No. 394514

SUPREME COURT OF THE STATE OF WASHINGTON

DEVIN CHRISTOPHER KIENOW, Appellant,

v.

TERESA A DITTENTHOLER KIENOW, Respondent.

PETITION FOR DISCRETIONARY REVIEW

Devin Kienow
Petitioner

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A. IDENTITY OF PETITIONER

Petitioner Devin Kienow ("Kienow") asks this Court to accept review of *In re: Kienow.* Kienow was the petitioner at the trial court, and the appellant at the court of appeals.

B. COURT OF APPEALS DECISION

Kienow asks for review of service on a show cause order. In the alternative, Kienow asks for review of the frivolous finding and the consequent award of attorney's fees.

The court of appeals decision was filed March 11, 2025. The order on motion for reconsideration was filed on April 22, 2025.

C. ISSUES PRESENTED FOR REVIEW

1. **A show cause order requires the nonmoving party to appear at a specific date and time. The superior court ordered a show cause order to be served only by email. Is email service sufficient for a show**

cause order?

2. **The nonmoving party is entitled to present oral argument at the show cause hearing. The superior court barred Kienow's oral argument on two material issues. Should Kienow's oral argument have been barred?**

In the alternative

3. **Raising at least one debatable issue bars a frivolous finding, and any doubt lands in favor of the appellant. Kienow raised at least one debatable issue. Should the finding of frivolousness and the corresponding award of attorney's fees should be reversed.**

D. STATEMENT OF THE CASE

Dittentholer went to the ex parte superior court. Kienow was not present. The ex parte superior court granted the order to show cause. CP 45 -46. And that order to show cause contained *additional* orders, to include the deprivation of property: it ordered the phone and passport to Dittentholer. CP 46, § 3.2, 3.3.

The superior court also granted the order allowing service solely by email. CP 43 – 44. The superior court did not authorize any other means of alternative service. *Id.*

At the September 30th, 2022 show cause hearing, Kienow argued lack of personal service. CP 78 – 85; CP 144, ll. 13 – 20; RP, Sept. 30, 2022, p. 10, ll. 21 – 25.

The superior court then barred oral argument for Kienow regarding the phone and tuition miscalculation. It erroneously awarded Dittentholer $9,362.48. CP 87. The superior court affirmed the ex parte order that Kienow must surrender the phone and a passport. CP 86.

E. ARGUMENT

The court of appeals is a highly respected and exceptionally busy court, tasked with making complex decisions with care and precision. It disagreed with

Kienow's arguments and also concluded that the appeal was frivolous.

The issues presented in this petition meet the standard for governing acceptance of review by this Court. This Court should hear this appeal for discretionary review.

1. Service of a show cause order by email is not sufficient.

Kienow objected to service of the September 30, 2022 show cause order. Although the court of appeals concluded that he did not object to personal service, its ruling relied on a prior show cause order—not the September 30, 2022 order at issue here. In fact, Kienow specifically challenged the sufficiency of service for the September 30, 2022 show cause order. Appellant's Br., pp. 11, 14, 39, 55. This Court reviews questions of service de

novo. *See Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155, 1159 (2014).

A. ***A show cause order is specific to its date and time.***

An order to show cause requires the nonmoving party to appear at a specific time and place. RCW 26.18.050(1). Each show cause order is therefore distinct and tied to its designated date and time. Once that date has passed, the petitioning party must return to the ex parte court to request a new, separate show cause order. That new order must be personally served. RCW 26.18.050(2) provides that "service of the order to show cause shall be by personal service, or in the manner provided in the civil rules of superior court or applicable statute."

Here, Dittentholer missed two court dates because she did not allow sufficient time for service. Appellant's Br., p. 21. In effect, the prior show cause orders expired.

Consequently, she returned to the ex parte court and sought a new, separate show cause order for September 30, 2022. This order not only set a new date and time but also included novel orders that were not part of the previous orders. Appellant's Br., p. 9; CP 46(3)(2-3) (ordering the iPhone and passport to be returned to Ms. Dittentholer). Thus, the September 30, 2022 show cause order was not a mere continuation but a distinct and separate order.

(1) *Jurisdiction as Authority.*

Additionally, the court of appeals correctly recognized that the superior court has continuing jurisdiction over Mr. Kienow with respect to matters like the parenting plan. But even where jurisdiction is established, the court must have proper service before it can validly enter a

specific order. Appellant's Br., p. 13. A failure of proper service deprives the court of authority to issue that particular order.

Indeed, a court's general jurisdiction is distinct from its jurisdiction—or authority—to enter a specific order. *See In re Marriage of Furrow,* 115 Wn. App. 661, 668, 63 P.3d 821, 825 (2003) (holding that jurisdiction may exist generally, but authority to enter a specific order can differ).

B. ***Alternative service by email service is insufficient.***

(1) *The basis for alternative service was arguably weak.*

The court of appeals upheld Dittentholer's basis for alternative service primarily based on the declaration of her process server, appearing to accept the server's opinions at face value without scrutiny.

