pen register

track and trace legal standard. This language is a coupling of words not seen in the *Nevada Revised Statutes* (NRS) or Nevada caselaw.

Senator Ford:
Caselaw evolves over time. Is inclusion of this iteration of probable cause, as is present in caselaw, a bit restrictive?

Mr. Frey:
Caselaw does evolve. However, the formulation of this concept has been steady since its development. We are willing to work on the phrasing of the language, but the two requirements of probable cause will never change. The requirements are that it must be individualized as to the person and to the individual crime. The amended language in section 5, subsection 1 meets the requirements better than the language in the original bill.

Senator Ford:
Would it be appropriate to revise the language to ensure we are not giving more or less deference to a police officer based on the definition of probable cause?

Mr. Frey:
Perhaps we can revise the language to state that probable cause is required for the commission of crime. The language could be general enough so that any changes in jurisprudence in this area would not affect the statutory standard. However, leaving the language general may be the more versatile approach.

Senator Ford:
Judges look at caselaw. The definition of probable cause in caselaw evolves.

Ms. Spinazola:
We have not seen abuse in the requests for public records. There is not much understanding of the differences in technology or the certain standard that is required. This speaks to the probable cause standard and why it is specifically stated here. This has to do with the difference in information gathered in real time versus information gathered from the past. No standard addresses how to obtain past information because we have not addressed it previously. There is no caselaw on this issue. We are somewhat concerned about borrowing general terms that apply to real-time information. Past information is more private, and we would like to be specific. However, we are willing to work on the language.

Senator Ford:
Are you attempting to preempt a court from defining probable cause in those circumstances?

Ms. Spinazola:
That is correct.

Assemblywoman Diaz:
Assemblywoman Pierce wanted to bring this before you because she feels it is important that we set a precedent. The information obtained should be limited in scope to the investigation.

John Jones, Jr. (Nevada District Attorneys Association):
The Nevada District Attorneys Association opposes A.B. 313. There are concerns with the language in the bill.

First, we are concerned about the provisions in the bill that change the requirement of a court order to the requirement of a warrant. Second, the probable cause language is extremely narrow. Probable cause is narrowed to the point that it would make it potentially difficult for law enforcement to obtain certain information. Third, we ask that there be an amendment to section 5, subsection 2, paragraph (a) to add "if known." Rarely does law enforcement know the owner of a telecommunications device.

Senator Jones:
Do you agree with the language in section 5?

Mr. Jones:
We prefer the original language. However, we are working with the authors of the bill.

Senator Ford:
Do you agree that we should define probable cause in section 5? Is it legal to preempt jurisprudence on certain issues?

Mr. Jones:
Not many states have particularized legislation pertaining to telecommunications and tracking devices. We want to be careful with probable cause language because other states may adopt the language.

Christopher Laurent (Chief Deputy District Attorney, Clark County):
This issue needs legislation. The bill mirrors the practice used in Clark County. However, the Clark County District Attorney's Office has concerns with the language in Exhibit D.

There is a distinction between historical data and real-time data. There is a standard for historical data according to the Stored Communications Act of the Electronic Communications Privacy Act of 1986. To obtain historical data, the officer must obtain a court order and must articulate facts that show the evidence being sought is material and relevant to an ongoing investigation. To obtain real-time data, probable cause is used.

We take issue with the bill calling for a warrant rather than an order. The territorial jurisdiction of district courts is only Nevada. We cannot issue a warrant to track a phone if that phone has been subscribed from an out-of-state company. We do not have jurisdiction over an out-of-state company. Under Title 18, USC, section 3122, courts of competent jurisdiction, such as a district court, are allowed to issue court orders anywhere in the Country. This gives us the ability to track a phone being used in Nevada that may be provisioned by an out-of-state company.

