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Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000511-MR
NO. 2002-CA-000584-MR
NO. 2002-CA-000611-MR

SHERRY DENISE VANN (NOW JORJANI) APPELLANT/CROSS-APPELLEE

APPEALS AND CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 96-CI-00632

BILLY RAY VANN APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: KNOPF, TACKETT, AND TAYLOR, JUDGES.

KNOPF, JUDGE: Sherry Denise Vann (now Jorjani) appeals, and Billy Ray Vann (Bill) cross-appeals, from an order of the Whitley Circuit Court which, among other things, denied their respective motions to modify the existing joint custody agreement concerning their only child, Billy Ray Vann, Jr. (B.J.). Sherry sought sole custody of B.J., while Bill sought

to continue joint custody with himself designated as the primary residential custodian. Sherry also appeals the granting of additional parenting time to Bill, and various evidentiary and procedural issues which arose in the custody litigation. For the reasons stated below, we affirm.

Sherry and Bill were married on November 22, 1989. During their marriage they had one child, Billy Ray Vann, Jr., born June 10, 1990. On October 28, 1996, Sherry filed a petition for dissolution of marriage. On March 18, 1997, a final decree was entered dissolving the marriage. The decree incorporated a separation agreement the parties had previously executed which, among other things, provided for joint custody of B.J., with Sherry designated as the primary residential custodian.

Following entry of the final decree, Sherry married David Jorjani. In the years following the decree, relations between Bill and Sherry, and between Bill and David, have been extremely bitter and acrimonious. Extensive post-decree litigation, mostly by way of motions for contempt, has resulted. The parties have repeatedly accused one another of violating parenting time orders, not sharing information concerning B.J., engaging in improper conduct in front of B.J., saying improper things in front of B.J., making threats, and of filing frivolous motions regarding these matters.

On June 29, 1998, and on July 1, 1999, Bill filed motions for a change of custody, but it appears that these motions were never ruled upon. On May 30, 2000, Bill filed a motion requesting that he be designated as the primary residential custodian, or, in the alternative, that he be awarded sole custody of B.J. On May 14, 2001, Sherry filed a motion to modify custody to grant her sole custody of B.J. The trial court referred the motions to the DRC.[1]

On June 6, June 7, and August 11, 2001, hearings were held on the custody motions. On November 6, 2001, the DRC entered her proposed custody and visitation order. The order recommended that Sherry remain B.J.'s primary residential custodian, but also recommended substantial additional parenting time for Bill.

On November 8 and November 14, 2001, respectively, Bill and Sherry filed their notices of exceptions objecting to the DRC's recommended order. On December 3, 2001, Sherry filed supplemental exceptions to the DRC report. On December 14, 2001, the trial court entered an order striking Sherry's supplemental exceptions as untimely.

On February 14, 2002, the trial court entered an order overruling the exceptions of the parties and adopting the DRC's proposed order. On February 23, 2002, Sherry filed a motion for

[1] Domestic Relations Commissioner.

additional findings of fact pursuant to CR[2] 52.02; a motion for the trial court to interview B.J. on the basis that the DRC's interview with the child was either erased or had not been recorded; and a motion for the trial court to reopen the judgment, take additional testimony, and to make new findings of fact and conclusions of law since her testimonial evidence from the DRC hearings was inaudible on the cassette recordings of the hearing. On March 15, 2002, the trial court entered an order denying Sherry's post-judgment motions.

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CUSTODY

First, Sherry contends that the trial court erred by failing to award her sole custody of B.J.

In Scheer v. Zeigler[3] this Court held that the same criteria apply for a modification of joint custody as apply to a modification of sole custody. Thus, in order for there to be a modification of joint custody, as in all custody cases, the party seeking modification must first meet the threshold

[2] Kentucky Rules of Civil Procedure.

[3] Ky. App., 21 S.W.3d 807 (2000); See also Fenwick v. Fenwick, Ky. 114 S.W.3d 767 (2003).

requirements for modification contained in KRS[4] 403.340 and KRS 403.350.

For a proposed modification occurring more than two years after the initial custody award, KRS 403.340(3) sets forth the threshold circumstances which must be met in order for the circuit court to reconsider its initial custody award:

> [T]he court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
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> (a) Whether the custodian agrees to the modification;
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.

