

**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.

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CIVIL CAUSE NO. 4:18-cv-00909

**PLAINTIFF’S REPLY TO DEFENDANT’S RESPONSE TO MOTION FOR SUMMARY
JUDGMENT**

The Court should grant Ms. Rivero’s Motion for Summary Judgment and should deny Fidelity Brokerage Services, LLC’s (“Fidelity”) Motion for Summary Judgment.

I. Argument¹

Fidelity previously informed this Court that this dispute raised a singular issue: “whether Ms. Rivero is required to provide an IRS Transfer Certificate, Form 5173 to transfer ownership of the Account” (Def’s Mot. Sum. Jud., ECF No. 21 p. 3) (emphasis added). But Fidelity, itself, appears to have now answered this question in the negative: it now acknowledges that “Ms. Rivero is the absolute owner of the property in the Account at this time.” (Def’s Resp., ECF No. 23 p. 4) (emphasis added). The

¹ Ms. Rivero adopts by reference and incorporates those arguments set forth in her Motion for Summary Judgment and Response to Fidelity’s Motion for Summary Judgment.

property at issue, in other words, has already transferred by operation of law. A transfer certificate is, therefore, not applicable. *See* Treas. Reg. § 20.6325-1.

Moreover, Fidelity effectively asks this Court to ignore controlling regulatory provisions. The Court should decline the invitation.

A. Fidelity Admits that Ownership Has Already Transferred and It Cites No Authority That Affirmatively Allows it to Legally Withhold Access to Ms. Rivero's Property When Access is Demanded.

Fidelity agrees that the Fidelity Account “passed to [Ms. Rivero] by operation of state law on the date of Mr. Medrano’s death.” (Def’s Resp., ECF No. 23 p. 4). Fidelity maintains as follows:

Fidelity does not dispute that Ms. Rivero is the absolute owner of the property in the Account at this time; however, Ms. Rivero’s legal ownership of the Account does not relieve Fidelity of its obligation to require a Transfer Certificate

(Def’s Resp., ECF No. 23 p. 4). Apparently retreating from the regulations, Fidelity now cites to Rev. Rul. 55-160 as the basis for its position. (Def’s Resp., ECF No. 23 p. 4).

Fidelity’s position ignores the plain language of Treas. Reg. § 20.6325-1(a) and misapprehends the function of a transfer certificate: “A transfer certificate is a certificate permitting the *transfer* of property of a nonresident decedent without liability.” Treas. Reg. § 20.6325-1(a) (emphasis added). A transfer certificate, by definition, only applies to the *transfer* of property. Treas. Reg. § 20.6325-1(a). But Fidelity now admits that the property has already transferred by operation of state law. *See* (Def’s Resp., ECF No. 23 p. 4). As Fidelity admits, “Ms. Rivero is the absolute owner of the property,” and there is no property for Fidelity to transfer at this time. (Def’s Resp., ECF No. 23 p. 4). Thus, the requirement for a transfer certificate does not apply.

Moreover, the revenue ruling cited by Fidelity conspicuously fails to address a fundamental issue: As a matter of governing law, can Fidelity refuse to grant Ms. Rivero access to property that she owns? Rev. Rul. 55-160 does not purport to answer this. *See generally* Rev. Rul. 55-160, 1955-1 C.B. 464. The ruling sidesteps the question. Much as the regulation at issue merely uses “should” language

that, in effect, indicates that a corporation may be “well advised”² to request a transfer certificate, the regulation does not purport to override governing state law. *See* Treas. Reg. § 20.6325-1(a). Like the ruling cited by Fidelity, it merely provides that the corporation can protect itself by obtaining a certificate. *See* Treas. Reg. § 20.6325-1(a). Critically, however, the regulation does not speak to an account owner’s legal right to access the funds, if she so demands. *See generally* Treas. Reg. § 20.6325-1. As the account owner, Ms. Rivero has a legal right to access the funds, and Fidelity cannot legally limit her access to her funds. It would be improper to find such a prohibition (overriding state law) in the words of a statute and regulation that do not expressly provide such a prohibition.