We have no problem with the standard of probable cause or using probable cause. However, we take issue with the definition of probable cause in the bill. Probable cause does not need to be particularized for an individual. I will offer three examples. In the first example, police have probable cause to believe a victim is being forced into prostitution. The woman calls her mother on her own phone and states she is in trouble and then hangs up the phone. Does the definition of probable cause in Exhibit D preclude the tracking of that phone because it is not particularized to the caller? In this scenario, the caller is not committing a crime. In the second example, we may have a defendant who has kidnapped a small child. The child does not have a phone, but we may have probable cause to believe that a relative may make phone contact with the person holding the child. Do provisions in Exhibit D preclude us from tracking a phone that belongs to someone else even though we have probable cause that it might lead to evidence? In the third example, we may have a violent offender who has made bail and is out of custody. He does not show up for his court hearing. We already have probable cause to believe that he has committed the crime because otherwise he would not have been in court initially. He has a phone, but we cannot track it because it will not show evidence of any crime.

Will we have to wait until he commits another crime before we can track his phone? There are problems with the language of probable cause in Exhibit D. The general notion of probable cause is that there is reasonable belief, based on the evidence in our possession, that evidence will be located in a certain place. We want to know if companies have information that is relevant to the investigation of the case. We set that standard, we have an order supported by an affidavit, the court reviews the affidavit and the court makes the determination if there is probable cause. This is the same standard used throughout the Country.

Senator Ford:
The warrant requirement will not work because a warrant cannot be used outside the State. Is that correct?

Mr. Laurent:
That is correct. The district court cannot issue a warrant to obtain information from a company in states other than Nevada. Telecommunications companies follow federal law and require a court order before they will release data. The warrant language will prevent us from doing our job.

Senator Jones:
Does the company have to have a store, its headquarters or its storage of information located in Nevada?

Mr. Laurent:
It depends on the company. Some companies accept subpoenas, some accept warrants and some require we send a warrant to their base of operation. We rely on the cooperation of the telecommunications companies. We are requesting that the language of the bill remain as a court order, not a warrant.

Senator Jones:
Are you stating that a court order is a way to ensure you can obtain information from any telecommunications company, regardless of whether the company has operations in the State?

Mr. Laurent:
That is correct.

Senator Hutchison:
Has the Legislature defined probable cause in Nevada law? Or is it understood that probable cause must exist and the body of law is used?

Mr. Laurent:
I do not believe we have defined probable cause in statute. We instruct grand juries that probable cause means one can draw a reasonable inference from the facts that a crime has been committed and that the defendant has committed the crime.

With a search warrant, a reasonable inference must be drawn that the items being sought are in a location being searched.

Senator Jones:
I researched this issue. I did not find any reference in NRS where probable cause is specifically defined.

Mr. Laurent:
We agree that the language "if known" should be added to section 5, subsection 2, paragraph (a). In my duties, I prepare pen registers. Many of them are burner phones with no identification. It is untenable that we would have to know the identity of the owner.

We agree with the change in the bill language from mobile phone to telecommunications device. We believe that change is appropriate for tracking mobile devices. There is a distinction between mobile phones and other devices. The U.S. Supreme Court has provided guidance on this issue. We use a warrant to install a police-owned tracker on a vehicle. The tracker can only be placed on a vehicle and retrieved with that warrant if it is done within the territorial jurisdiction. We can track the vehicle regardless of where it is driven. However, we cannot retrieve the tracker from a car if it is in another state without an additional search warrant from that state.

Senator Jones:
Do we need to put language in the bill that clarifies an exception for tracking devices?

Mr. Laurent:
I do not believe the bill addresses telecommunications devices owned by another party. We have the consent of the owner of the telecommunications device to track the device. However, we do not have consent to place the device. A warrant used is to place the device. The bill states we must have the permission of the owner of the device. When I send someone out to place a tracker on a vehicle, the tracker is owned by the Las Vegas Metropolitan Police Department (LVMPD) or another department. I do not need permission to track the device. I need court authorization to track the vehicle. This bill, as written, does not contemplate tracking devices.

