UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CARMELA RIVERO, **Plaintiff,** v. FIDELITY INVESTMENTS, INC. and FIDELITY BROKERAGE SERVICES, LLC, **Defendants.**	§ § § § § § § § § § §	CIVIL CAUSE NO. 4:18-cv-00909

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court should deny Fidelity Brokerage Services, LLC's ("Fidelity") Motion for Summary Judgment and should grant Ms. Rivero's Motion for Summary Judgment. The dispute at issue is purely legal in nature, *see* (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 1), and there is no material issue of fact.

I. Response to Fidelity's Statement of Issues

Ms. Rivero disagrees with Fidelity's Statement of Issues. (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 3). This dispute presents a single question: Can Fidelity condition access to Ms. Rivero's property on her obtaining and providing it with a Transfer Certificate? Fidelity frames the issues as a question of "transferring ownership." (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 3). Ownership is technically not the issue.

II. Response to Fidelity's Statement of Undisputed Material Facts

Ms. Rivero does not dispute Fidelity's Statement of Undisputed Material Facts subject to the following modifications[1]:

[1] Ms. Rivero incorporates by reference the list of Undisputed Material Facts provided in her Motion for Summary Judgment. (Ms. Rivero's Mot. Sum. Jud., ECF No. 22 pp. 2–5).

1. Fidelity was not obligated under federal law to obtain a Transfer Certificate after receiving the foreign death certificate. *See* (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 4–5). This is a legal conclusion and not a statement of fact.
2. Ms. Rivero admits that she held a checking account that gave right of survivorship rights to Mr. Medrano. As indicated in her declaration, however, Ms. Rivero exclusively funded that account. *See* (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 4–5); (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4, 8, 10).

III. Argument[2]

The Court should deny Fidelity's Motion for Summary Judgment. First, upon Mr. Medrano's death, the Fidelity Account transferred by operation of law. I.R.C. § 2040(a) applies and reinforces this state-law-driven transfer, providing that the joint account was not included in Mr. Medrano's gross estate where, as here, that account was established and entirely funded by Ms. Rivero. While Fidelity maintains that it "was obligated under federal law to obtain a Transfer Certificate prior to finalizing the re-registration transaction," Fidelity fails to recognize that the only provisions at issue govern ***transfers*** of property, not "finalizing [a] re-registration" to memorialize what occurred by operation of state law. (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 4–5).

Second, Ms. Rivero is a proper person to make the required demonstrations, and Ms. Rivero has, in fact, made the required demonstrations. Ms. Rivero is the "executor" of Mr. Medrano's estate within the meaning of I.R.C. § 2203 and Treas. Reg. § 20.2203-1. She is, moreover, a "responsible person" and has submitted the necessary facts.

Fidelity's final argument is that an IRS webpage—not a statute, and not a regulation—mandates that "[e]ven if Ms. Rivero's allegation that Mr. Medrano had no property in the United States is taken as true, [thus satisfying Treas. Reg. § 20.6325-1(b)(1)(i),] the IRS [webpage] still requires Ms.

[2] Ms. Rivero adopts and incorporates those arguments set forth in her Motion for Summary Judgment.

Rivero to submit certain documents to the IRS demonstrating proof of this fact." (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 14). Fidelity undermines its own argument by acknowledging in other portions of its brief that a Transfer Certificate would not be necessary under such circumstances. Its position is further undermined by the actual legal authorities referred to in that webpage. And finally, the position is undercut by the fact that a webpage of this nature is simply not authoritative law.