[4] Kentucky Revised Statutes.

KRS 403.350 provides that a party seeking modification of a custody decree submit an affidavit setting forth facts supporting the requested modification, which would include the presence of circumstances contained in KRS 403.340, and that the court must deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it must set a date for hearing to show cause why the requested order or modification should not be granted.

While it appears that the circuit court did not enter an order explicitly holding that Sherry's motion had met the threshold requirements of KRS 403.340 and KRS 403.350, Bill does not allege that the threshold for the trial court to consider a modification of custody was not met, and his own motion to modify custody carries with it the implicit contention that the threshold conditions for a change of custody are met.

However, in considering whether there should be a change in the existing custody decree, KRS 403.340 also requires that the change be in the best interest of the child. In fact, the overriding consideration in any custody determination is the best interests of the child.[5]

In this case, unfortunately, the trial court provided minimal findings of fact addressing the best interest factors as

[5] Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); KRS 403.270.

set forth in KRS 403.340(3) and KRS 403.270(2). Rather, the trial court's order was limited to the following findings and conclusions:

> The Court finds that B.J. has finally begun to adjust to his parents' divorce, and everything that followed from it, including a new school, new friends, and a new home.
>
> . . . .
>
> The Court finds and concludes that it is in B.J.'s best interest not to interrupt his life again, and Sherry should remain primary residential custodian. However, it is also in B.J.'s best interest that Billy should have more parenting time with him.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[6] A factual finding is not clearly erroneous if it is supported by substantial evidence.[7] "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.[8]

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be

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[6] Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999); CR 52.01.

[7] Janakakis-Kostun at 852.

[8] Id.

disturbed unless it constitutes an abuse of discretion.[9] The trial court possesses broad discretion in determining the child's best interests.[10] "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.' . . . The exercise of discretion must be legally sound."[11]

The trial court's finding that B.J. was finally becoming adjusted to the acrimonious divorce of his mother and father, and that his life should not be interrupted again, was not clearly erroneous. While these findings appear more concerned with the issue of whether there should be a change in the primary residential custodian, they apply equally to the issue of whether there should be a change in the existing joint custody decree. The trial court's finding that a change in custody status could be disruptive to B.J.'s acceptance of his parents' divorce, and that it was in the child's best interest that his life not be so disrupted was not clearly erroneous.

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[9] Bickel v. Bickel, Ky., 442 S.W.2d 575, 577 (1969); Carnes v. Carnes, Ky., 704 S.W.2d 207, 208 (1986).

[10] Squires, supra, at 770; Dull v. George, Ky. App., 982 S.W.2d 227, 230 (1998).

[11] Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)(citations omitted); See also, Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 782 – 783 (2002).

The trial court thus did not abuse its discretion by denying Sherry's motion for sole custody.

SHARED PARENTING TIME

Next, Sherry contends that the shared parenting time schedule awards excessive time to Bill. Previously Bill had parenting time with B.J. substantially consistent with the standard schedule for Whitley County. This consisted of shared parenting time every other weekend, one evening per week, alternate holidays, and four weeks during the summer. Under the February 14, 2001, order Bill was awarded parenting time with B.J. three weekends per month from 6:00 Friday until Monday morning; overnight parenting time one night per week; alternate holidays; and summer parenting time from the Sunday following the last day of school until Sunday the week before school starts, with Sherry having parenting time every other weekend during the summer. The additional parenting time schedule provided Bill with approximately 79 additional days of parenting time per year.

Sherry alleges that shared parenting time with Bill produces emotional and mental harm to B.J. and that, if anything, the shared parenting time should be reduced, not increased.

KRS 403.32 provides, in relevant part, as follows:

> (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.
>
> . . . .
>
> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

What constitutes "reasonable visitation" is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula.[12] When the trial court decides to award joint custody, an individualized determination of reasonable shared parenting time is even more important. A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest.[13] A parenting time schedule should be crafted to allow both parents as much involvement in their children's lives as is possible

[12] Drury v. Drury, Ky. App., 32 S.W.3d 521, 524 (2000).