Mr. Jones:
We obtain the warrant to place the tracking device on the vehicle. Because the device is owned by a law enforcement department, the department can track the vehicle. This exception is addressed in section 3, subsection 2, paragraph (a).

A.J. Delap (Las Vegas Metropolitan Police Department):
The LVMPD believes there is merit in this legislation. It is difficult for law enforcement to stay ahead of technology. Our agency was pleased to work closely with the ACLU on this bill. We thought we were getting close to supporting A.B. 313. However, we were unable to come to an agreement. We are hopeful we can come to an agreement before the Session ends.

E. (Gino) Basilotta (Las Vegas Metropolitan Police Department):
Technology changes rapidly. The LVMPD deals with situations in which a mobile device is used, not necessarily a mobile phone.

When we receive an order for a pen register, I complete paperwork and send it to the telecommunications company. Ninety percent of the time, these are out-of-state companies. We have technicians at the company remote into phone switches, which are oftentimes out of state.

Recently, we had a situation where threats were made against the parent of a child. The offender making threats was not using a cell phone. The offender was using a device similar to an iPad with an application that had the capability to grab a phone number. The offender made death threats through the device, which was routed through the wireless network in the victim's home, and accessed the victim's cell phone. In that case, the offender was not using a

mobile phone. Many different devices and applications are used. We cannot always use the same approach in our investigations.

Eric Spratley, Lieutenant (Washoe County Sheriff's Department):
The Washoe County Sheriff's Department opposes A.B. 313 as drafted.

Bill Ames, Sergeant (Washoe County Sheriff's Department):
The original bill can be worked on to create an acceptable compromise that will benefit law enforcement and the citizens of the State. We need these tools to keep people safe, to do our job and to conduct high-level investigations. Almost all provisions in the original bill are the current practice in the State. We follow federal law, caselaw and guidelines provided by the U.S. Department of Justice.

Technology is constantly changing, and the Legislature cannot keep up with the technology because of the time it takes to put new laws on the books. The federal guidelines are updated quickly, and we change our practices to meet these guidelines.

Vehicle tracking devices are not addressed in Exhibit D. Tracking devices must be physically installed on a vehicle. We face difficulties in placing these devices. These difficulties are not addressed in Exhibit D.

The original bill cannot be revised to satisfy everyone's needs. Exhibit D causes another set of problems. We are opposed to A.B. 313 as amended.

Senator Jones:
Are you opposed to the change of language from "mobile device" to "telecommunications device"?

Sergeant Ames:
I am opposed to that change. The original intent of the bill pertained to tracking cell phones. There should be separate legislation to address tracking devices. After we provide a court order to a company to track a cell phone, we access a computer program to track the cell phone without going outside the State.

Senator Jones:
Clark County testifiers stated they preferred the change in language because it expands the definition of devices.

Sergeant Ames:
Vehicle trackers should be defined separately as in federal law. I agree that the change in language expands the definition of devices.

Senator Jones:
Is the term "telecommunications device" a suitable alternative to "mobile phone" if we separate tracking devices from the definition?

Sergeant Ames:
Yes.

Mr. Frey:
In our discussions with law enforcement, there were no objections to the change in language from "mobile phone" to "telecommunications device." In addition, vehicle trackers require a warrant pursuant to federal law.

Senator Jones:
Are you amenable to defining "telecommunications device" to exclude those specific tracking devices?

Mr. Frey:
I am amenable only to the extent that we could guarantee a warrant would be required for those tracking devices. If we amend that out of the bill, law enforcement will be operating on something less than probable cause to obtain and install a tracking device. This presents a concern. If the federal government requires warrants for those devices, we should consider similar restrictions at the State level.

Senator Jones:
If tracking devices are not included in the bill, the federal law is the default.

