

[Cite as *McCoy v. McCoy*, 2006-Ohio-2363.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

MELDO A. MCCOY	:	
Plaintiff-Appellant	:	C.A. CASE NO. 21119
v.	:	T.C. NO. 2003 DR 1406
SOPHIA F. MCCOY	:	(Civil Appeal from Common Pleas Court, Division of Domestic Relations)
Defendant-Appellee	:	

**OPINION**

Rendered on the 12<sup>th</sup> day of May, 2006.

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WOLFF, J.

{¶ 1} Meldo McCoy appeals from a judgment of the Montgomery County Court of Common Pleas, Domestic Relations Division, following the exclusion of the testimony of his witnesses at trial.

{¶ 2} Meldo and Sophia McCoy were married on September 8, 1990. No children

were born of the marriage. On October 7, 2003, Meldo filed a complaint for divorce; Sophia filed a counterclaim for divorce.

{¶ 3} According to the court's February 13, 2004 pretrial order, each party was required to file a pretrial statement no later than March 9, 2004. The statement was to include, inter alia, "[a] list of the names, addresses, and phone numbers of all witnesses expected to be called at trial with a brief summary of the expected testimony of each." In addition, the order provided that "no witness will be allowed to testify who is not so disclosed." Trial was scheduled for March 18, 2004. Meldo did not file a pretrial statement by March 9, 2004.

{¶ 4} On March 16, 2004, the divorce action was referred to the family relations department for mediation. Consequently, no trial was held on March 18, 2004. The mediation was apparently unsuccessful. The court subsequently set a new trial date for September 27, 2004. On September 28, 2004, the trial was again rescheduled for November 2, 2004.

{¶ 5} On October 20, 2004, Meldo filed a motion to terminate spousal support on the ground that Sophia was co-habiting with her boyfriend and her adult son. On October 25, 2004, Meldo filed a pretrial statement in which he named seven witnesses, six of whom would testify as to Sophia's co-habitation.

{¶ 6} On November 2, 2004, a trial began on the issues of spousal support, attorney fees, and ownership of vehicles. At the beginning of trial, Sophia's attorney objected to Meldo calling any witnesses on the issue of whether Sophia was co-habiting with an unrelated male. The court sustained the objection on the ground that he had failed to timely file his pretrial statement. After hearing testimony from Meldo, the court continued

the trial until December 7, 2004, so that Sophia could provide certain receipts prior to Meldo's cross-examination of her. The court indicated that Meldo would not be permitted to present witnesses concerning co-habitation upon the resumption of the trial. On November 30, 2004, Meldo filed another witness list, naming four individuals; these four individuals had previously been identified in the October 25 pretrial statement as witnesses who would testify regarding Sophia's co-habitation. Trial resumed on December 7, 2004. Sophia testified, in part, that she did not live with her boyfriend.

{¶ 7} On February 25, 2005, the court issued a decision on the contested issues. The court indicated, in part, that Sophia testified that she lived alone in an apartment and that no one assisted her with her payments except for the temporary spousal support from Meldo. The court awarded Sophia spousal support in the amount of \$375 per month for fifty-six months, unless she first remarried or co-habitated with an unrelated male. The court's ruling was incorporated into the final judgment and decree of divorce, dated May 23, 2005.

{¶ 8} Meldo appeals from the final judgment, raising one assignment of error.

{¶ 9} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT REFUSED TO ALLOW MELDO TO PRESENT WITNESSES AT THE DIVORCE TRIAL."

{¶ 10} In his sole assignment of error, Meldo asserts that the trial court abused its discretion when it refused to permit him to present witnesses regarding Sophia's co-habitation with another man. He argues that his failure to file his pretrial statement in a timely manner was due to excusable neglect and that Sophia was not surprised or prejudiced by his late submission. Meldo notes that his current counsel could not have filed the pretrial statement by the March 9, 2004, deadline because he was not retained

until April 20, 2004.

{¶ 11} The trial court has discretion to set a deadline by which parties have to disclose witnesses and to enforce its order by excluding testimony from those witnesses who are not disclosed by the deadline. See *Cox v. Greene Memorial Hosp., Inc.* (Sept. 1, 2000), Greene App No. 2000-CA-46; *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44, 472 N.E.2d 704. We note that, although the trial date was extended on several occasions, the extension of the trial date did not extend the deadline for filing the pretrial statement. See *Paugh*, 15 Ohio St.3d at 46.

{¶ 12} We are unpersuaded by Meldo's arguments that he could not comply with the court's deadline because his current counsel was not retained until April 20, 2004, and that his failure to timely file a pretrial statement was the result of excusable neglect. Although Meldo's present counsel could not have met the deadline, Meldo has offered no explanation why his prior counsel did not file a timely pretrial statement. The record reflects that his prior counsel participated in the pretrial conference and was served with the pretrial order. Moreover, his present counsel did not request permission to file the pretrial statement at any time between April 20 and October 25, 2004, a period of six months. At the November 2 trial, Meldo's counsel could offer no explanation for his failure to do so.

{¶ 13} We also reject Meldo's assertion that Sophia was neither prejudiced nor surprised by the untimely disclosure of witnesses. Although Meldo asserts that cohabitation was a "main issue in this case" and that Sophia was not surprised by these witnesses, Meldo's late disclosure provided Sophia little opportunity to prepare for those witnesses. Moreover, Sophia's counsel represented at trial that he did not receive the

pretrial statement until October 29, 2004, the Friday before the scheduled trial date.

{¶ 14} Finally, the record contains no offer of proof as to the excluded witnesses' anticipated testimony. Although Meldo stated generally that these witnesses would testify regarding Sophia's cohabitation, no further elaboration was provided. Without such a proffer, we have no way of knowing what these witnesses would have testified to and any error in excluding them is waived. Evid.R. 103(A)(2)..

{¶ 15} In sum, we conclude that the trial court acted within its sound discretion when it excluded the testimony of Meldo's witnesses.

{¶ 16} The assignment of error is overruled.

{¶ 17} The judgment of the trial court will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:  
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Hon. Denise L. Cross