[13] Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993).

under the circumstances.[14] Moreover, trial courts should not give undue weight to the terms of a "standard" visitation order.[15] In the absence of an agreement between the parties, the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children.[16] This Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case.[17]

In contrast with the standard parenting time schedule, the trial court awarded one extra weekend per month, with visitation ending Monday morning rather than on Sunday evening. During the summer months, Bill becomes, in effect, the primary residential custodian with Sherry receiving alternate weekend parenting time. This results in Bill receiving approximately 79 additional days of parenting time per year above the former schedule.

Under the circumstances of this case, we cannot conclude that the trial court’s determinations as to parenting

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[14] Drury at 524.

[15] Drury at 524 - 525.

[16] Drury at 525.

[17] Id.

time constitute a manifest abuse of discretion or were clearly erroneous. The trial court made a specific finding that it was in B.J.'s best interest that Bill have more parenting time with him. Bill's testimony in this regard supports the trial court's finding. Accordingly, we will not disturb the parenting time schedule established by the trial court.

THOMAS CONNERS TESTIMONY

Next, Sherry contends that the trial court erred by permitting Billy's counselor, Thomas Conners, director for the Christian Appalachian Project, to be qualified as an expert and to present opinion testimony. Specifically, Sherry contends that Conners is not licensed by the Kentucky Board of Licensed Professional Counselors and was therefore not qualified to testify concerning the Taylor-Johnson Temperament Analysis test, the primary subject of his testimony.

KRE 702 vests the trial court with broad discretion to determine whether a witness is qualified to express an opinion in a matter which requires expert knowledge, skill, experience, training, or education. Likewise, the rule requires the trial court to determine if such expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.[18] KRE 702 provides as follows:

[18] R.C. v. Commonwealth, Ky. App., 101 S.W.3d 897, 901 (2002).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training, or education, may testify thereto in the form of an opinion or otherwise.

Application of KRE 702 is addressed to the sound discretion of the trial court.[19] An abuse of discretion occurs when a "trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[20] A trial court's ruling on the qualifications of an expert should not be overturned unless the ruling is clearly erroneous.[21]

Mr. Conners has a B.A. and a masters in psychology and is certified by a national board as a counselor. Conners is the director of the Christian Appalachian Project and supervises twenty-eight managers and four assistant directors of that program. Conners manages several types of programs, including education programs and school programs. He also manages elderly programs, prescription assistance programs, and shelters. However, Conner admitted that he is not licensed as a counselor in Kentucky and that he has had limited case experience.

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[19] Ford v. Commonwealth, Ky., 665 S.W.2d 304, 309 (1983).

[20] Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

[21] Farmland Mutual Insurance Company v. Johnson, Ky., 36 S.W.3d 368, 378 (2000).

Despite any shortcomings in Conners' credentials, we cannot say that the trial court abused its discretion in qualifying him as an expert. Conners holds a masters degree in psychology and is nationally certified as a counselor. Further, Conner's testimony, rather than being presented to a jury, was presented to an experienced DRC who, we are persuaded, had a full appreciation of Conners' experience and limitations and who was able to give proper weight to the testimony. Hence, to the extent there may have been shortcomings in Conner's credentials, under the circumstances, we are persuaded that the admission of any testimony outside the scope of his expertise was harmless error. "No error in either the admission or the exclusion of evidence and no error or defect in any ruling . . . or in anything done or omitted by the court . . . is ground for . . . disturbing a judgment . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[22] Accordingly, there was not reversible error associated with the testimony of Mr. Conners.

[22] CR 61.01.

AVOWAL TESTIMONY OF SUE REED

Next, Sherry contends that the trial court erred by denying her the opportunity to present the avowal testimony of the child's treating psychologist, Sue Reed.

In January 1997, upon the initiative of Sherry, B.J. began counseling treatment with Sue Reed. In June 1999, following a visitation with Bill, B.J. appeared to Sherry to be extremely upset. As a result, Sherry contacted Reed, who asked that B.J. be brought in to her office. As a result of her evaluation of B.J. and his reaction to the recent shared parenting time, Reed concluded that B.J. should not have parenting time with his father. Reed advised Sherry of this, and, as a result, B.J. missed parenting time with his father as scheduled under the order. In response, Bill filed a motion to hold Sherry in contempt for violation of the trial court's parenting time order. Sherry responded with a motion to suspend parenting time. At the hearing on the contempt motion, it came to light that Reed had influenced Sherry's decision to violate the trial court's parenting time order. The trial court held Sherry in contempt and expressed annoyance that Reed had recommended violating the trial court's order.

