NOT FOR OFFICIAL PUBLICATION
*See* Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

TINA KESSLER,

Petitioner/Appellee,

vs.

FLOYD A. KESSLER,

Respondent/Appellant.

Case No. 122,504



APPEAL FROM THE DISTRICT COURT OF
NOWATA COUNTY, OKLAHOMA

HONORABLE CARL GIBSON, ASSOCIATE DISTRICT JUDGE

**AFFIRMED**

Dale Warner
Tulsa, Oklahoma — For Petitioner/Appellee

Curtis L. DeLapp
Bartlesville, Oklahoma — For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Appellant Floyd Kessler appeals from the parties' divorce decree, alleging that the court did not conduct a proper valuation of the parties' property and assets and that the court should have granted a motion to continue his contempt trial. Upon careful review, we affirm the decree in all aspects and find that Floyd did not ask the court, at least on the record we have before us, for a continuance. And, even if he did, the appeal of the contempt citation is premature as the court passed sentencing pending distribution of the parties' marital assets.

## I.

Tina and Floyd Kessler were married on August 3, 1979. Tina filed for divorce on September 15, 2021. However, the parties apparently reconciled on December 10, 2021, and continued to live together in a state of reconciliation until March 7, 2022. Tina filed an amended petition for divorce and an application for a temporary order on March 28, 2022. Floyd filed an answer and counter-petition for dissolution of marriage on March 29, 2022.

On May 10, 2022, the parties executed an agreed order requiring Floyd to pay to move a travel trailer from their residence to an RV park in Oologah, Oklahoma, for Tina to reside in. The agreed order also stated that Floyd was required to pay the RV park $400 per month until the entry of the divorce decree to cover the rental fee.

On August 9, 2022, Tina filed an application for indirect contempt, alleging that Floyd had refused to make the required monthly payments of $400 for the months of July and August. Tina later dismissed this application without prejudice.

A pretrial conference order was entered on July 18, 2023, setting the parties' trial date for September 26, 2023. Although not contained in the record, the trial date was apparently passed to December 6, 2023, because Floyd's attorney was unable to appear. Trial was later reset for January 23, 2024. On January 23, 2024, the parties appeared, and the case was passed to March 5, 2024, at the request of Floyd's attorney. The case was called on the docket for trial; however, the case was passed by agreement to May 7, 2024.

On April 1, 2024, Tina filed another application for contempt citation, alleging that Floyd had again failed to make the required $400 monthly rental payments for January, February, and March and that it was anticipated that he would not make any future payments. In the application, Tina specifically requested that the court set the matter for arraignment and trial on May 7, 2024, in conjunction with the divorce proceedings. Based on the record we have before us, Floyd did not file any response to the contempt motion and did not ever request a jury trial—orally or in writing—but pled not guilty the morning of trial.

A bench trial was held on May 7, 2024, after which the court orally granted the parties' divorce, determined property division and alimony, and sustained the contempt citation. The court issued the parties' decree of dissolution of marriage on August 26, 2024. Notably, the decree clarifies that sentencing on the contempt charge was continued "pending distribution of all marital assets ...." It is from this order that Floyd appeals.

**II.**

In a divorce action, the trial court is vested with wide discretion in dividing property. *McLaughlin v. McLaughlin*, 1999 OK 34, ¶ 12, 979 P.2d 257, 260. On appeal, this court will not disturb the trial court's judgment regarding property division absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence. *Id.* The burden is on the party appealing from a divorce decree to show that the findings and judgment are against the clear weight of the evidence. *Id.*

## III.

### A.

On appeal, Floyd generally alleges that the trial court's division of property was inequitable. At trial, Tina presented Exhibit 28, which was her proposed division of the parties' assets. Tina testified that her valuation of the parties' assets was based on what Floyd had told her items were purchased for or her own personal knowledge of what they were purchased for. Floyd did not offer his own proposed division; rather, Floyd was asked about each of the assets listed in Tina's Exhibit 28 and testified that he thought that most items were worth less than Tina believed. In the divorce decree, the trial court awarded Floyd "real estate and property valued at $391,680.00 based upon the Court's modified Petitioner's trial Exhibit 28" and Tina "$41,500.00 in property and a money judgment of $347,220.00 as established by the Court's modified order of Exhibit 28 of Petitioner's," totaling $388,720.00. ROA 68.

