

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP3064

Cir. Ct. No. 1996CV1156

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF TOD A. BERGEMANN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TOD A. BERGEMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Tod Bergemann appeals an order denying his motion for postcommitment relief. He argues that WIS. STAT. ch. 980 violates due

process because it does not require that the person sought to be committed be given a document that would provide adequate notice to the person of the allegations against them. We affirm.

¶2 At a hearing on November 18, 1996, Bergemann moved to dismiss the WIS. STAT. ch. 980 petition, challenging the court’s jurisdiction on the grounds that he had not been served with the petition. After Bergemann testified, the court continued the hearing to allow the State to call a rebuttal witness. When the hearing was continued on December 13, 1996, Bergemann withdrew his motion challenging service. Because Bergemann withdrew the motion, the circuit court did not hear rebuttal testimony on the issue of whether Bergemann had been served and did not rule on the service issue.

¶3 We conclude that Bergemann is estopped from challenging the statute based on the statute’s service requirements.¹ Judicial estoppel precludes a party from asserting inconsistent positions in legal proceedings. *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54. This equitable doctrine is intended “‘to protect against a litigant’ playing ‘fast and loose with the courts’ by asserting inconsistent positions.” *Id.* A party asserting judicial estoppel must show: (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position. *Id.* (citation omitted).

¹ Were we to address this issue, Bergemann’s argument on the topic has arguable merit. It is not apparent to us why a person who is a subject of a WIS. STAT. ch. 980 commitment would not be accorded the same rights as a criminal defendant to receive notice of the charges against him. However, because we conclude Bergemann is estopped from challenging the statute on this basis, we do not discuss the issue.

¶4 Bergemann contends that the statute is unconstitutional because it does not require adequate service on the person against whom the petition is brought. Bergemann's position is inconsistent with the position he took during the 1996 proceedings when he decided to withdraw his challenge to service. The facts present here are the same as the facts that existed in 1996, when Bergemann affirmatively requested that the circuit court not consider his motion challenging service. Under *Mrozek*, Bergemann is judicially estopped from challenging the constitutionality of the service requirements in the statute.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