The court of appeals has a difficult job of deciphering the truth. But Kienow's argument that he did

not evade service is more compelling than Dittentholer's claim that he did. He parked in the adjacent lot due to ongoing construction, a detail the school has confirmed via email. Appellant's Br., p 20; CP 18 – 19. Further, he was not even aware he was being tailed by a process server. Appellant's Br., p 20.

Dittentholer's process server claimed that Kienow's parking—even after conceding that Kienow parked in the 4th street school parking lot—amounted to evasion, asserting that Kienow "attempted to avoid" service by parking there. Appellant's Br., p. 18 - 19.

Since it is implausible that someone attempting to evade service will simply move their vehicle a few feet to the next lot, given the close proximity of the two lots, CP

18 – 19, it is far more likely that a person trying to avoid service will not park in any of the school parking lots.

Therefore, weighing the facts and evidence—including the school's email confirmation versus the opposing server's opinion—it is more likely that Kienow did not attempt to evade service by parking in the authorized, adjacent school parking lot. In other words, the facts do not support the finding of evasion.

Also, the court of appeals referenced the commissioner's later finding regarding an alleged service evasion. But the commissioner was merely repeating the same underlying allegation—not addressing a new one. As the incident in question remains unchanged, there is still only a single allegation of evasion.

Because there was no evasion, and the reason for the failed service was Dittentholer's poor planning, Appellant's Br., p. 21, there was no basis for alternative service.

(2) *Email service was insufficient*

The superior court granted an order to serve the September 30, 2022 show cause order by email. The court of appeals affirmed.

Even if alternative service was proper, alternative service by email is insufficient. Although the superior court ordered email service, it was outside of its authority to do so. RCW 26.18.050(2) ("Service of the order to show cause shall be by personal service, or in the manner provided in the civil rules of superior court or applicable statute."); Appellant's Br., pp. 25 – 26; 29 (citing to *Jepsen*,

explaining that an e-mail cannot constitute substantial compliance with personal service on a party where there is no express waiver of personal service and no agreement for electronic service). Alternative service, therefore, can only be accomplished through publication or U.S. mail after proper motion. RCW 4.28.100; Appellant's Br., p. 27.

Furthermore, accepting service by email must be the result of affirmative action by the parties. In other words, if the parties intend to permit service by email, they must explicitly agree to it. Appellant's Br., p. 25. The very existence of the option to enter into an email service agreement will be rendered meaningless if email service is permitted without such an agreement.

Here, Dittentholer did not personally serve, publish, or send via U.S. mail, the show cause order for September 30, 2022. Appellant's Br., p. 30. Dittentholer served the subject show cause order *only* by email. Appellant's Br., p. 33; CP 152, l. 21. But neither party accepted service by email. Appellant's Br. 24 – 26. If either party intended to "carry out" that they agreed to email service, the parties would have entered into an email service agreement.

By ordering service by email without the agreement of either party, the court effectively imposed an email service agreement where none existed. A court should neither create nor infer an agreement that the parties themselves did not make. Accordingly, the superior court

should have directed that the September 30, 2022, order to show cause be served by publication or by U.S. mail.

2. The nonmoving party is entitled to present oral argument at the show cause hearing.

Even if the court deems service sufficient, the nonmoving party must still be afforded the opportunity to orally contest the show cause order. Without that opportunity, the hearing itself serves no meaningful purpose.

Indeed, the purpose of providing notice of a hearing is to ensure that the nonmoving party has the opportunity to appear and present an oral defense. RCW 26.18.050. ("the obligor may appear to show cause why the relief requested should not be granted."). Even the local rule provides the nonmoving party with oral argument. *See* Yakima Cty. Super. Ct. Loc. Fam. Law R. 1(c) (requiring

"the other party to appear and show cause why certain relief should not be granted.").

An analogous show cause statute directs that a nonmoving party can respond "orally or in writing." *Leda v. Whisnand,* 150 Wn. App. 69, 79, 207 P.3d 468, 474 (2009) (citing to Landlord-Tenant Act's RCW 59.18.380).

Here, Kienow was prevented from orally defending at the show cause hearing on two material issues:

A. ***Determination of Physical Custody of the Phone.***

(1) At the ex parte hearing—held without Kienow present—the superior court ordered the phone to be turned over to Dittentholer without hearing any argument from Kienow

(2) Then, at the subsequent hearing on September 30, 2022, the superior court again did not hear from

Kienow. This time, however, it went further by denying the nonmoving party any opportunity to argue for physical custody of the phone.

After brief preliminary argument on the issue of service—and without permitting any defense from Kienow—the superior court issued two rulings. Appellant's Br., p. 41 ("The phone and passport are pretty easy. You are to give them back."). No oral argument had been presented.

The court heard only Dittentholer's arguments. As a result, Kienow was not given the opportunity to defend against the show cause order. Despite this, the superior court proceeded to rule—ordering the phone to Dittentholer—without ever allowing Kienow to present any oral argument in his defense.

