

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-1048

OFFICE OF CHILD SUPPORT
ENFORCEMENT and LAURA
HUGHES SMITH

APPELLANTS

V.

MICHAEL BUTLER

APPELLEE

Opinion Delivered MARCH 30, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
NINTH DIVISION
[NO. PT-96-538]

HONORABLE MARY MCGOWAN,
JUDGE

REVERSED AND REMANDED

CLIFF HOOFFMAN, Judge

The Office of Child Support Enforcement (OCSE) appeals from an order of the Pulaski County Circuit Court requiring it to pay a refund of \$3146 to appellee Michael Butler. We reverse and remand.

OCSE filed a complaint and affidavit against Butler on January 18, 1996. An agreed judgment of paternity was filed on October 1, 1996, wherein the parties agreed that Butler was the father of the minor child.¹ Butler was ordered to pay \$65 per week in current child support and past-due support in the sum of \$4636. The court ordered a wage assignment in the amount of \$71.50 per week, \$65 in current support plus \$6.50 to be applied to the past-due support.

¹Laura Hughes, the mother of the child, assigned her rights for child support to OCSE.

On March 8, 2010, Butler filed a petition to change child custody and abate child support. A hearing on the matter was held on July 8, 2010. Butler testified that his son had lived with him since August of 2009. Regarding his child-support payments, Butler testified that in addition to paying \$65 per week, the \$6.50 per week was still being deducted even though he had become current with his child support. Butler testified that he called to have this corrected and that he got a reimbursement check at the time, but OCSE never stopped taking out the additional amount. The OCSE court liaison prepared an affidavit of arrears and testified that Butler had overpaid in the amount of \$676.60 as of July 2, 2010. The OCSE attorney stated that the employer continued to pay the extra amount because a new wage assignment was not issued as it should have been.

The trial court seemed to think that the amount of overpayment should have been calculated as the entire amount of support paid since August 2009 when the child began living with Butler. The OCSE attorney explained that the affidavit showed the obligated amount and that the overpayment occurred because Butler was paying extra toward that amount. The court stated that this was not shown on the affidavit of arrears. Butler's attorney stated that she thought the overpayment calculation by OCSE was correct. The court, however, found that Butler should be refunded the entire amount he had paid since August 2009. The court calculated the overpayment to be \$3146 and ordered OCSE to pay this amount. OCSE objected to the judgment on the grounds that the money would have to be refunded from the state treasury, but the court stated that OCSE should have stopped the overpayments.

OCSE filed a motion for reconsideration of the court's July 26, 2010 order, but the court did not rule on this motion. OCSE filed a timely notice of appeal on August 23, 2010, and now appeals in this one-brief case.

Our standard of review for an appeal from a child-support order is *de novo* on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *White v. White*, 2009 Ark. App. 790. A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.* In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

OCSE argues that the trial court abused its discretion when it ordered OCSE to refund an amount of child support that was more than the evidence showed the overpayment to be and was arbitrarily computed. OCSE maintains that the overpayment was \$676.60, and Butler confirmed this amount at the hearing.

OCSE claims that when the current child-support payments had been paid in full, the excess amount was moved to a different category in the affidavit of arrears, "amount paid to unadjudicated arrears." OCSE claims that any overage amount that existed was applied to the unadjudicated arrears, and that the years where the employer withheld the additional \$6.50 per week but there were not any unadjudicated arrears, the money simply accumulated as an overpayment. Once the underpayments of current support in the "balance" category were

added to the overpayments in the “amount paid to unadjudicated arrears” category, the end result revealed an overpayment by Butler.

OCSE claims that the court computed the overpayment as the total child support paid by Butler from the time his son began living with him in August 2009 until the court date of July 8, 2010. OCSE argues that the methodology behind the court’s computation is illogical because the parents had not obtained an order approving the custody change or authorizing the abatement of Butler’s child-support obligation. This court has recognized that a trial court abuses its discretion if it modifies child support for the time period before the filing of a petition for modification. *Martin v. Martin*, 79 Ark. App. 309, 312, 87 S.W.3d 817, 819 (2002) (citing *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002); *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997)). Butler did not file his petition to abate child support until March 8, 2010; thus, it was error for the trial court to order a refund of his child-support payments made before that date. Moreover, the trial court did not enter an order abating Butler’s child-support obligation until the court granted custody to Butler at the July 8, 2010 hearing. Thus, the trial court erred in ruling that Butler was entitled to any refund based on his alleged custody of the child since August of 2009.

The amount Butler overpaid according to the affidavit of arrears totals \$676.60. Under the doctrine of sovereign immunity, OCSE cannot be ordered to refund any amount where the only source of payment would be the state treasury. *State Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997). OCSE has consented to a judgment for

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\$676.60 representing the overpayment by Butler, and we reverse and remand for the trial court to reduce the award to Butler from \$3146 to \$676.60.

HART and ROBBINS, JJ., agree.