

The gravamen of this appeal is child support. Nina Alice Kimble and Michael Wayne Kimble were married in 1985, divorced in 1992 and will be referred to as Wife and Husband, respectively. When they married, Wife had a son from a previous marriage and Husband a daughter. Husband adopted the son but Wife did not adopt the daughter.

The divorce decree incorporated the terms of a marital dissolution agreement which provided that Husband would pay child support of \$250 monthly for 24 months. It was further agreed that at the end of that period it would not be necessary for Wife to show a material change of circumstances upon petitioning for an increase in child support due to the fact that Husband had just begun a new business and his income was uncertain at that time.

Wife petitioned for an increase in child support and the matter was referred to a referee. Following a hearing, the referee ruled that the child support be increased to \$637 per month “which includes adjustment for self-emp. tax and fact of no visitation and \$37 for her cost of health insurance on child.” Wife was also awarded \$1,700 in attorney’s fees. The referee’s ruling was presented to the trial court which reached essentially the same result. Husband appeals to this Court where our scope of review is *de novo* of the record with a presumption that the trial court’s findings of fact are correct unless the preponderance of the evidence is otherwise. Rule 13(d) T.R.A.P.

Although the amount of monthly support awarded by the trial court coincided with that awarded by the referee, the trial court stated from the bench that an additional \$225 was awarded due to the fact that Husband had no visitation with his adopted son and, according to Husband’s testimony, had virtually no contact with the child whatsoever. Husband argues that this was error on the part of the trial court because Wife failed to present any evidence of the child’s expenses. Need and ability to pay are factors to be considered in determining child support. Our review of this matter is hampered somewhat by the fact that the record contains scant evidence of the expenses incurred by Wife as a result of her custody of Christopher. While it appeared that Husband was testifying from a statement of income and expenses before the referee, such a document does not appear in this record. Other than the testimony of Mr. Kimble, the evidence consists of his 1993 individual income tax return, a corporate return and two canceled checks.

He further argues that \$12,108 listed as depreciation on his federal income tax return should be deducted from his gross income. We find no merit in this contention as the guidelines provide that “[i]ncome from self-employment includes income from business operations and rental properties, etc., less reasonable expenses necessary to produce such income. Depreciation . . . should not be considered reasonable expenses.” Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(3).

Wife argues that the additional amount of \$225 per month for non-visitation is proper. She relies upon ch. 1240-2-4-.02(6) which provides for an upward deviation if the child is not staying overnight with the obligor for the average visitation period of every other weekend from Friday evening until Sunday morning, two weeks during the summer and two weeks during holiday periods throughout the year. She further contends that the trial court erred in considering the fact that Husband is the sole support of his minor daughter from a previous marriage because the child is not included in a decree of child support. She relies upon a portion of the guidelines which provide the children of the obligor who are not included in the decree of child support shall not be considered for the purposes of reducing the obligor’s net income or in calculating guideline amounts. *See* ch. 1240-2-4-.03(4). We do not believe that the intent of the guidelines was to cover a situation such as this, where a sole surviving parent has sole custody of a minor child, as there could not reasonably be expected to be a support order entered by a court in these circumstances. Without doubt he is obligated to support his minor daughter. The Child Support Guidelines apply as a rebuttable presumption in child support cases. T.C.A. § 36-5-101(e)(1). The guidelines are subject to deviation upward or downward when the assumptions on which they are based do not pertain to a particular situation. *Nash v. Mulle*, 846 S.W.2d 803, 805 (Tenn. 1993). Wife cites to this Court’s decision in *Tower v. Tower*, C.A. No. 02A01-9407-CV-00170 (Tenn. App. Nov. 3, 1995). However, the father in *Tower* contended he was voluntarily paying child support for children from a previous marriage. He did not purport to be the sole surviving parent.

While the trial court did state from the bench that \$225 per month was being added to the child support due to non-visitation, the record before us is not entirely clear as to the formula the court used in arriving at \$637. As noted in the referee’s ruling, \$37 represents the cost of health insurance on the child. There is evidence in the record that Mr. Kimble’s net profit for the year preceding the hearing in this matter was \$33,730. Applying the guidelines 21% for one child results

in \$589 per month. Considering that Husband exercises no visitation with Christopher and the fact that he is the sole support of Lydia, we do not find the evidence to preponderate against the result reached by the trial court and affirm the award of \$637 per month.

Husband next contends that the trial court erred in awarding Wife attorney's fees and costs. The trial court awarded attorney's fees and suit expenses of \$1,700 to be paid in 15 monthly installments. It is Husband's position that the Wife failed to present evidence of her inability to pay her attorney's fees. As this Court said in *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. App. 1992),

[T]rial courts may award attorney's fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case. The purpose of these awards is to protect the children's, not the custodial parent's, legal remedies.

Wife's attorney presented her affidavit of her charges and expenses totaling \$3,027. While Husband questions the reasonableness of the bill, he did not do so in the trial court and did not afford himself the opportunity to cross-examine Wife's attorney or present any evidence to the contrary. We find no error in the trial court's award of attorney's fees and affirm. We decline Wife's request to award her additional attorney's fees for the appeal.

The judgment of the trial court is affirmed and costs of this appeal are taxed to Michael Wayne Kimble for which execution may issue if necessary.

FARMER, J.

HIGHERS, J. (Concurs)

LILLARD, J. (Concurs)