(i) *Additional.*

Although the court of appeals stated that Kienow found the phone in a bag, that is incorrect. In fact, the phone was discovered in the hand of his minor child, actively in use, in the child's room at Kienow's residence during his residential time.

Kienow does not believe the court of appeals intended to suggest that he lacked the right to supervise his children. On the contrary, he was fully within his parental rights—and indeed, his parental responsibilities—when he investigated his child's unauthorized possession and use of the phone. That responsibility carries legal weight. *See Zellmer v. Zellmer*, 164 Wn.2d 147, 161, 188 P.3d 497, 503 (2008) (affirming

that parents may face legal consequences for "willful or wanton" failure to properly supervise their children).

B. ***Determination of the correct tuition amount.***

In addition to previously being denied any opportunity to argue, this time the superior court went further by expressly prohibiting Kienow from offering any oral response regarding the tuition issue. Appellant's Br., p. 35. In effect, the court heard argument from one party while refusing to hear from the other.

Here, the superior court miscalculated the tuition. The superior court erroneously awarded almost $10,000 based on the upcoming school year. Appellant's Br., p. 9. But it should have only awarded Kienow's proportional share of one year of tuition: roughly $4,000. Appellant's Br, p. 36.

Subsequently, the court further miscalculated the award, resulting in a judgment exceeding $25,000. CP 211 §8. As a result, what began as a $4,000 back tuition claim was erroneously transformed into a judgment of over $25,000. Although Kienow errored and did not file an amended appeal for the $25,000 order, CP 211 §8, this Court can correct the initial $10,000 error. Appellant's Br., p. 9.

The court of appeals did not address the miscalculation issues in its opinion. Nonetheless, raising these substantial miscalculation concerns is far from frivolous.

In the Alternative

3. The finding of frivolousness and the corresponding award of attorney's fees should be reversed.

The court of appeals awarded attorney's fees on the

grounds that the appeal was frivolous. But the appeal was not frivolous. The mere fact that a court ultimately rejects an argument does not render that argument frivolous. *See Brett v. Martin*, 9 Wn. App. 2d 303, 316, 445 P.3d 568, 574 (2019). Far from it.

A finding of frivolousness sets a high threshold. An appeal is considered frivolous only when no debatable issues exist—meaning that the presence of even a single arguable issue defeats a claim of frivolity. Moreover, any doubt as to whether an issue is frivolous must be resolved in the appellant's favor. *See Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1, 5 (2009). Thus, a determination of frivolousness is appropriate only after clearing an exceptionally high bar.

Here, Kienow brought debatable issues, and if there are any doubts whether any point was debatable, Kienow should be given the benefit of the doubt that they were debatable.

The following are all debatable issues that Kienow brought:

A. *The sufficiency of alternative service by email is a matter of legitimate debate.*

No law authorizes email as a sufficient alternative method of service—particularly for a show cause order. The relevant statute explicitly permits only publication and U.S. mail as alternative means. Appellant's Br., p. 27; RCW 4.28.100; CR 4(d)(3), (4). Moreover, the show cause order itself, signed by the judge, expressly requires personal service, stating: "You must have this order, and

the paperwork you filed…*personally served* on the other party….” CP 46, ll. 20–21 (emphasis added).

Thus, the argument that a show cause order mandates personal service is at least as compelling as any argument in favor of email service. Likewise, the contention that pleadings cannot be served via email absent a prior email service agreement is similarly well-founded. In either case, whether email constitutes sufficient alternative service remains a genuinely debatable issue.

Because both alternative service by email and regular service by email present genuinely debatable issues, Kienow’s argument cannot be deemed so lacking in merit as to be frivolous.

B. ***Whether the tuition was properly calculated remains a matter of legitimate debate.***

The superior court miscalculated the tuition award. It erroneously doubled the amount owed. The court of appeals did not address the issue. Kienow seeking a review on the miscalculation of an award is a debatable issue.

C. *Whether a nonmoving party may be barred from presenting oral argument at a show cause hearing is a matter of legitimate legal debate.*

A nonmoving party must be permitted to orally respond at a show cause hearing. In this case, Kienow was denied the opportunity to present oral argument on two material issues.

Therefore, because a finding of frivolity cannot be made where at least one debatable issue exists—and any doubts must be resolved in favor of the appellant—and since at least one such issue has been raised, this Court

should reverse the frivolousness determination and the award of attorney's fees.

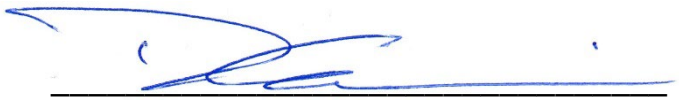
F. CONCLUSION

Service was insufficient. Because service by email is not permitted absent an agreement between the parties, the superior court lacked the authority to authorize email service. Since the September 30, 2022 show cause order was served solely by email, this Court should remand the matter to the superior court for further proceedings consistent with proper service requirements.

Alternatively, because a finding of frivolousness requires that no debatable issues be present—and at least one such issue was raised—this Court should reverse the frivolousness determination and the resulting award of attorney's fees.