Mr. Frey:
I do not believe that federal law exclusively governs the issue. There is room for State legislation pertaining to tracking devices. At the federal level, if jurisprudence were to suggest that a warrant was not required for tracking devices, Congress could provide greater protections. That is what was done with Rule 41. We can do this at the State level. If we clarify that this bill does not extend to tracking devices, we lack standardization and we risk a law enforcement agency's jurisdiction by jurisdiction operating on different

standards for purposes of those devices. I would like to see this bill expand to tracking devices. This may take more work on the bill, but I believe that is the sponsor's intent.

Senator Jones:
I did not read the original bill to have that intent. I am somewhat concerned. The justification for the bill was that Congress had not acted, so we needed to be at the forefront regarding telecommunications devices. Now you are saying the opposite.

Mr. Frey:
As the bill is drafted, the language does not extend to tracking devices. Tracking devices should probably be the subject of independent legislation.

Senator Jones:
I do not believe that was the sponsor's intent, and I am happy with the legislation as is.

Senator Ford:
It seems that the warrant requirement cannot be included in this legislation. We need to leave the term "order" in the bill. There is an impossibility to track a phone in another state.

Mr. Frey:
The territorial jurisdiction issues that have been raised require further research. There is a possibility for cooperating law enforcement in another jurisdiction to seek a court order or obtain a warrant in the jurisdiction of the carrier to overcome those jurisdictional issues. I will need to verify this.

Senator Ford:
Assuming that what we have heard from law enforcement is accurate, it sounds like there is a jurisdictional issue. If so, we cannot use the term "warrant." We would have to use the term "order" in the bill. Which means the bill does not address anything that requires warrants, including tracking devices. That discussion becomes moot for the purposes of this bill.

Assemblywoman Diaz:
Testimony today indicated a need for a warrant in certain instances to submit to telecommunications providers. I do not believe the use of the term "warrant" is

inapplicable. We need to continue to have dialogue to hammer out these issues. The decision will be Assemblywoman Pierce's.

Senator Ford:
In this case, words matter. We cannot use the term "warrant" if we need to use the term "order."

Ms. Spinazola:
If we change the term, we need to articulate the standard. Confusion might arise about which probable cause standard would apply. I need to research this matter.

Senator Jones:
We do not define probable cause in NRS, so why would we do it in this bill?

Ms. Spinazola:
We need to define probable cause because the current probable cause jurisprudence applies to real-time information. Historical information is private, and it deserves a definition. Historical information is a vast amount of information about one's personal life that cannot be obtained from real-time information.

Senator Jones:
Does the proposed federal legislation define probable cause in the way you are proposing?

Ms. Spinazola:
I believe the proposed federal legislation is similar. This is being discussed in the Geolocational Privacy and Surveillance Act, but nothing has been agreed to yet.

Senator Brower:
What is the difference between an order and a warrant?

Mr. Frey:
An order and a warrant are functionally the same. They are dissimilar in the operative legal standard. For purposes of pen register, the legal standard is something less than probable cause. For warrants, probable cause is required before a warrant is issued. For purposes of consistency, a warrant requires

probable cause. Those are complementary provisions. This is the basis for including a warrant in the articulation of probable cause in Exhibit D.

Senator Hutchison:
There seems to be some skepticism about including the definition of probable cause in the bill. This definition has varied over the years and has been dependent upon the evolution of technology. I believe defining probable cause is a problematic concept. For decades, courts, law enforcement agencies and public defenders have been the ultimate arbitrators of probable cause. There is a body of jurisprudence that is difficult for me to sidestep. I do not believe that because technology has changed, we now must define probable cause.

Assemblywoman Diaz:
On behalf of Assemblywoman Pierce, I thank the Committee for hearing A.B. 313. It is my hope we can come back to the Committee with improved language.

Senator Jones:
I just looked at the Geolocational Privacy and Surveillance Act and Senate Resolution 639 of the 113th Congress. Neither of these proposals have included the definition of probable cause.