As the June and August 2001 custody hearings approached, Bill filed a motion to exclude the testimony of Reed on the basis of her qualifications. The trial court granted

Bill's motion and stated to the effect that he would not allow a witness who had recommended that his orders be violated to testify in his court.[23] Reed thus did not testify at the custody hearings.

As a result of the trial court's ruling, Sherry sought to enter into the record the avowal testimony of Reed. As this could not be done during the time allotted for the hearings, the DRC allowed Sherry thirty days[24] in which to take the avowal testimony, which, in effect, established a window for taking Reed's avowal deposition to end on September 10, 2001, thirty days after August 11. It appears uncontested that Bill's attorney waived notice of the avowal deposition and did not intend to attend if the deposition was held during the thirty-day window.

As it turned out, Sherry failed to take the deposition within the window established at the hearing. The DRC issued her proposed order on November 6, 2001. On December 3, 2001, after the entry of the proposed order and the parties' exceptions thereto, Sherry served Bill with notice that she would be taking the deposition of Reed the next day, December 4.

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[23] Sherry sought to appeal this ruling to this Court; however, by order dated October 8, 2001, the appeal was dismissed as interlocutory. See Case 2001-CA-001736-MR.

[24] Because of the poor quality of the cassette tape recording, it is unclear whether the DRC granted a window of 30 days or 14 days to take the deposition.

Bill then objected to inadequacy of notice and moved to exclude the avowal testimony from the record. The trial court granted Bill's motion and Sue Reed's avowal testimony is not in the appellate record.

Excluded testimony must be placed in the record by avowal to be preserved for our review.[25] Obviously Sherry was attempting to comply with this requirement, but since the avowal testimony is not in the record for us to review, we cannot address the merits of whether the trial court erred by granting Bill's motion to exclude her from testifying, but, rather, we will limit our review to whether the trial court erred by granting Bill's motion to exclude Reed's avowal deposition.

It appears undisputed that (1) the DRC granted Sherry's motion to take Reed's avowal deposition within thirty days following the conclusion of the custody hearing; (2) Bill's attorney waived notice if the deposition was taken during this window; (3) Sherry did not take the deposition within the window; (4) when Sherry took Reed's testimony substantially after the thirty day period she served Bill's attorney; and (5) the notice was not timely.

[25] Transit Authority of River City [TARC] v. Vinson, Ky. App., 703 S.W.2d 482, 487 (1985).

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings."[26]

Sherry was given a generous amount of time, thirty days following the custody hearing, to take Reed's avowal deposition. Further, had she taken the deposition within the allotted time, notice would not have been an issue because Bill waived notice. However, Sherry waited until almost four months after the conclusion of the custody hearing, and almost a month after the DRC had entered her recommended order, and after the parties had entered their exceptions to the DRC's order, to take the avowal deposition. With all that had transpired since Bill's original waiver of notice – most notably the expiration of the window and the entry of the DRC's recommended order – we are persuaded that the waiver was no longer effective.

In light of Sherry's failure to conduct Reed's avowal deposition within the thirty days allotted by the DRC, and her failure to timely give notice of her belated taking of Reed's avowal testimony, we find no abuse of discretion in the trial court's granting of Bill's motion to exclude Reed's avowal testimony.

REDUCTION OF PARENTING TIME AS PUNISHMENT

[26] Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

Next, Sherry contends that the trial court erred by reducing her parenting time to punish her.

CR 76.12(4)(c)(iv) mandates that a party indicate how an issue is properly preserved for review by an appellate court. Sherry's brief does not cite to where in the record this issue is preserved, and we will not search the record on appeal to make that determination.[27]

Moreover, CR 76.03(8) provides that a party shall be limited on appeal to the issues in the prehearing statement before the Court of Appeals. Sherry did not list this as an issue on her prehearing statement, so the issue is unpreserved on two grounds.