A. The Account Transferred Automatically by Operation of Law Upon Mr. Medrano's Death.[3]

State law provides that the Fidelity Account transferred to Ms. Rivero by operation of law upon Mr. Medrano's death. As a result, Mr. Medrano's estate held no interest in the account.[4] Thus, Treasury Regulation § 20.6325-1(a) is inapplicable. That regulation provides that "no domestic corporation or its transfer agent should *transfer* stock registered in the name of a non-resident decedent . . . except [under certain circumstances] . . . ." (emphasis added). But where, as here, the transfer occurred automatically by operation of state law, that regulation does not apply.[5]

Both parties agree that a right of survivorship was in place at the time of Mr. Medrano's death. (Original Pet. Dkt. # 1 ¶ 12); (Answer, Dkt. # 8 ¶ 12). Massachusetts law provides that property that is held by joint tenancy "passes to the survivor by operation of law and does not constitute a part of the decedent's estate." *In re Smith*, 361 Mass. 733, 737 (1972). Texas law applies a similar rule by statute:

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[3] Texas or Massachusetts law governs—either under a choice-of-law provision or the fact that Ms. Rivero resided in Texas and all dealings with Fidelity took place in Texas. *See generally* (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1); (Exh. B to Ms. Rivero's Mot. Sum. Jud. ECF No. 22-1 p. 25). The outcome is not impacted by which state's laws are operative.

[4] Even during Mr. Medrano's life, Ms. Rivero owned 100 percent of the Fidelity Account because she contributed all of the property in the account. *See* Tex. Est. Code § 113.151(a); *In re Smith*, 361 Mass. 733, 737 (1972); (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4–8, 10, 14). As such, there was no property interest to "transfer."

[5] Fidelity appears to improperly equate a "transfer" with finalizing a "re-registration." *See* (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 4–5) (citing *Transfer Certificate Filing Requirements for Non-U.S. Citizens*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/transfer-certificate-filing-requirements-for-non-uscitizens(last visited July 23, 2019)).

> Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.

Tex. Est. Code § 113.151(a); *see also Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.").

Fidelity cites no federal statute or regulation that overrides this automatic transfer of the account by operation of law. *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."). Mr. Medrano's estate, therefore, has no property interest for Fidelity to transfer. Notably, federal law underscores and reinforces this outcome. *See* I.R.C. § 2040(a); Treas. Reg. § 20.2040-1(a).

B. I.R.C. § 2040(a) Applies and is Consistent with State Law

Fidelity incorrectly maintains that I.R.C. § 2040(a) does not apply because it appears in Subchapter A of the Internal Revenue Code. (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 10–11). This proposition places form(at) over substance and suffers from a structural misunderstanding of the statutory provisions at issue.

I.R.C. § 2031, which is located in Subchapter A, defines "gross estate." *See* I.R.C. § 2031. I.R.C. § 2040(a) clarifies the scope of the phrase, "gross estate," excluding from the gross estate the portion of an account held as joint tenants with a right of survivorship that "originally belonged to [the survivor] and [was] never . . . received or acquired by the [survivor] from the decedent for less than an adequate and full consideration." I.R.C. § 2040(a); *see also* I.R.C. § 2031 (Subchapter A).

The definition and scope of the "gross estate" of a nonresident and noncitizen is built upon and incorporates the foregoing sections in Subchapter A. I.R.C. § 2103 (a nonresident and noncitizen's gross estate is "determined as provided in section 2031."). *See also* I.R.C. § 2106(a)(4). Fidelity makes much of the fact that Subchapter A is titled "Estates of Citizens or Residents," but it

fails to recognize that Subchapter B is expressly built upon Subchapter A and incorporates Subchapter A's definition of "gross estate." Flagging this titular language puts forth a red herring that carries no analytical weight, and there is simply no textual basis or policy rationale to read § 2040 in the manner proffered by Fidelity.

C. Ms. Rivero is a Proper Person to Make the Necessary Demonstration, and Has, in Fact, Made that Demonstration.

Fidelity clings to a hyper-technical and flawed view of the requirements at issue. It refuses to release Ms. Rivero's assets because, it asserts: "To date, Fidelity has not received any submissions or otherwise *from the executor* of Mr. Medrano's estate." (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 11) (emphasis added). This myopic focus on the term "executor" is misplaced.