Ms. Spinazola:
They do not include the definition of probable cause yet. However, Congress is working on drafts to include the definition.

Senator Kihuen:
The hearing on A.B. 313 is closed. The hearing on A.B. 358 is open.

ASSEMBLY BILL 358 (2nd Reprint): Enacts the Uniform Deployed Parents Custody and Visitation Act. (BDR 11-171)

Assemblyman James Ohrenschall (Assembly District No. 12):
This Act, which was promulgated by the Uniform Law Commission (ULC) in 2012, has the potential to help our deployed service members. During the 2011 Session, A.B. No. 313 of the 76th Session was passed. That bill provided more rights and protections for deployed service members to maintain the relationships they had with their children. Assembly Bill 358 builds upon and complements the work done in the 76th Session.

Often when a service member is deployed, the spouse or partner has custody of the child and can go to a different state. We have the interplay of differing state laws. That is one reason the Commissioners felt the Uniform Act was wise. This Act has been enacted in North Carolina and North Dakota. This year, the Act has been introduced in two other jurisdictions in addition to Nevada. It is my hope this will become uniform across the Country.

There are two parts to the Act: first, a definitions section; second, provisions for an agreement between the deployed parent and the other parent as it pertains to the child. When parents cannot reach an agreement, provisions allowing courts to attempt to expedite the process apply.

Section 23 states that the court issuing the order must have jurisdiction. If the parent is deployed, his or her residence does not change. Section 26 states that courts cannot hold a service member's past deployment against him or her in custody proceedings. Section 27 pertains to temporary custody agreements. Section 28 mandates that the agreement is temporary, not final. Section 29 pertains to modifications of the agreement. Section 34 allows a party to appear at a proceeding by electronic means. The latter part of the bill pertains to the judicial process. In addition, the bill addresses the process for the deployed parent who wants to provide custody with a nonfamily adult with whom the child has a close relationship. When no family member is available to care for the child, a nonfamily adult may be ideal as a custodian until the deployed member returns home.

Terry Care:
Assemblywoman Irene Bustamante Adams is a cosponsor of this bill. I approached her months ago, and we spoke about this bill. This Act is more comprehensive than A.B. No. 313 of the 76th Session.

There is a need for uniformity. This act was promulgated and approved in Nashville, Tennessee, in July 2012. There have been two enactments to date with introductions in three states this year.

There is no fiscal note or opposition to this bill.

Senator Hutchison:
Section 26 is interesting. Under statute, it is my understanding that the best interest of the child is the overarching concern in child custody issues.

I understand the need to weigh the interests of the deployed parent. How will section 26 work?

Mr. Care:
The ULC stated, "This section prohibits the court from using a parent's past deployment or possible future deployment itself as a negative factor in determining the best interests of the child."

Assemblyman Ohrenschall:
While the language in NRS 125C.150 is not identical to the language the Commissioners proposed, it parallels the language in section 26.

Senator Hutchison:
What does the language mean?

Kim Surratt (Nevada Justice Association):
The fact that a child would be away from a parent for a significant amount of time could have potentially destroyed joint physical custody altogether. It could have caused the deployed parent to lose custody. The bill language states that the fact of deployment should not change the custody, but it may be considered based on the best interest of the child. Previously, attorneys could motion the court and use the fact of deployment for custody. This would destroy the deployed parent's custody. Now, attorneys differentiate between the fact of deployment versus the impact on the child. If a parent is deployed for an entire year, that will have an impact on the child. However, it should not impact whether the person is a fit parent to have joint or primary custody. There is a difference between the fact of deployment and the fact that a parent is unable to be around the child because of deployment. There is no reason for deployment to change custody because the impact on the best interest of the child is not there.

