**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 19, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-3604**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

---

**IN RE THE MARRIAGE OF:**

**ELIZABETH M. MARZOUKI,**

**PETITIONER-RESPONDENT,**

**v.**

**JAMEL MARZOUKI,**

**RESPONDENT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Jamel Marzouki appeals from the child custody provisions of a judgment of divorce from Elizabeth M. Marzouki. He argues that the trial court's refusal to grant him joint legal custody and unsupervised and lengthy visitation with his son is based on the impermissible factor of his religion.

We reject the notion that the trial court's decision was driven by Jamel's religion and conclude that the trial court properly exercised its discretion. We affirm the judgment.

Jamel and Elizabeth met in Paris, France, wed there in 1993, and returned to the United States in 1995. In February 1996, Elizabeth returned to Wisconsin and filed an action for legal separation. The action was amended to one for divorce. The parties' son was born on March 13, 1996. He was six months old at the time the divorce was granted.

The trial court granted sole legal custody and primary physical placement of the parties' son to Elizabeth. Jamel was granted physical placement of the child for two hours in the morning whenever Jamel is in the United States.[1] Jamel's physical placement is to take place in the child's home and be supervised by a third person.

This appeal involves two separate issues—the award of sole legal custody to Elizabeth and the restrictions placed on Jamel's periods of physical placement. Both involve matters committed to the trial court's discretion. *See* ***Bohms v. Bohms***, 144 Wis.2d 490, 496, 424 N.W.2d 408, 410 (1988).

> An appellate court must give great weight to the circuit court's determination as to custody. A custody determination depends on first-hand observation and experience with the persons involved and is therefore committed to the sound discretion of the circuit court. The circuit court's determination merits a high degree of insulation from appellate interference. Discretionary determinations, however, do not lie beyond meaningful appellate scrutiny. The custody determination will be reversed if the appellate court is convinced that the findings

[1] At the time of the final hearing, Jamel was living in Paris, France.

> of fact upon which the custody determination is based are clearly erroneous, or that the custody determination represents a clear abuse of discretion. To find an abuse of discretion the appellate court must find that the circuit court either has not exercised discretion or has exercised its discretion on the basis of an error of law or irrelevant or impermissible factors.

***Gould v. Gould***, 116 Wis.2d 493, 497-98, 342 N.W.2d 426, 429 (1984) (citations omitted).

Joint legal custody and placement of a minor child must be consistent with his or her best interest. *See* § 767.24(2) and (5), STATS. The determination of what is in a child's best interest is a mixed question of law and fact. *See* ***Wiederholt v. Fischer***, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992).

The thrust of Jamel's arguments on appeal is that he is being excluded from his son's life by the award of sole legal custody and restricted physical placement. Jamel claims that the decision is based on an unsubstantiated fear that he will abduct the child and remove the child to the Islamic country of Tunisia, his homeland. He contends that the trial court's decision was clouded by a belief that because Tunisia is not a signatory to the Hague Convention, there would be no available recourse to retrieve the child once removed to that country. He characterizes the result as nothing less than religious and ethnic discrimination.

We acknowledge that Elizabeth's proof focused on her fear that Jamel would abduct the child. However, the trial court's decision was not driven by that factor and was not ethnically biased.[2]

Section 767.24(2), STATS., structures the trial court's decision. When the parties do not agree to joint legal custody,[3] the trial court may grant joint legal custody only when it specifically finds all of the following:

> a. Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child.
>
> b. No conditions exist at that time which would substantially interfere with the exercise of joint legal custody.
>
> c. The parties will be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody....

Section 767.24(2)(b)2.[4]

As to the first factor, the court noted that there was insubstantial evidence that Jamel is capable of caring for the child, although the court was willing to assume this fact based on Jamel's intelligence. It found that certain conditions exist that would substantially interfere with the exercise of joint legal

---

[2] Upon concluding that the trial court failed to state its findings of facts and conclusions of law with adequate clarity, by an order of October 7, 1997, we remanded the record to the trial court for additional findings. *See* ***Haugen v. Haugen***, 82 Wis.2d 411, 415, 262 N.W.2d 769, 771 (1978). The trial court has completed separate findings of facts and conclusions of law pertinent to its custody decision. We accept those findings and conclusions as part of the record.

[3] Jamel and Elizabeth did not agree to joint custody.

[4] Section 767.24(2)(b)2.c, STATS., has been amended by 1995 Wis. Act 275, § 127 and 1995 Wis. Act 343, § 3. The changes do not affect our analysis.

custody, most notably that the parties do not live in the same community or even the same country. Most importantly, the trial court found that the parties are not able to cooperate in the future decision making required by an award of joint legal custody. These findings are not clearly erroneous.