Contrary to Fidelity's position, § 2040(a) does not require that an "executor"—as that term is commonly understood in the context of state probate law—submit the information at issue. *See* I.R.C. § 2040(a); *cf.* Treas. Reg. § 20.2040-1(a). Indeed, the Internal Revenue Code defines "executor" in this context, and Ms. Rivero falls within the scope of that definition:

> *The term "executor" wherever it is used in this title in connection with the estate tax imposed by this chapter* means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then *any person in actual or constructive possession of any property of the decedent.*

I.R.C. § 2203 (emphasis added). As Treas. Reg. § 20.2203-1 further provides:

> The term executor means the executor or administrator of the decedent's estate. However, *if there is no executor or administrator appointed, qualified and acting within the United States*, *the term means any person in actual or constructive possession of any property of the decedent.* The term "person in actual or constructive possession of any property of the decedent" includes, among others, the decedent's agents and representatives; safe-deposit companies, warehouse companies, and other custodians of property in this country; brokers holding, as collateral, securities belonging to the decedent; and debtors of the decedent in this country.

Treas. Reg. § 20.2203-1 (emphasis added). Tax Court precedent holds that an individual who controlled a decedent's bank account after death had actual possession of a decedent's assets, establishing that he was an "executor" for the purposes of § 2203, even though the estate was not

probated. *See Allen v. Commissioner*, No. 24984-97; No. 24985-97; No. 24986-97; No. 24987-97, 1999 Tax Ct. Memo LEXIS 438, at *25-27 (T.C. 1999). In *Allen*, the "executor" did not even own the account and was not even a signatory on the account. *Id.* at *9–12. His control over it was evidenced by merely having deposited a check into the account and even by forging checks on the account. *Id.* at *25–27. Nonetheless, even under such facts, the court held that he fell under the definition of "executor" under § 2203. *Id.* at *27.

Assuming that the account did not transfer by operation of law (as Fidelity implicitly argues), Ms. Rivero is a person in actual or constructive possession of the Fidelity Account. (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4–5, 7–8, 10, 14). In fact, Fidelity admits that "Ms. Rivero is the absolute owner of the property in the Account at this time . . . ." (Fidelity's Resp. to Mot. Sum Jud., ECF No. 23 p. 4). She is, therefore, an "executor" within the meaning of that term in this context. While Fidelity submits that "the evidence fails to demonstrate why Ms. Rivero . . . would be in a position similar to that of an *executor* with regard to knowledge of [Medrano's] assets," (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 13-14), it appears that Ms. Rivero was, *by definition*, in precisely such a position.

Moreover, this definition is consistent with Treas. Reg. § 20.6325-1(b)(3), which refers to an "other responsible person, who may be reasonably regarded as in possession of the pertinent facts." This language evidences an intention to expand the scope of persons eligible to provide the pertinent facts, and is, in fact, consistent with the broad definition of "executor" that applies in this context.

Against this background, Ms. Rivero is a proper person to make the required demonstration—particularly as the "executor" of the estate under Treas. Reg. § 20.2040-1(a); sole funder and owner of the Fidelity Account; and long-time, close friend of Mr. Medrano. (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 5, 7, 12).

Moreover, Ms. Rivero has, in fact, made the required demonstration. She has provided a

statement of the facts demonstrating that the gross value of the estate falls under Treas. Reg. § 20.6325(b)(1)(i)'s exception and that the property at issue belongs to her. *See* (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4–5, 8, 10, 12). She has demonstrated that she solely funded the account and that Mr. Medrano made no contributions to the account. (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4–8, 9–10, 12, 14). Indeed, each of the putative shortcomings noted by Fidelity is addressed in the Declaration tendered with Ms. Rivero's Motion for Summary Judgment. That declaration demonstrates that the gross value of the estate falls under the exception provided by Treas. Reg. § 20.6325(b)(1)(i) and that the property at issue was acquired solely by, and belongs to, Ms. Rivero. *See* (Exh. A to Ms. Rivero's Mot. Sum. Jud., ECF No. 22-1 ¶¶ 4–5, 8, 10, 12).

i. There is No Competent Summary Judgment Evidence Demonstrating Information to the Contrary.