Senator Hutchison:
I understand what you are saying, but I do not read that in the bill. Section 26 states a court cannot consider a parent's deployment or possible future deployment in itself in determining the best interest of the child. However, it also states the court may consider any significant impact the parent's past or possible future deployment may have on the best interest of the child. Section 26 is contradictory.

Katherine Provost:
In the last Session, NRS 125C.150 was passed.

Senator Hutchison:
Does NRS 125C.150 contain the same language as section 26?

Ms. Provost:
The language in NRS 125C.150 is different from the language in A.B. 358. Section 26 prevents a nondeploying parent from coming into court and requesting to have custody changed because the spouse is being deployed. In the past, the judge would be allowed, based on that fact alone, to find that fact to be the controlling factor in what is in the best interest of the child and change custody as requested by the parent. This bill does not allow the court to use that fact as a basis. However, because an analysis exists of what is in the best interest of the child, the court can look at the effects of the deployment on the child. By removing the argument that there is a fact of a deployment involved and moving it to a standard of the impact on the child, this is more helpful for the courts. The mere argument that one of the parents is deployed is removed from the custody decision. The argument should be whether there is an impact on the child based on one deployment or multiple deployments.

Senator Hutchison:
Are these the issues you face in the family law arena?

Ms. Surratt:
Yes. We are comfortable with the language in the bill.

Senator Brower:
Is this is a rebuttable presumption rather than a per se rule?

Ms. Surratt:
Yes. The courts will look at both deployment status and the impact on the child.

I worked on A.B. No. 313 of the 76th Session, which adopted many of these provisions into law. Assembly Bill 358 replaces everything we did last Session with agreement from all the interested parties. We need the provisions in A.B. 358.

Senator Hammond:
We have not had statutes like this in past deployments. Are more soldiers being deployed who have gone through divorces?

Ms. Surratt:
I have seen a significant trend upward in military clientele. I have seen many contested custody actions. Judges have been restricted because we have not had a bill like this. Our laws have not developed with long or multideployments in mind. Our laws have been contemplated for people at home who may not be participating in the lives of their children. Absentee parenting is contemplated in our laws as unfit parenting. The deployment element should not be considered unfit parenting.

Ms. Provost:
There is an increase in custody issues and divorces in military families in the State. The number of deployments has not only been high, but has increased. The evolution of this Act and A.B. No. 313 of the 76th Session results from more families facing custodial issues. Assembly Bill 358 allows a methodology for service members to maintain their parental obligations. In addition, this bill allows the service member to delegate parental responsibilities so that the child's life is not disturbed.

Mr. Care:
We did not have an all-volunteer military in the past. The military now relies on members of the National Guard and the Reserves.

Ms. Surratt:
We hope that family law develops so we have only one set of custody provisions to apply to everyone. We realized that we did not have the procedural changes we needed for the court to handle these matters. For example, the electronic appearance of military members was not allowed because divorce provisions required attendance. Being in front of the court has always been an ordeal. This bill requires that the court make electronic appearance available to the service member. With electronic appearance, we do not have to follow the standard custody provisions and timelines.

Kay Kindred (Ralph Denton Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; Uniform Law Commissioner):
I am a member of the ULC drafting committee. There has been an increase in deployments. There has been a need for military families to have an expedited process for custody. This bill is warranted given the frequency of military deployments.

Senator Hutchison:
As a member of the ULC drafting committee, do you agree with the testimony you have heard regarding section 26 of the bill?

Ms. Kindred:
Yes. The intention is that the deployment itself not be a dispositive or controlling factor, but that it be taken into consideration in terms of the impact on the child.

Senator Kihuen:
The hearing on A.B. 358 is closed.

Chair Segerblom:
The meeting is adjourned at 10:41 a.m.

RESPECTFULLY SUBMITTED:

_____
Sara Weaver,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	2		Attendance Roster
A.B. 313	C	2	Assemblywoman Peggy Pierce	Written Statement
A.B. 313	D	2	American Civil Liberties Union	Proposed Amendment