It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court.[28] We have reviewed Sherry's argument applying this standard and conclude that no manifest injustice occurred. To the contrary, the record does not reflect that the trial court increased Bill's visitation time with B.J. for the purpose of punishing Sherry.

TRIAL COURT'S REFUSAL TO RULE ON MOTIONS

[27] Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46, 53 (2003).

[28] Charash v. Johnson, Ky. App., 43 S.W.3d 274, 281 (2000).

Finally, Sherry contends that the trial court erred by refusing to hear and rule on various motions. Specifically, Sherry contends that the trial court failed to rule on her motion to require Bill to undergo anger management counseling and her motion to increase child support.

On November 6, 2000, Sherry filed a motion to require Bill to undergo anger counseling. On November 20, 2000, the trial court entered an order directing the DRC to "conduct a change of custody hearing and a hearing on all substantive Motions now pending . . . ." On June 1, 2001, Sherry filed a motion for an increase in child support.

The hearings were held on June 6, June 7, and August 11, 2001. The DRC entered her recommended order on November 6, 2001. In her exceptions filed November 14, 2001, Sherry stated, among other things, that she excepted to the Commissioner's order because "it did not address all pending motions of the petitioner . . ." On December 3, 2001, Sherry filed a "supplement to exceptions" in which she stated that she excepted from the recommended DRC order because "[t]he Commissioner failed to rule on motions, including child support and to have Mr. Vann attend anger management."

Again, Sherry has failed to direct us to where in the record this issue was preserved. The hearings before the DRC were held on June 6, June 7, and August 11, 2001. The record of

those hearings consists of sixteen cassette tapes. It was incumbent upon Sherry to direct us to where she requested the DRC to rule on the issues of child support and the anger management motion, if indeed she did.

We note, further, that the motion for an increase in child support was filed only five days prior to the commencement of the child custody hearings. It appears that Bill had not even filed his response to Sherry's motion prior to the commencement of the hearings on June 6. We are not persuaded that it was the intent of the trial court that the DRC even address that issue at the custody hearings.

Moreover, the anger management motion had been filed some six months earlier, and while this motion apparently would have been included in the trial court's November 20, 2000, referral to the DRC; nevertheless, much had transpired since that time. The parties were engaged in almost constant litigation during this time, and there was a constant stream of contempt motions flowing into the record. Given the status of the case, and considering that the hearings were addressed primarily to the issue of custody, absent the issue being brought to her attention by the parties, the DRC could not reasonably have been expected to rule on the motion of anger management. As Sherry has not directed us to where she

requested that the DRC rule on the anger management motion, this issue is not preserved.

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The only issue raised by Bill in his cross-appeal is that the trial court erred by failing to award him primary custody of the child.

Bill contends that according to the overwhelming evidence in the case, he should have been awarded primary custody of B.J. In particular, Bill argues that he can be a full-time parent whereas Sherry cannot; Bill does not have any domestic violence in his home whereas Sherry does; that Bill has a healthy relationship with B.J. whereas the child has periods of extreme emotional distress while living with Sherry and David Jorjani; and that Bill's overall credibility in this case is substantially greater than Sherry's.

We discussed the general principles of a modification of a joint custody decree and the standards of appellate review in our discussion of Sherry's appeal of the trial court's child custody decision.

We also addressed the trial court's provided minimal findings of fact addressing the best interest factors as set forth in KRS 403.340(3) and KRS 403.270.

As previously noted, the trial court found that B.J. was finally adjusting to the divorce of his mother and father and his life should not be interrupted again. These findings were not clearly erroneous. These findings appear specifically addressed to the issue that B.J. should not be subjected to a change of residence, as he has finally, after a long period of difficulty, become adjusted to his new home.

In light of the trial court's finding that a change in custody status could be disruptive to B.J.'s acceptance of his parents' divorce, and that it was not in the child's best interest that his life be so disrupted, it did not abuse its discretion by denying Bill's motion to modify custody.

Accordingly, we affirm the February 14, 2002, order of the Whitley Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Sherry Jorjani, pro se Corbin, Kentucky	Marcia A. Smith Corbin, Kentucky