

HNOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
 In re: Harilaos Alexandros TSARBOPOULOS; In re:
 Ionna Isabella Tsarbopoulos; In re: Iason Antonis
 Tsarbopoulos.
 Anthony TSARBOPOULOS, Plaintiff-Appellee,
 v.
 Kristi Lee TSARBOPOULOS, Defendant-Appellant.
No. 00-35393.
D.C. No. CV-00-00083-AAM.

Argued and Submitted Nov. 13, 2000.

Decided Nov. 17, 2000.

Appeal from the United States District Court for the Eastern District of Washington, [Alan A. McDonald](#), District Judge, Presiding.

Before REAVLEY,^{FN2} [FERNANDEZ](#), and [THOMAS](#), Circuit Judges.

[FN2](#). The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

MEMORANDUM ^{FN1}

[FN1](#). This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by [Ninth Circuit Rule 36-3](#).

*1 Kristi Tsarbopoulos appeals the district court's *sua sponte* order granting Anthony Tsarbopoulos summary judgment on his petition for return of minor children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A. S. No. 11670, 1343 U.N.T.S. 49 (the "Hague Convention"). Because the parties are familiar with the factual and procedural history of this case,

we need not recount it here.

I

Under the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act, [42 U.S.C. §§ 11601-11610 \(1995\)](#), the court entertaining the petition for return of children must determine, as a threshold matter, whether the removal of the child was "wrongful" under the law of the State that was the child's "habitual residence" at the time of removal. [Shalit v. Coppe](#), 182 F.3d 1124, 1128 (9th Cir.1999). The petitioner must show this by a preponderance of the evidence. [42 U.S.C. § 11603\(e\)\(1\)](#). If the removal was wrongful, then the court must order the child returned to its habitual residence for the custody determination. [Shalit](#), 182 F.3d at 1128.

The Hague Convention does not define the term "habitual residence." However, United States courts have typically focused on two factors: whether the parents shared a mutual, settled purpose to make the new state their settled home and whether the children have sufficiently acclimatized to the new location. *See, e.g.,* [Feder v. Evans-Feder](#), 63 F.3d 217, 224 (3d Cir.1995); [Friedrich v. Friedrich](#), 983 F.2d 1396, 1401-02 (6th Cir.1993).^{FN3}

[FN3](#). A decision is expected shortly in *Mozes v. Mozes*, No. 98-56505, which should provide additional guidance on the specific standards applicable in the Ninth Circuit.

Anthony Tsarbopoulos made a strong showing that Greece was the children's habitual residence at the time of their removal. However, the strength of disputed evidence is not the dispositive issue in a summary judgment analysis. Rather, the salient question is whether genuine issues of material fact exist, a determination we review *de novo*. [Weiner v. San Diego County](#), 210 F.3d 1025, 1028 (9th Cir.2000). In reviewing the appropriateness of summary judgment, we must construe the evidence in the light most favorable to the non-moving party. [Lopez v. Smith](#), 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

Construing the tendered evidence in the light most favorable to Kristi Tzarbopoulos, we conclude that genuine issues of material fact exist that preclude summary judgment on the question of habitual residence. Mrs. Tzarbopoulos offered an affidavit indicating that she never intended to relocate permanently to Greece; that she believed her husband's job was a temporary two-year position; that she never intended to open a business in Greece; that she only sought an "Alien's Residence Permit" in Greece to allow her to stay more than four months; that she retained her United States citizenship; and that her financial transactions were based in the United States. We note that the couple had resided in the United States for ten years prior to their relocation to Greece. All of the children of the marriage were born and had continuously resided in the United States prior to their departure. Likewise, the extent of the children's acclimatization in Greece is disputed, particularly with respect to the younger two children.

II

*2 There are also genuine issues of material fact precluding summary judgment as to whether there is a "grave risk" that returning the children to Greece would expose them to physical or psychological harm or otherwise place them in an intolerable situation. If proven by clear and convincing evidence, the "grave risk" defense allows a court, in its discretion, to refuse to return a child even if the other requirements of the Hague Convention are satisfied. Hague Convention, art. 13(b), T.I.A.S. No. 11670 at 8; [42 U.S.C. § 11603\(e\)\(2\)](#).

Kristi Tzarbopoulos produced sufficient evidence to preclude the entry of summary judgment on her "grave risk" defense. She alleged that she and the children had suffered abuse, and tendered the affidavits of four health care professionals stating that the children had experienced abuse and would be physically and psychologically harmed if returned to their father. Anthony Tzarbopoulos strongly disputes this, and the district court rejected the evidence as lacking credibility. However, in a summary judgment analysis, all evidence must be construed in the light most favorable to the non-moving party. The evidence offered by Kristi Tzarbopoulos is sufficient to raise genuine issues of material fact concerning this defense, even when measured by the requirement that the evidence be clear and convincing.

If the district court determines that there is a grave risk that returning the children to Greece would expose them to physical or psychological harm or otherwise place them in an intolerable situation, the court may refuse to order the return of the children to Greece, but may also consider "a range of remedies that might allow both the return of the children to their home country and their protection from harm." [Blondin v. Dubois](#), 189 F.3d 240, 249 (2d Cir.1999). Thus, our decision does not preclude the district court from considering and imposing appropriate protective measures as a condition of the children's return, including, but not necessarily limited to those initially proposed by Anthony Tzarbopoulos in district court and at oral argument before this court. If Anthony Tzarbopoulos agrees, the court may impose those measures without actually making a finding of grave risk.

III

Kristi Tzarbopoulos requests reassignment of this case on remand to a different judge. We do not doubt the fairness or impartiality of the district court. However, this is a sensitive case involving delicate international judicial relations. The district judge has already expressed his view of the merits. Because we have decided that this case requires an evidentiary hearing and fact-finding by the district court, reassignment is appropriate to forend the suggestion by any party that the outcome has been predetermined. Similarly, our holding that genuine issues of material facts exist should not be construed as expressing any opinion on the ultimate merits of any aspect of the case.

Because the Hague Convention requires speedy resolution of these issues, we request the district court to schedule the necessary hearings as soon as possible. Toward that end, we instruct the Clerk of Court to issue the mandate immediately.

***3 REVERSED AND REMANDED WITH INSTRUCTIONS**

C.A.9 (Wash.),2000.
In re Tzarbopoulos
243 F.3d 550, 2000 WL 1721800 (C.A.9 (Wash.))

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