As Fidelity notes, Treas. Reg. § 20.6325-1(b)(3) removes any liability exposure for failing to provide a Transfer Certificate on the transfer of a decedent's property if "having no information to the contrary, [the custodian] first receives from the executor or other responsible person, who may be reasonably regarded as in possession of the pertinent facts, a statement of facts showing [that the decedent's gross estate situated in the United States did not exceed $60,000 at the time of his death]." (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 11) (quoting Treas. Reg. § 20.6325-1(b)(3)). Fidelity contends that it has certain information to the contrary regarding the value of the decedent's estate because Ms. Rivero listed a joint checking account with Mr. Medrano held at Shareplus Federal Credit Union in Texas when opening the Fidelity Account. (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 11). But Ms. Rivero's declaration adequately explains this fact, and demonstrates that this information is not inconsistent with the statement of facts that Ms. Rivero has provided. There is no genuine dispute with respect to a material fact in this regard.

D. The Webpage Relied Upon by Fidelity is Not a Source of Authority and Actually Undermines Fidelity's Position.

Fidelity's final argument is that an IRS webpage—not a statute, and not a regulation—mandates that "[e]ven if Ms. Rivero's allegation that Mr. Medrano had no property in the United States is taken as true, the IRS [webpage] still requires Ms. Rivero to submit certain documents to the IRS demonstrating proof of this fact." (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 14). In other words, a mere non-APA compliant webpage effectively requires the parties to disregard a duly-enacted regulatory exception. That is not, and has never been, the law. *See* 5 U.S.C. § 553; *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019).

As a threshold matter, Fidelity undermines this final argument by acknowledging that it would not need the IRS to approve or issue a transfer certificate if the very exceptions raised here are satisfied. (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 11 – part 2) ("Ms. Rivero further fails to satisfy the exception articulated in Treasury Regulation §§ 20.6325-1(b)(1)(i) and 20.6325-1(b)(3), which, if satisfied, would allow Fidelity to act without the Transfer Certificate and incur no liability for such actions."); (Fidelity's Mot. Sum. Jud., ECF No. 21 pp. 8–9) ("Finally, subsection (b)(3) dictates that a custodian like Fidelity will not incur liability for the transfer of a non-resident decedent's property without a Transfer Certificate if the custodian first receives from the executor or some other responsible person a statement of the facts relating to the estate showing that its sum does not exceed $60,000 . . . .").

Moreover, the authorities cited on the webpage actually undermine Fidelity's position and demonstrate that Fidelity misplaces its reliance on the webpage. The webpage cites to two authorities: Form 706-NA and IRS Notice 2011-66. First, the webpage cites the instructions to Form 706 NA. *See Transfer Certificate Filing Requirements for Non-U.S. Citizens, IRS*, https://www.irs.gov/businesses/small-businesses-self-employed/transfer-certificate-filing-requirements-for-non-us-citizens (last visited August 26, 2019). The instructions to Form 706-NA direct one to "the Instructions for Form 706" "for additional information concerning joint tenancies."

Instructions for Form 706-NA, IRS, https://www.irs.gov/pub/irs-pdf/i706na.pdf at p. 3 (last visited August 26, 2019). The Instructions to Form 706 provide that the "full value of jointly owned property also does not have to be included in the gross estate if you can show that any part of the property was acquired with consideration originally belonging to the surviving joint tenant or tenants." *Instructions for Form 706*, IRS, https://www.irs.gov/pub/irs-pdf/i706.pdf (last visited August 26, 2019), p. 26.