Pursuant to 43 O.S. § 121, the court shall distribute jointly-acquired property by making "such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to be paid such sum as may be just and property to effect a fair and just division thereof." *Id.* Accordingly, Oklahoma courts have consistently held that a trial court "has wide latitude in determining the division of jointly-acquired property in a divorce proceeding, and its distribution of a marital estate will not be disturbed absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of

evidence." *Childers v. Childers*, 2016 OK 95, ¶ 21, 382 P.3d 1020, 1025. The words "just" and "reasonable," however, are equivalent to "equitable" and not synonymous with "equal." *Id.* ¶ 22. "The division of a marital estate does not necessarily need to be equal in order to be just and reasonable." *Id.*

In his appellate brief, Floyd lists each asset contained in Tina's Exhibit 28 one by one and disputes its amount. *See Brief-in-Chief*, pgs. 6-8. First, we note that at trial, Tina entered forty-seven exhibits into evidence. The exhibits provided information regarding the parties' tax returns, real estate appraisals, photographs of farm equipment, photographs of vehicles, bank statements, insurance documents, and retirement documents. Floyd entered two exhibits into evidence, being photographs of bins of clothes and shoes taken at the parties' storage unit. Tr. (May 7, 2024), pg. 54. At trial, Floyd was asked about each of the assets listed in Tina's Exhibit 28 and testified that he thought that most items were worth less than Tina believed.[1]

For example, Tina valued a 2005 Keystone mobile home at $3,000. When asked what he thought it was worth, Floyd responded, "I'd give it away if somebody would pull it out of there." *Id.* at 78. Further, Tina valued a 1985 International Harvester Cab Tractor at $14,000. Floyd testified, without any explanation as to how he reached this opinion, that it was only worth $6,500. *Id.* at 84. Floyd contends that the "2018 hot tub was purchased in October 2019 for $7500. The current value is well below that amount." *Brief-in-Chief*, pg. 5.

[1] The record reflects that Floyd did not provide Tina with a witness or exhibit list before trial. *See* Tr. (May 7, 2024), pg. 8.

Additionally, Floyd states, "[t]he 35-foot Trail Master trailer is used in the agricultural business and has a value of $6500.00 not the $8500.00 stated by [Tina]." *Id.* at 4. Floyd also contends that certain assets should not have been considered marital property because they were purchased after the parties' separated. However, we note that neither party entered any receipts or proof of purchase regarding the vehicles or farm equipment. There was an invoice for a hot tub entered into evidence as plaintiff's Exhibit 10 and the appraisal of the property, which was appraised at $487,500, and entered into evidence as Exhibit 12. Aside from these two exhibits, this court has no means to verify when the items were purchased or their purchase price. The trial court, and now this court, can only rely on the testimony of the parties and what they thought the various vehicles and farm equipment were worth when purchased and the extent of each item's depreciation.[2]

Oklahoma courts have consistently held that "[t]he trial court is ideally situated to assess the credibility of witnesses." *Childers v. Childers*, 2016 OK 95, ¶ 18, 382 P.3d 1020. "'The trial court was the trier of the facts. The credibility of

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[2] On appeal, Floyd argues that much of parties' property was not properly appraised because it is agricultural in nature and should have been appraised in accordance with Oklahoma Administrative Code 710:10-10-27. First, a review of the record reveals that this argument is being raised for the first time on appeal, which is generally forbidden. *See Northwest Datsun v. Okla. Motor Vehicle Comm.*, 1987 OK 31, 736 P.2d 516 ("Issues not raised at trial will not be considered for the first time on appeal."). Floyd sets forth no argument as to why he should be permitted to operate outside this general rule. Additionally, even if it had been raised below, we note that the function of this statute is to set forth the requirements for inspecting and valuing agricultural property for ad valorem tax purposes as part of a county's visual inspection plan under the Oklahoma Tax Commission rules. While they may be of some evidentiary value, these regulations do not dictate the value of property in a divorce proceeding.

the witnesses and the effect and weight to be given to conflicting or inconsistent testimony are questions of fact to be determined by the trier of facts, whether court or jury, and are not questions of law for this Court on appeal.'" *Kerr v. Clary*, 2001 OK 90, ¶ 18, 37 P.3d 841 (quoting *Clark v. Addison,* 1957 OK 111, ¶ 36, 311 P.2d 256). As the trier of fact, the trial court gave greater credence to Tina's testimony and the evidence she presented regarding the differing values of the assets, a decision fully within its purview. Accordingly, we find that the court's decision to adopt Tina's proposed property division with modifications was neither inequitable nor against the clear weight of the evidence.