This document contains 2,860 words, excluding the parts of the document exempted from the word count in RAP 18.17.

Respectfully submitted, this 22nd day of May, 2025.



Devin C. Kienow
Pro se petitioner

G. APPENDIX

(i) Decision; and

(ii) Decision on Reconsideration.

Tristen L. Worthen
Clerk/Administrator

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March 11, 2025

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CASE # 394514
In re: Devin C. Kienow v. Teresa A. Dittentholer Kienow
YAKIMA COUNTY SUPERIOR COURT No. 1830071139

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email:** Hon. Shane Silverthorn (J. Gibson's case)

FILED
MARCH 11, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

In the Matter of the Marriage of DEVIN CHRISTOPHER KIENOW, Appellant and TERESA A. DITTENTHOLER KIENOW, Respondent.	)	No. 39451-4-III UNPUBLISHED OPINION

STAAB, J. — This case concerns a post-dissolution dispute between Devin Kienow and Teresa Dittentholer[1] involving two primary issues: Kienow's alleged failure to pay his court-ordered share of their children's private school educational expenses and his retention of Dittentholer's phone, which he believes contains evidence relevant to the children's custody.

The trial court found Kienow in contempt for failing to pay the educational expenses and ordered him to return the phone. Kienow appeals this order, and the order denying revision, raising four main arguments: (1) the trial court lacked jurisdiction or

[1] The final dissolution order changed the respondent's name from Teresa Dittentholer Kienow to Teresa A. Dittentholer.

authority to hear the contempt motion, (2) the court erred by failing to preserve potential criminal evidence on Dittentholer's phone, (3) Dittentholer abused the ex parte process, and (4) Dittentholer should be sanctioned for bad faith litigation.

Dittentholer argues that the trial court properly exercised its jurisdiction, reasonably found Kienow in contempt, and correctly denied his motion to view the contents of the phone. Dittentholer also opposes Kienow's request for sanctions, contending his appeal is frivolous and requesting attorney fees incurred in responding.

We affirm and grant Dittentholer's request for reasonable attorney fees.

BACKGROUND

Devin Kienow and Teresa Dittentholer were married and have two children. Their dissolution was finalized on June 15, 2021.

As part of the dissolution, Kienow and Dittentholer were ordered to pay a proportionate share of the children's educational expenses. Kienow has not made any payments toward this expense since March 2021, which were applied to the 2020-21 school year.

In May 2022, Dittentholer allowed her son to use her cell phone, which he accidentally brought to Kienow's home without her permission. While searching his son's backpack, Kienow found the phone and confiscated it.

When Dittentholer requested the phone's return, Kienow refused. Instead, Kienow, who was still represented by an attorney at the time, emailed a "Letter to

Preserve Evidence" to Dittentholer's attorney, claiming the phone contained evidence that needed to be preserved. Clerk's Papers (CP) at 186-89. After an exchange of emails, Kienow emailed Dittentholer's attorney directly and indicated that he was now representing himself and could be reached at a certain email address.

On August 17, Dittentholer filed a motion for contempt, seeking enforcement of Kienow's obligation to pay his share of the children's educational expenses and the return of her phone and the children's passports. She obtained an order to show cause, setting a hearing for September 7, 2022.[2]

Dittentholer served Kienow using several methods. Someone from Dittentholer's attorney's office attempted to serve Kienow with the motion and order sometime before August 23, leaving copies at his front door. Copies were also mailed to Kienow on August 31. Dittentholer also hired a process server to personally serve Kienow with the contempt hearing documents. The process server first tried, unsuccessfully, to serve Kienow at his home on August 27, noting that it appeared "abandoned." The process server commented that there were security cameras by the front door and facing the driveway, and the court documents were still lying on the doorstep. The process server spoke to a neighbor the next day, who confirmed that Kienow still lived at the residence.

[2] A copy of this order is not included in the record.

On August 30, the process server pulled into the children's school parking lot behind Kienow, but Kienow drove away quickly in what the process server characterized as an attempt to avoid being served. The process server walked to the other school parking lot where Kienow had parked and personally served him with the order to show cause, the motion for contempt, and Dittentholer's declaration.

On September 1, Kienow filed a pro se objection to the show cause hearing with the court. He acknowledged being personally served, denied trying to evade service, and moved the court to strike the hearing because he was not served at least 14 days before the hearing.

In response to Kienow's objection to the timing of the show cause hearing, Dittentholer obtained an amended order to show cause, moving the hearing to September 15. Dittentholer mailed the amended show cause order to Kienow on September 1, using the address provided by Kienow.

On September 12, Kienow filed another pro se objection, asking the court to strike the September 15 hearing, arguing that the court lacked personal jurisdiction because he was not personally served with the amended order to show cause. Alternatively, he argued that he still had not received 14-days notice of the new hearing date.

On September 15, Dittentholer sought and obtained an ex parte order allowing her to serve future documents on Kienow by email, claiming service by email would be as effective as service by mail and also alleging that Kienow had been evading service. The

court found that Kienow was evading service, authorized email service, and renoted the show cause hearing for September 30. The court also ordered Kienow to immediately return the phone and Dittentholer's passport. Dittentholer also requested that the court impose attorney fees against Kienow for his intransigence.