B. Fidelity Asks this Court to Ignore the Controlling Provisions.

Fidelity asks this Court to ignore and completely read away the critical and dispositive regulation upon which this case turns: Treas. Reg. § 20.6325-1(b)(3). That section provides:

A corporation . . . or other custodian will not incur liability for a transfer of the decedent’s property without a transfer certificate if the corporation or other person, having no information to the contrary, first receives *from the executor or other responsible person*, who may be reasonably regarded as in possession of the pertinent facts, *a statement of the facts relating to the estate showing that the sum of the value on the date of the decedent’s death of that part of his gross estate situated in the United States*, . . . is such an amount that, pursuant to the provisions of paragraph (b) (1) and (2) of this section, a transfer certificate is not required.

Treas. Reg. § 20.6325-1(b)(3). (emphasis added).³

Fidelity takes the position that duly-enacted Treas. Reg. § 20.6325-1(b)(3) does not apply because Ms. Rivero “offers only her word to support [the] bare allegation” that Ms. Medrano’s estate

² So to speak.

³ Notably, **Treas. Reg. § 20.6325-1(b)(3)** and **Treas. Reg. 20.2040(a)-1** contain language that is distinct from that contained in Treas. Reg. § 20.6325-1(c). Treas. Reg. § 20.6325-1(c) refers to estates administered “by an executor or administrator *appointed, qualified, and acting within the United States*.” Treas. Reg. § 20.6325-1(b)(3) and Treas. Reg. 20.2040(a), on the other hand, refer to less-restrictive phrases: “*the executor or other responsible person*” and “*the executor*,” respectively. The language in Treas. Reg. § 20.6325-1(c) is arguably more restrictive than the language in **Treas. Reg. § 20.6325-1(b)(3)** and **Treas. Reg. 20.2040(a)**. The use of distinct language in these provisions provides a textual basis for inferring an intention to construe both **Treas. Reg. § 20.6325-1(b)(3)** and **Treas. Reg. 20.2040-1(a)** as encompassing a broader array of persons than Treas. Reg. § 20.6325-1(c). This further underscores and strengthens Plaintiff’s position that she is an appropriate person to make the demonstrations necessary under the controlling provisions: **Treas. Reg. § 20.6325-1(b)(3)** and **Treas. Reg. 20.2040-1(a)**.

falls under this exception. (Def's Resp. ECF No. 23, p. 6). Fidelity is incorrect. On the contrary, Ms. Rivero's "word" is in the form of a declaration and constitutes a "statement of the facts relating to the estate" of Mr. Medrano. *See generally* (Exh. A to Ms. Rivero's Mot. Sum Jud., ECF No. 22-1). It "show[s]" that the sum of the value of Mr. Medrano's estate situated in the United States on the date of his death was sufficiently low that the transfer certificate requirement was not applicable.

The regulation is clear and unambiguous. It simply requires a "statement of the facts" from the executor or other responsible person—nothing more. *See* Treas. Reg. § 20.6325-1(b)(3). The Court should not impose greater restrictions or more onerous hoops to jump through than those evident from the plain language of the regulation.

Ms. Rivero satisfies the basic requirements. Fidelity nonetheless clings to its position, unreasonably seeking to cast doubt on Ms. Rivero's credibility and honesty. *See* (Def's Resp. ECF No. 23, p. 7 n. 4). It asks the Court to look beyond her sworn "statement of facts" and to find that she does not satisfy the regulation's plain standard because it believes she is an "interested third-party" who "lacks credibility." (Def's Resp. ECF No. 23, p. 7 n. 4).

First, the statute merely looks to whether a person "may be reasonably regarded as in possession of the pertinent facts." Treas. Reg. § 20.6325-1(b)(3). It sets forth an objective test, not a subjective one. *See id.* It does not ask the parties to make judgment calls about the person's penchant for veracity and truth telling. *See id.* Instead, it looks to whether the person was objectively close to the facts at issue and could "reasonably [be] regarded" as having relevant knowledge. *See id.* (As to the reasonableness of such a finding, probate courts make decisions with respect to the disposition of property every day in this country on the basis of declarations and testimony exactly like that at issue.). From an *objective* perspective, it is not even a close call.