As stated above, Tina provided the court with some exhibits to support her proposed valuation, in addition to her own personal knowledge of each item and its worth. After hearing the testimony from both witnesses and reviewing all of the exhibits, the trial court awarded Tina $388,720 of marital assets and Floyd was awarded $391,680 of marital assets. Floyd essentially asks us to remand the case for another trial on the value of each asset. Floyd already had an opportunity to provide the court with documentation disputing the price of the items, provide documentation showing the purchase date of the items he contends are separate property, or provide the court with his own proposed distribution of assets. Instead of introducing evidence to support his claims, Floyd merely testified that, in his opinion, items were worth less, often with little to no explanation. We cannot find on this record that the trial court's decision was clearly contrary to the weight of the evidence.

**B.**

Floyd also takes issue with the court's modification to Tina's Exhibit 28. In the parties' decree, the trial court explained the modification as follows:

> To arrive at the modified value the court started with the figures proposed at the top of page two (2) of Exhibit 28 which proposed starting awards as follows:
>
> | To Respondent: | To Petitioner: |
> | --- | --- |
> | $458,650.00 | $379,750.00 |
>
> The Court then added to each party 1/2 of the value of a John Deere Tractor that had been inadvertently omitted from Exhibit 28. The tractor was valued at $42,000.00. This added $21,000.00 to each party. The Court then deducted from Respondent $37,970.00 alimony in lieu of property and added the $37.970.00 to the Petitioner's share. The Court then reduced each parties [sic] value by $50,000.00 The resulting award to Respondent is $391,680.00 and to Petitioner is $388,720.00.

ROA, pg. 66.[3] Floyd contends that the court abused its discretion because it "failed to explain the $50,000 that was subtracted off the total amount that was submitted by [Tina]." *Brief-in-Chief*, pg. 7. Specifically, he contends that this offset amount determined by the trial court "falls way short" of what the correct amount should be. *Id.* at 8. We note, however, that Floyd did not object to the court's deduction of $50,000 for both parties below, did not propose what he considered to be the equitable amount, and did not (and does not now) provide

[3] If either party should harbor a complaint about how this modification was calculated, it should be Tina. The trial court should have added the full value of the tractor—$42,000—to Floyd's side of the ledger, as he was awarded possession. Attributing $21,000 to both Tina and Floyd had the effect of shorting Tina's judgment by $42,000. Nevertheless, Tina agreed to the court's method below and did not appeal the judgment.

this court with an alternative proposed property distribution. Instead, Floyd repeats his argument that the court should have valued assets differently and should have given him credit for various payments he had made already such as the RV rental fee, car payments, retirement withdrawal fees, and insurance payments.

We reiterate that the trial court is the trier of facts and, accordingly, witness credibility and the effect and weight to be given to conflicting or inconsistent testimony are questions of fact to be determined by the trier of facts. *Kerr v. Clary*, 2001 OK 90, ¶ 18, 37 P.3d 841. They are not questions of law for this court on appeal. *Id.* The trial court heard Floyd's testimony regarding payments he made on the parties' Cadillac, what he thought Tina's collectibles were worth, and the payments he made (and did not make) on the RV rental fee, and still decided to adopt Tina's proposed valuation, with modifications. We find that such a decision, for the reasons explained above, was not an abuse of discretion or clearly contrary to the weight of the evidence.

Further, we find the error, if any, in reducing both parties' total property allocation by $50,000 was harmless. As a matter of basic mathematics, because the court deducted the same amount from both sides of the ledger, there was no net effect to either party. This adjustment did not cause either party to be awarded more or less property or more or less of a judgment. It is quintessential harmless error. *See* 12 O.S. § 78 ("The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be

reversed or affected by reason of such error or defect."). *See also* 12 O.S. § 3001.1 ("No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.").

**C.**

Next, Floyd contends that "the court failed to grant a continuance as requested by the appellant for good cause shown." *Brief-in-Chief*, pg. 7. This court has reviewed the record and the trial transcript thoroughly. There is no evidence contained in this record that Floyd filed a motion to continue that was denied by the trial court or asked for a continuance at any point during trial on May 7, 2024. Accordingly, we find no error in a purported failure to grant a continuance when Floyd cannot point us to where in the record such failure allegedly occurred. *See Chamberlin v. Chamberlin*, 1986 OK 30, ¶ 7, 720 P.2d 721, 724 ("It is the duty of the appealing party to procure a record that is sufficient to obtain the corrective relief sought. That record, which should incorporate all pertinent and necessary pleadings or other papers, *must always include* a written memorial of the judicial action that triggered the appealable event.").