That same day, Kienow filed an objection to the order authorizing service by email. He continued to argue that the new order to show cause must be personally served and asked for sanctions, alleging Dittentholer's motion to serve by email was made in bad faith.

Kienow also filed two motions. The first was a "Motion To Vacate" the order authorizing email service, arguing that Dittentholer should be sanctioned for abusing the court process by obtaining the order to show cause in ex parte without there being an emergent need for it. The second was a "Motion for Order of Protection of Evidence," requesting the court order Dittentholer to protect the phone's data from being destroyed and allow Kienow to view the phone's contents. In a sealed declaration, he alleged that the phone contained inappropriate content.

On September 21, Dittentholer filed a second contempt motion, asserting that Kienow had failed to immediately return her phone and passports as directed by the court's September 15 order. Dittentholer also responded to Kienow's motions.

On September 27, Kienow filed a response to the motion for contempt, arguing that the court did not have authority to authorize email service and that the court lacked

personal jurisdiction over him because he had not been personally served. He acknowledged receipt of the emailed show cause order on September 15.

At the September 30 show cause hearing, the trial court concluded that it had personal jurisdiction over Kienow. The court then denied Kienow's motion to vacate, finding that Kienow had notice of the motion and hearing and that the court had authority to waive service rules and authorize alternative service on a case-by-case basis. The court noted its earlier finding that Kienow was evading service and emphasized that Kienow had filed pleadings related to the motion and hearing, demonstrating his knowledge of them.

Turning to the issue of Dittentholer's phone and passport, the court heard arguments from both parties. The court ordered Dittentholer not to delete anything from the phone but directed Kienow to return the phone and passport to Dittentholer's attorney.

The court then addressed the motion for contempt. Ultimately, the court found Kienow in contempt for failing to pay educational expenses, imposed a $100 civil penalty, and granted attorney fees and costs to Dittentholer, reserving the determination of the specific amount.

Kienow subsequently filed a motion for revision, arguing, in part, that the commissioner erred by denying his motion to vacate the order authorizing email service

and declining to sanction Dittentholer for her alleged misuse of the ex parte process. The trial court denied the motion.

Between the time he filed his motion for revision and the trial court's decision on that motion, Kienow also filed a motion to view the phone and requested sanctions against Dittentholer for "destroying evidence." CP at 197. The trial court eventually entered an order continuing Kienow's motion to view the phone's contents until January 18, 2023. The trial court also found Kienow to be intransigent for evading service, requiring Dittentholer to move for an order for alternative service, failing to immediately return the phone after the September 30 hearing, and requiring a new motion for contempt and hearing to be ordered again.

Kienow timely appealed the orders denying his motion to vacate, finding him in contempt, and denying his motion for revision.

Post Appeal Procedure

While this appeal was pending, the trial court held a hearing on January 18, 2023, regarding Kienow's motion to view the phone's contents.[3] Following the hearing, the court denied Kienow's motion, ordering the phone to be released to Dittentholer without restrictions. The court found that there was no pending action for a modification of the

[3] A copy of this hearing transcript is not in the record. We denied Kienow's motion to supplement the record with this transcript because he did not appeal the order that resulted from this hearing. *See* Letter Ruling, *In re Kienow*, No. 39451-4-III (Wash. Ct. App. Jan. 24, 2024).

parenting plan to support an order or to allow Kienow to view the phone's contents. Kienow did not appeal this order.

During the same hearing, Dittentholer's attorney filed a new motion for a contempt hearing against Kienow based, in part, on Kienow's continued failure to pay his portion of the children's educational expenses. The court granted the motion, set a hearing, and issued an order to show cause. Dittentholer's attorney personally served Kienow with the motion and order. Kienow filed a response arguing, in part, that he could not pay.

Following the second show cause hearing,[4] the trial court again found Kienow in contempt for failing to pay his portion of educational expenses and entered a judgment detailing the amounts owed and attorney fees. In support of its order, the court found that Kienow was able, but unwilling, to comply with the orders to pay. The court found that Kienow "failed to make any payment of the ordered amounts," failed "to demonstrate what steps he [took] to address his financial situation," and that, based on his financial declaration "he has not shown a lack of ability [to pay]." CP at 208. Kienow did not appeal this order.

[4] A copy of this hearing transcript is not in the record, presumably because the contempt order that resulted from this hearing was not appealed.

ANALYSIS

1. MOOTNESS

As a threshold issue, Dittentholer argues that Kienow's appeal is moot because Kienow did not appeal the February 2, 2023 contempt order, which stands independent of the first contempt order. We disagree and conclude that this issue is not moot.

We typically refrain from addressing moot issues. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). An issue is moot when we are unable to provide effective relief. *Id*.