As the trial court noted, the parties were unable to agree on something as basic as a name for the child. The choice of different countries of residence reflects the parties' conflicts regarding cultural mores. The guardian ad litem highlighted that future cooperation requires communication and trust between the parties and that those two elements are clearly absent in this situation. The trial court found Elizabeth's testimony that Jamel had threatened her to be credible. Such threats undermine the parties' ability to communicate and foster the trust necessary for cooperation.

Jamel points to Elizabeth's expressed willingness to involve Jamel in major decision making, to give Jamel frequent reports about the child's progress, and to change the child's middle name to the name Jamel chose. The parties were also able to agree that the child should be exposed to both parents' religion and be allowed to choose for himself when old enough. We reject Jamel's supposition that this evidenced the parties' ability to compromise and cooperate.

Contrary to Jamel's contention, Jamel's religion was not a factor in the custody determination.[5] Religion was not even mentioned by the trial court. Indeed, because of the child's age and Elizabeth's expressed willingness to expose the child to Jamel's faith, the trial court refused to make any provision as to

[5] Jamel contends that Elizabeth convinced the court that Jamel, as a practicing Muslim, believes Elizabeth is unnecessary to the parenting equation.

religious training. We conclude that the trial court's award of sole legal custody was properly grounded in the statutory criteria and was a proper exercise of discretion.

Turning to the periods of physical placement awarded to Jamel, he objects to the requirement that his periods of placement are restricted to two hours a day and must be supervised. Jamel characterizes the supervision as precluding his ability to take his child to religious services, the park or the zoo "without being shadowed by an armed guard." Jamel contends that the restrictions are the result of Elizabeth's unsubstantiated fears that he would abduct the child.

We again turn to § 767.24, STATS., for the parameters of the trial court's exercise of discretion. Section 767.24(4)(b) recognizes that a child is entitled to periods of physical placement with both parents. Jamel was not denied periods of physical placement. Section 767.24(4)(b) does not mean that physical placement must be awarded on a fifty-fifty basis or without restrictions necessary to protect the child's best interest. Section 767.24(5) provides that in determining periods of physical placement which are in the best interest of the child, the court may consider, among other factors, the wishes of the child's parents, interaction of the child and the parents, the child's adjustment to home and community, and whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

The schedule for Jamel's periods of physical placement was set to accommodate the child's breast feeding schedule and was based on the child's age. These are overriding considerations given the child's tender age. Moreover, Jamel did not have an established residence in the same community as the child and was only in the United States for limited times. In ordering placement in the

child's home, the trial court astutely observed, "That's not for any great international reason. The child is six months old. I don't know where else you can do it." Although Jamel asks for a "normal placement schedule," he does not suggest what that would be or how it would be effectuated with a child of such tender age.

We acknowledge that the trial court stated that the restriction on Jamel's physical placement "is made in consideration of the risk of this child being removed from the jurisdiction of this court, of being removed from this country, and of being removed to a non-Hague Treaty country." Even if, as Jamel asserts, there was insufficient proof independent of Jamel's religion that the child was at risk of being abducted, the trial court's order that the visitation be supervised was made to accommodate Elizabeth's anxiety regarding that risk. Reasonable accommodations to the wishes of the sole legal custodian of the child are appropriate, particularly here where threats were made against the custodial parent. Indeed, Jamel himself recognized the need to make Elizabeth feel secure and he offered to surrender his passport and air travel tickets when exercising periods of physical placement with the child. It is also notable that until a few days before the final hearing, Jamel had not even seen the child or been responsible for his care.

We conclude that the restrictions placed on Jamel's periods of physical placement are a proper exercise of discretion based on the child's age. As the trial court noted, as the child matures the placement schedule may have to

be revisited.[6] It is an unfortunate reality of the legal system that the court may only rule on the current circumstances before it.

Finally, Jamel argues that he has been denied his constitutional right to freedom of religion and equal protection because the trial court's determination is based on his religion. Because we conclude that the trial court's determination is not driven by religious or ethnic concerns, we do not address the additional claims.[7]

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[6] The court commented that, "I feel like I'm doing a temporary order in this case. I think that's basically what it is. I think in a couple of years it's going to change."

[7] Elizabeth contends that the entire appeal should be dismissed for the failure to raise certain claims in the trial court by a motion for reconsideration. *See* ***Schinner v. Schinner***, 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988) (failure to bring a motion before the circuit court to correct manifest error constitutes a waiver of the right to have such an issue considered on appeal). Her contention is misplaced. The claims raised here do not fall within the category of "manifest error" which ***Schinner*** requires to be first brought to the attention of the trial court.