It appears that Floyd contends that the trial court should have continued the contempt issue *sua sponte* because he was "just arraigned on a contempt citation and having the case set on a 9:00am docket. [Floyd] entered a plea of

not guilty and requested time to respond to the citation and never waived his right to jury trial." *Brief-in-Chief*, pg. 7. However, the record reflects that Tina specifically requested that the court decide the contempt citation in conjunction with the divorce proceedings. Floyd did not file a response objecting to this proposition and any plea he might have filed in response to her application is not contained in this record. At trial, counsel for Floyd testified as follows:

> There is a contempt citation which was served. My client has pled not guilty to that, I believe he has pled not guilty to that. He believes that there's a reason for not—for him not paying that. And they'll be testimony regarding that.

Tr. (May 7, 2024), pg. 9. Later, the court clarified that the issues before it were the contempt citation and the property division. Tr. (May 7, 2024), pgs. 9-10. Counsel for Floyd agreed that was "the nutshell" that they were looking at. *Id.* at 10. At no point did counsel for Floyd object to proceeding on the contempt issue or request a jury trial on the same. In fact, the record reflects that he agreed that the contempt issue was before the court that day. In the absence of any objection, we reiterate that issues not raised at trial will not be considered for the first time on appeal. *Northwest Datsun v. Okla. Motor Vehicle Comm.*, 1987 OK 31, 736 P.2d 516.

Even if the issue had been preserved, we also note that "an order in contempt proceedings is not appealable by right until the judgment and sentence become final." *Lay v. Ellis*, 2018 OK 83, ¶ 21, 432 P.3d 1035, 1042. Here, the court delayed sentencing, pending the distribution of marital assets. Therefore, the appeal related to the contempt citation is premature.

**D.**

For Floyd's final proposition of error, he alleges that counsel for Tina "over embellished" her physical condition, "framing her as a complet [sic] invalid which caused the court to have sympathy for her." *Brief-in-Chief*, pg. 9. At trial, Tina testified that after she and Floyd got married, she stayed home with their two children and did not work for eight years. Tr. (May 7, 2024), pg. 22. She added that once the children were attending school, she began working at Walmart and worked there for seventeen years. *Id.* She testified that she has been diagnosed with Parkinson's disease, which was a contributing factor in her decision to stop working at Walmart. *Id.* She stated that she started receiving disability insurance and is allowed to work eight hours a week. *Id.* at 23. Tina's pretrial financial declaration reflects that she makes $480 a month, receives $1,106 from social security, and $20 for food stamps. *Id.*; *see also* Plaintiff's Exhibit 7. Tina also testified that due to a storm the electricity in her RV went out and the pipes froze. *Id.* at 25. She stated that there is still no electricity or water in the RV and as a result, she will periodically stay with other people. *Id.*

While Floyd clearly finds Tina's testimony to be overstated, we reiterate that because the trial court is the finder of fact in non-jury trials, the trial court also determines issues of the credibility of witnesses and the weight of testimony "[b]ecause the trial court is in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence." *Stephens Production Co. v. Larsen*, 2017 OK 36, ¶ 12, 394 P.3d 1262, 1266. Tina presented sufficient evidence that would allow the trial court to adopt her proposed distribution. To

say that her testimony was embellished and imply that it elicited an emotional reaction from the trial court misapprehends these basic trial facts. Floyd was free to present contradictory testimony and evidence and argue below that Tina exaggerated her condition. But the trial court was equally permitted to believe Tina's testimony. We must affirm unless the judgment is clearly contrary to the weight of the evidence. Because the trial court is better suited to evaluate the demeanor of the witnesses and gauge the credibility of the evidence, we will defer to the trial court as to the conclusions it reached concerning those witnesses and that evidence. This proposition of error is rejected.

* * *

Ultimately, we affirm the appealed decree in all respects. The trial court's property division was not clearly contrary to the weight of the evidence, except as it may have negatively affected Tina. *See* note 3, *supra.* As to the contempt, we find that the issue is premature, as sentencing has not yet occurred.

**AFFIRMED.**

BARNES, J., and HUBER, J., concur.

May 15, 2026