Although the court entered a subsequent order finding Kienow in contempt for failing to pay the educational expenses, which Kienow is not appealing, the first order of contempt included a $100 civil penalty and awarded Dittentholer her attorney fees. Were we to find in favor of Kienow, we could provide relief in the form of reversing the imposition of these financial consequences.

2. PERSONAL JURISDICTION

Kienow argues that the trial court erred in determining it had personal jurisdiction over him. He contends that personal service of all the motion documents was required each time Dittentholer rescheduled the hearing and the superior court abused its discretion in authorizing substitute service by email. He requests that we vacate the contempt orders as void due to lack of jurisdiction.

Contrary to Kienow's assertions, the trial court had personal jurisdiction over him. A trial court obtains in personam jurisdiction upon the initial service of process, and the court's jurisdiction continues through a trial on the merits and through supplemental proceedings such as a motion for contempt. *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 327, 331-32, 553 P.2d 442 (1976); *see also* RCW 26.18.040 (The trial court retains jurisdiction over child support enforcement proceedings until the obligor satisfies his support obligations). While RCW 26.18.050(2) requires an order to show cause to be personally served on the other party, RCW 26.18.050(5) explicitly states that jurisdiction is continuing as provided in RCW 26.18.040.

In this case, the trial court obtained personal jurisdiction over Kienow when he was served with the petition for divorce, and the court retained jurisdiction over Kienow to enforce the child support order under RCW 26.18.040(3). Because the court retained jurisdiction over Kienow, his arguments that the court's orders are void for lack of jurisdiction fail.[5]

3. FAILURE TO PERSONALLY SERVE

Beyond the jurisdiction argument, Kienow raises several technical arguments challenging the sufficiency of service upon him. In evaluating these claims, we keep in

[5] Given our conclusion that the trial court had personal jurisdiction over Kienow for the contempt motion, we need not address his additional jurisdictional arguments, including that his appearance at the show cause hearing did not establish jurisdiction and mere notice of the hearing was insufficient.

mind the preference to address cases on the merits. *See Tacoma Pierce County Small Bus. Incubator v. Jaguar Sec., Inc.*, 4 Wn. App. 2d 935, 943, 424 P.3d 1247 (2018). While service of process is required, the purpose of service is to fulfill the due process requirements of notice and an opportunity to be heard. *Spencer v. Franklin Hills Health-Spokane, LLC*, 3 Wn.3d 165, 170, 548 P.3d 193 (2024). As such, service statutes are "to be liberally construed . . . 'to effectuate [this] purpose . . . while adhering to its spirit and intent.'" *Id*. (quoting *Sheldon v. Fettig*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996)).

Kienow argues that personal service of the order to show cause and supporting document was required. We agree. RCW 26.18.050(2) mandates that the order to show cause be served personally or "in the manner provided in the civil rules of superior court or applicable statute." Here, Kienow acknowledged that he was personally served with the first order to show cause and supporting documents. He then filed an objection to the timing of the hearing with the court. Despite his claim to the contrary, his objection to the timing of the hearing is not the same as objecting to the manner of service. *See Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC*, 116 Wn. App. 117, 120-121, 64 P.3d 656 (2003). Kienow did not claim that the personal service upon him was defective.

Kienow's argument implies that RCW 26.18.050(2) requires personal service of any amended orders to show cause. We disagree. The initial order to show cause was the "process," and Kienow was personally served with this process. After being

personally served Kienow filed an objection with the court. His response qualified as his appearance in the matter. RCW 4.28.210. Once Kienow appeared in the action, opposing counsel could serve any subsequent documents by mail. CR 5(b)(2). Thus, it was appropriate for Dittentholer's attorney to mail Kienow notice of the first amended order to show cause renoting the hearing to September 15.

Kienow next contends that the superior court erred by allowing substitute service of process by email and disputes the finding that he was evading service. We note that the court was not authorizing email service in lieu of personal service. At the point in time when the court authorized email service, Kienow had already been personally served and had appeared in the action. The court authorized service by email in lieu of service by mail. Kienow fails to demonstrate that an order authorizing email service in lieu of mail service under CR 5(b) is an abuse of discretion.

Finally, Kienow argues that service by email was ineffective because the emailed documents he received did not include all of the documents submitted in support of the third order to show cause. Specifically, Kienow contends that the email did not include the motion for contempt or declaration in support of contempt. Kienow does not deny that he was personally served with these documents on August 30. Instead, he argues that a hyper-technical reading of the order to show cause statute required Dittentholer to re-serve all of the supporting documents on him even when these documents did not

change. In light of our preference to address cases on the merits and liberally construe the service statutes, we disagree.

Kienow's procedural arguments fail. He was personally served with the initial show cause order and filed his objections with the court, thereby appearing in the action. He acknowledged receiving notice of the hearing dates and supporting documents in his various objections, responses, and motions. Kienow also attended the hearing, demonstrating that he had sufficient notice of the hearing.

4. CONTEMPT FINDING

Kienow argues the trial court erred in finding him in contempt for claiming that his inability to pay does not constitute intentional disobedience of a court order. We review a finding of contempt for an abuse of discretion. *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999). We will uphold a finding of contempt on review if we find that the order is supported by a proper basis. *State v. Hobble*, 126 Wn.2d 283, 292, 892 P.2d 85 (1995).