The webpage also cites to IRS Notice 2011-66, which demonstrates that a transfer certificate is not required. IRS Notice 2011-66 ("Concerns have been raised as to whether it is still necessary to obtain [] transfer certificates prior to transferring property owned by nonresident decedents . . . This notice clarifies that a transfer certificate is not required, and the IRS will not issue transfer certificates, with respect to the property of a nonresident decedent who is not a citizen of the United States, who died in 2010, and whose executor makes the Section 1022 Election."). This authority pointedly demonstrates that there is no requirement to submit documents to the IRS to obtain some sort of preliminary "ruling."

Finally, an agency webpage is simply not authoritative law, and the webpage at issue does not even purport to be. *See* 5 U.S.C. § 553; *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1075 (D.N.J. 2011) (holding that even if an agency webpage were an "interpretive rule," "[the agency] has not explained the type of investigations, if any, which led to its drafting, the regulations that it purports to interpret, or the grounds for its interpretation in the statutory and regulatory text" as required by *Cleary v. Waldman*, 167 F.3d 801, 807-808 (3d Cir. 1999), *cert. den'd*, 528 U.S. 870 (1999).). An agency must abide by notice-and-comment procedures in accordance with the Administrative Procedure Act in order for guidance to be legally authoritative. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) ("[5 U.S.C. § 553] requires agencies to follow notice-and-comment procedures when issuing or amending legally binding regulations (what the APA calls 'substantive rules' . . ."). While it is true that agencies can issue "interpretive rules" without abiding

by this procedure, those rules "do *not* have force of law." *Id.* at 2420 (emphasis in original). Thus, the webpage is not authoritative law. (Fidelity's Mot. Sum. Jud., ECF No. 21 p. 14).

Moreover, the webpage cannot override an unambiguous statute or regulation providing that a Transfer Certificate is not required if a decedent's gross estate is less than $60,000. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (citing *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *Seth B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 968 (5th Cir. 2016) ("'If [a] regulation is unambiguous, we may . . . consider agency interpretation, but only according to its persuasive power.'") (quoting *Belt v. EmCare, Inc.*, 444 F.3d 403, 408 (5th Cir. 2006)); *cf. Summit Petroleum Corp. v. United States EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012) ("We afford an agency's interpretation no deference, however, if the language of the regulation is unambiguous, for doing so would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.'") (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

IV. Conclusion

The Court should deny Fidelity's Motion for Summary Judgment. The Fidelity Account transferred by operation of law, and Mr. Medrano's gross estate did not include the joint account where, as here, the account was established and entirely funded by Ms. Rivero. Because the account transferred by operation of law, the provisions at issue are simply not applicable.

Moreover, Ms. Rivero is the proper person to make the demonstrations at issue, and in fact, made the necessary demonstrations. Ms. Rivero is the "executor" of Mr. Medrano's estate under Treas. Reg. § 20.2203-1, and she is a "responsible person" who has submitted the necessary facts required by Treas. Reg. § 20.6325-1(b)(3).

Finally, Fidelity's position—that a webpage somehow mandates that even if Ms. Rivero demonstrated that a regulatory exception applies, it must nonetheless disregard that exception and seek a ruling from the IRS—is simply incorrect. Fidelity contradicts its own assertion by

acknowledging in other portions of its brief that a Transfer Certificate would not be necessary in this context. The authorities cited in the webpage, in fact, further undermine Fidelity's position. And, in any event, the webpage is not authoritative law and cannot override a duly-enacted regulation.

WHEREFORE, Ms. Rivero requests that this Court deny Fidelity's Motion for Summary Judgment. Ms. Rivero further requests that this Court grant her Motion for Summary Judgment, and declare that (1) she is the sole owner of the Fidelity Account, (2) a Transfer Certificate is not necessary to transfer ownership of the Fidelity Account, and (3) Fidelity may grant Ms. Rivero access to the Fidelity Account.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August 2019, I have electronically filed the foregoing document with the Clerk of Court through the CM/ECF document filing system, which sent notification and copies of the filing to all counsel of record.

/s/ *Jason B. Freeman*
Jason B. Freeman