

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000609-ME

BRIAN ENDERS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE DONNA DELAHANTY, JUDGE  
ACTION NO. 08-CI-500158

JULIA ENDERS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Brian Enders (Brian) appeals from the family court's order setting child support based on the Kentucky Child Support Guidelines (the Guidelines) and the court's order denying his motion to alter, amend, or vacate. On appeal, Brian argues that the family court abused its discretion in refusing to deviate from the Guidelines because the parties have nearly equal parenting time.

Furthermore, Brian argues that the family court erred when it took into consideration the parties' income in opting to follow the Guidelines. For the following reasons, we affirm.

## FACTS

The parties married on May 13, 2000. One child was born of the marriage. On January 15, 2008, Brian filed a petition for dissolution of the marriage. The parties ultimately reached an agreement through mediation regarding all matters except for the issues of child support and attorney's fees. Following receipt of briefs on those issues from the parties, the court entered an order requiring Brian to pay child support in the amount of \$600 per month and a portion of Julia Enders' (Julia) attorney's fees. Because the court's award of attorney's fees is not in dispute, our recitation of the remainder of the facts will focus only on the court's award of child support.

In its order setting child support, the court noted the following: Brian "parents the child forty-three percent (43%) of the time;" Brian pays health and dental insurance for the child in the amount of \$83.78 per month; the parties each pay half of the \$147.00 weekly child care expenses; Brian had income of \$4,615.00 per month; and Julia had income of \$2,750.00 per month, giving Brian \$1,865.00 more income per month than Julia. Because the court determined that there was a disparity in parenting time and income, it chose to follow the Guidelines.

Brian filed a motion to alter, amend, or vacate arguing, as he does here, that the court erred by following the Guidelines. The court denied Brian's motion and he filed this appeal.

### STANDARD OF REVIEW

The trial courts have been given broad discretion in considering what circumstances are relevant and what settings correspond in determining appropriate child support. *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). While the trial court's discretion is not limitless, we will only disturb its findings if it fails to follow the Guidelines or, when deviating from the Guidelines, the court inadequately explains why it did so. *Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 400-01 (Ky. App. 2000). With these standards in mind, we address Brian's arguments. Before doing so, we note that Brian treats the family court's alleged errors as separate issues in his brief. However, because they are intertwined, we will address them as one.

### ANALYSIS

Brian argues that the trial court should have deviated from the Guidelines because the parties have nearly equal parenting time and that the trial court inappropriately looked to the parties' incomes in determining to follow the Guidelines. Kentucky Revised Statute(s) (KRS) 403.211(2) provides that:

the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be

accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

Section 3(g) of KRS 403.211 sets forth a number of reasons that justify an award of child support that varies from the Guidelines. Nearly equal parenting time and the relative income of the parties are not listed factors. However, if the court specifically identifies a factor “of an extraordinary nature . . . which would make application of the guidelines inappropriate,” the court may deviate from the Guidelines. It is within the discretion of the court to determine if a factor of an extraordinary nature exists. KRS 403.211(4).

Brian argues that the nearly equal parenting time the parties share is a factor of an extraordinary nature that would have permitted the family court to deviate from the Guidelines. We agree. However, while the family court is free to make a finding that such a parenting schedule is an extraordinary factor, it is not required to do so.

In support of his argument, Brian cites primarily to two cases from this Court, *Brown v. Brown*, 952 S.W.2d 707 (Ky. App. 1997); and *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). However, contrary to what Brian argues, both *Brown* and *Plattner* are distinguishable and neither of those opinions mandates a deviation from the Guidelines in this case.

In *Brown*, the children resided with their mother approximately 40% of the time and with their father approximately 60% of the time. When a dispute arose regarding child support, the trial court ordered the mother to pay the father

\$660.90 per month. In doing so, the court deviated from the Guidelines by reducing the mother's total obligation by the percentage of time the children spent with her. On appeal, the mother did not argue that the trial court erred in deviating from the Guidelines. She argued that the trial court should have ordered the father to pay her child support because she had the children 40% of the time.

This Court found no error in the trial court's refusal to award the mother child support. In doing so, this Court noted that the children resided with their father a greater percentage of time than with their mother, thus creating greater ongoing financial obligations for their father. This Court held that the trial court could legitimately consider such "household maintenance expenses" in refusing to order the father to pay child support as a counterbalance for the time the mother cared for the children. In *Brown*, this Court did indicate that deviation from the Guidelines is acceptable in certain situations. However, this Court's ultimate holding in *Brown* is not related to the application of the Guidelines and, despite Brian's implication to the contrary, does not mandate deviation from the Guidelines. In fact, this Court, in affirming the trial court, relied to a great extent on the Browns' parenting schedule to support its opinion. The Enders' parenting schedule divides time with the child on a proportionate basis similar to the Browns'. Therefore, as with Mr. Brown, Julia's greater parenting time places a greater financial obligation on her and the family court was free to consider that when determining child support.

In *Plattner*, the parties entered into a shared parenting agreement post-dissolution. Based on that agreement, the father was ordered to pay \$1,103.63 in child support to the mother. Subsequently, the father moved the court for an order reducing his child support obligation. In doing so, the father noted that the mother's income had increased substantially and that the parties had nearly equal parenting time. The trial court found that the parties' incomes were nearly equal; however, it refused to deviate from the Guidelines in setting child support. On appeal, the father argued that he should have no child support obligation because the parties had nearly equal income and nearly equal parenting time.

This Court reversed the trial court, noting that:

[w]hile Kentucky's child support guidelines do not contemplate such a shared custody arrangement, they do reflect the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. They also provide a measure of flexibility that is particularly relevant in this case. Under the provisions of KRS 403.211(2) and (3), a trial court may deviate from the child support guidelines when it finds that their application would be unjust or inappropriate. The period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines.

*Id.* at 579.

However, this Court also noted that the amount of shared parenting time is not the only factor to be considered. The family court should also consider the relative incomes of the parents. Taking those factors into consideration, this

Court held that the family court should deviate from the Guidelines when it finds that the parents have “almost identical responsibility for the day-to-day expenses associated with [child] care,” and there “is no significant disparity between the parties’ annual income.” *Id.* at 580. As this Court noted, in such cases, “the expenses necessary to provide a home for the children (even when they are not in residence) are also incurred by each party in equal proportion.” *Id.* Therefore, neither party should be ordered to pay child support to the other.

Brian downplays the importance the parties’ incomes played in the opinion in *Plattner*. However, we disagree with Brian’s assertion that the parties’ incomes are “secondary to parenting time and the resultant sharing of expenses.” Parenting time and income are inexorably intertwined and the family court has the discretion to weigh those factors as it sees fit. In this case, the family court placed a greater emphasis on the parties’ disparate income, which it was within its discretion to do.

Finally, we note that Brian has cited to a number of cases that indicate a family court may deviate from the Guidelines and to one case that indicates that a family court should deviate from the Guidelines when the parents have equal parenting time and income. However, Brian has not pointed to any caselaw that mandates a deviation from the Guidelines when the parties have approximately equal parenting time but a significant disparity in income. As noted above, it was within the discretion of the family court to weigh the various factors when determining child support. Because the family court did so and gave reasonable

explanation for its determination, we cannot say that it abused its discretion.

Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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