A trial court is permitted to use a contempt action to enforce a child support obligation until the obligor satisfies all duties of support. RCW 26.18.050(5). If the obligor contends at the [show cause] hearing that he or she lacked the means to comply with the support or maintenance order, the obligor [must] establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order." RCW 26.18.050(4).

In this case, the trial court did not abuse its discretion in finding Kienow in contempt for "failing to pay his proportionate share of school costs." CP at 87. During the contempt hearing, Kienow's only argument was that he did not have the money to pay. He offered no evidence or argument to show that he exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself able to comply with the court's order to pay. Thus, the trial court's decision to find him in contempt for failure to pay his share of the children's educational expenses was supported by RCW 26.18.050 (4), (5) and was, therefore not an abuse of discretion.

Kienow's argument that his inability to pay does not rise to the level of intentional disobedience of a court order is also without merit. As discussed above, a court is permitted to find a party in contempt for failing to pay his child support obligations based on an inability to pay unless the party establishes that they exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering themselves able to comply with the court's order. RCW 26.18.050(4). Because Kienow failed to show such diligence, the contempt finding was not an abuse of discretion.

5. PROTECTIVE ORDER

Kienow argues the trial court should have kept the protective order for the phone in place and should not have ordered the phone be returned to Dittentholer. Dittentholer contends that we should decline review of this issue because Kienow failed to appeal the order denying his motion to view the phone's contents. We agree with Dittenholer.

A. Additional Facts

At the September 30, 2022 hearing, the court ordered Dittentholer not to delete anything from the phone, but also ordered Kienow to return the phone. The court's order allowed Kienow 45 days to request to view certain information on the phone. On November 14, 2022, Kienow moved the trial court for an order allowing him to view the phone's contents. Following a hearing on January 18, 2023,[6] the trial court denied Kienow's motion, reasoning that there was no pending petition for modification or adequate cause order to justify granting the motion. The court also ordered the phone, which had been held in a safe at Dittentholer's attorney's office, be released to Dittentholer.

B. Analysis

Dittentholer argues that we should dismiss this claim because Kienow did not appeal the order denying his motion and releasing the phone. We agree.

Kienow failed to amend his notice of appeal to include the order releasing the phone to Dittentholer. As such, this issue is not properly before this court for review.

[6] Kienow cites to the transcript from this hearing to support this argument. However, we specifically denied Kienow's motion to supplement the record with the transcript of this hearing. *See* Letter Ruling, *In re Kienow,* No. 39451-4-III (Wash. Ct. App. Jan. 24, 2024).

See RAP 5.3(a)(3) (The notice of appeal must designate the decision that the party wants the court to review). Accordingly, we decline review of this issue.

Moreover, this issue is essentially moot because we cannot provide effective relief. *Hunley*, 175 Wn.2d at 907. Kienow cites to no authority that would permit us to order Dittentholer to turn over the phone so that he could review its contents. Kienow acknowledges, in his brief, that he could find no authority on this issue.

Last, Kienow's argument that Dittentholer's failure to preserve evidence should give rise to the legal presumption that the evidence would be harmful to her case is without merit. Kienow argued that the alleged felony evidence he viewed on the phone would be relevant to a modification of the parenting plan. However, Kienow never filed any action to modify the parenting plan, as the trial court recognized in its order denying Kienow's motion to view the contents of the phone.

6. DITTENHOLER'S USE OF EX PARTE

Kienow argues Dittentholer abused the ex parte process and that the trial court should have rejected Dittentholer's request for an order requiring Kienow to return her phone. He contends that the motion was not an emergency and that ex parte proceedings should not be used to "adjudicate[ ] property." Br. of Appellant at 41-45. In response, Dittentholer asserts that the ex parte process was authorized by statute to initiate contempt proceedings and that the trial court addressed ownership of the phone during

the September 30 hearing, where Kienow was present and had an opportunity to argue. We agree with Dittentholer.

First, Kienow provides no legal authority to support his claim that ex parte proceedings are reserved solely for emergencies. Nevertheless, RCW 26.18.050(1) explicitly allows a party to use the ex parte process to obtain a show cause order, which is exactly what Dittentholer did here.

Second, contrary to Kienow's argument, the trial court did not improperly "adjudicate[ ] property" at the ex parte hearing. Rather, the court resolved the issue of phone ownership during the September 30 show cause hearing based on the parties' arguments and briefing. Kienow was present at the hearing, submitted briefing, and argued his position, meaning he was afforded due process.

Finally, this issue is moot because there is no relief that this court could grant Kienow. *See Hunley*, 175 Wn.2d at 907. Since Kienow failed to appeal the trial court's later order requiring him to return the phone to Dittentholer, we cannot disturb that ruling.

7. BAD FAITH LITIGATION CONDUCT

Kienow challenges the trial court's refusal to find that Dittentholer engaged in bad faith litigation conduct. He requests sanctions against Dittentholer for alleged bad faith conduct, seeking an award of appellate costs under RAP 18.1 and RCW 26.09.140.

Dittentholer argues that the trial court acted within its discretion in declining to sanction her and urges us to deny Kienow's request for attorney fees. We agree with Dittentholer.

A. Additional Facts

Kienow requested the trial court impose CR 11 sanctions against Dittentholer in his motion to vacate the order authorizing email service. He argued that Dittentholer should be sanctioned for abusing the court process by obtaining the show cause order in ex parte without there being an emergent need for it, for being "untruthful" about his evasion of service, and for Dittentholer's attorney's failure to know that email service was improper. During the hearing on the motion, Kienow reiterated these same arguments in support of his sanctions request. The trial court ultimately denied Kienow's motion to vacate the email service order but did not explicitly address his request for CR 11 sanctions.

B. The Trial Court's Decision to Deny Kienow's Motion for CR 11 Sanctions

Kienow assigns error to the trial court's failure to find that Dittentholer engaged in bad faith litigation conduct. We conclude that the trial court did not abuse its discretion when it denied his motion for CR 11 sanctions.

We review a trial court's ruling on a motion for CR 11 sanctions for an abuse of discretion. *Watness v. City of Seattle*, 11 Wn. App. 2d 722, 735, 457 P.3d 1177 (2019). "The trial court abuses its discretion where its conclusion was the result of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons."

Id. at 736. We can affirm a trial court's sanctions award on any basis supported by the evidence. *Id*.

The trial court's decision to not sanction Dittentholer was not manifestly unreasonable. As discussed above, it was not error for the trial court to conclude that it had jurisdiction over Kienow for the contempt proceedings. Moreover, Kienow fails to show that Dittentholer abused the ex parte process as the contempt statute specifically contemplates the use of ex parte. RCW 26.18.050(1). And, although not the subject of this appeal, the trial court later made explicit findings that Kienow was intransigent for his actions related to these contempt proceedings for causing Dittentholer to have to bring a motion for alternative service, for failing to return the phone, and for requiring a new contempt motion. Therefore, it was tenable for the trial court to deny Kienow's motion for CR 11 sanctions against Dittentholer.

Kienow argues that Dittentholer's requests for "past due" tuition before the school year started and for her passport amounted to sanctionable bad faith. However, Kienow failed to raise these issues in the trial court to allow the trial court to correct any potential errors or develop a record on them. Accordingly, we decline to review these arguments. RAP 2.5(a).

Kienow contends Dittentholer acted in bad faith by attempting to modify child support obligations without complying with the modification statutes. This argument fails. Dittentholer commenced *contempt proceedings* based on Kienow's failure to

comply with the child support order and pay his portion of the children's educational expenses. Contempt proceedings to enforce a child support obligation are different than a petition to modify a child support order. *Compare* RCW 26.09.175 *with* RCW 26.18.050.

C. Kienow's Request for Appellate Costs

Kienow requests that we sanction Dittentholer and her attorney by awarding him his appellate costs under RAP 18.1 and RCW 26.09.140.[7] For the same reasons we conclude that the trial court did not abuse its discretion in declining to sanction Dittentholer. We deny Kienow's request for his costs on appeal.

8. DITTENTHOLER'S REQUEST FOR ATTORNEY FEES ON APPEAL

Dittentholer requests we award her appellate attorney fees for having to respond to a frivolous appeal. We grant her request.

RAP 18.9(a) authorizes this court, on its own initiative or on motion of a party, to order a party or counsel "who files a frivolous appeal . . . to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "Appropriate sanctions may include . . . compensatory damages, [or] an award of attorney fees and costs [on appeal] to the opposing party." *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008).

[7] In dissolution proceedings, this court may, "in its discretion, order a party to pay for the cost to the other party of maintaining the appeal." RCW 26.09.140.

An appeal is considered frivolous if, after examining the entire record, we determine that it "presents no debatable issues upon which reasonable minds might differ" and is "so devoid of merit that there is no possibility of reversal." *Advocs. for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

Here, all of Kienow's arguments lack substantive merit. Given that his appeal raises no debatable issues and presents no possibility of reversal, we conclude that it is frivolous. Accordingly, we grant Dittentholer's request for appellate attorney fees under RAP 18.9(a).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

Tristen L. Worthen
Clerk/Administrator

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April 22, 2025

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CASE # 394514
In re: Devin C. Kienow v. Teresa A. Dittentholer Kienow
YAKIMA COUNTY SUPERIOR COURT No. 1830071139

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's March 11, 2025 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Enc.

FILED
APRIL 22, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of DEVIN CHRISTOPHER KIENOW, Appellant and TERESA A. DITTENTHOLER KIENOW, Respondent.	)	No. 39451-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 11, 2025 is hereby denied.

PANEL: Staab, Fearing, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

DEVIN KIENOW

May 22, 2025 - 4:50 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

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Appellate Court Case Title:	In re: Devin C. Kienow v. Teresa A. Dittentholer Kienow (394514)

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