Moreover, the parties now even agree 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). Alternatively,

she is in actual or constructive possession of the property. She is, therefore, an “executor” within the meaning provided by I.R.C. § 2203 and Treas. Reg. § 20.2203-1. The fact that she satisfies this definition *via statute* further underscores the fact that she is an “executor or other responsible person” within the meaning of the regulations at issue.

For example, the term “executor” is defined by statute:

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). Notably, a revenue ruling cannot change this definition.⁴ 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).

Next, Fidelity asserts that “it has information which casts doubt on Ms. Rivero’s statements regarding the value of Mr. Medrano’s gross estate situated in the U.S.” (Def’s Resp. ECF No. 23, p. 7 n. 4). It cites exclusively to a joint checking account that Ms. Rivero disclosed to Fidelity. (Def’s Resp. ECF No. 23, p. 7 n. 4). Ms. Rivero, however, specifically noted this prior account in paragraph 8 of

⁴A Revenue Ruling is not controlling authority and cannot alter a statute or regulation. *Kornman & Assocs. v. United States*, 527 F.3d 443, 453 (5th Cir. 2008) (“We will disregard a ruling if it ‘conflicts with the statute it supposedly interprets, with the statute’s legislative history, or if [it] is otherwise unreasonable.’ . . . Both the IRS and the Fifth Circuit have stated that revenue rulings are entitled to less deference than treasury regulations.”); see *Kravetz v. Commissioner*, Docket No. 703-84, 1985 Tax Ct. Memo LEXIS 135, at *14 (T.C. Sep. 23, 1985). Revenue rulings are not entitled to *Chevron* deference. *Kornman & Assocs. v. United States*, 527 F.3d 443, 454 (5th Cir. 2008) (quoting John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 86 (1995)) (“By choosing to issue a Revenue Ruling rather than a regulation, the IRS in effect announces that it does not intend to exercise its authority in a way that would make *Chevron* deference appropriate.”).

her Declaration. *See* (Exh. A to Ms. Rivero’s Mot. Sum. Jud., ECF No. 22-1 ¶ 8). She noted that she “had added [Medrano] to one other, prior account as a joint right of survivorship right, but [she] had opened and funded that account with [her] property entirely.” (Exh. A to Ms. Rivero’s Mot. Sum. Jud., ECF No. 22-1 ¶ 8). She further averred that Mr. Medrano’s “only relation to any property in the United States was his right of survivorship with respect to [her] assets.” (Exh. A to Ms. Rivero’s Mot. Sum. Jud., ECF No. 22-1 ¶ 9). Far from “cast[ing] doubt on Ms. Rivero’s statements” (Def’s Resp. ECF No. 23, p. 7 n. 4) as Fidelity argues, these statements actually fully explain the relevant facts; are entirely consistent with Ms. Rivero’s statement and position; and even add credibility, further demonstrating that she was in fact a person with knowledge of the relevant facts.

Because she satisfies the plain, objective standard of the regulation, and because she has provided the requisite “statement of facts,” the Court should grant Ms. Rivero’s Motion for Summary Judgment.

Further, Rev. Rul. 55-160 is not applicable and does not change the result here. First, the statutory section setting forth the definition of “executor” at issue (and cited above) was enacted in late 1954. *See* 83 P.L. 591, 68 Stat. 730, 83 Cong. Ch. 736. The ruling cited by Fidelity was issued in 1955, apparently based on a prior legal provision. *See* Rev. Rul. 55-160, 1955-1 C.B. 464. This is evident from the fact that the ruling cites only to “Section 81.62 of Estate Tax Regulations 105,” which no longer exists, and did not cite to the definition of “executor.” In addition, the regulatory definition of “executor” under Treas. Reg. § 20.2203-1 was not adopted until 1958. *See* 23 FR 4529. This ultimately renders the ruling inapplicable legally.

Second, the ruling provided extremely sparse factual background and reasoning, limiting any propositions that can be drawn from it. *See* Rev. Rul. 55-160, 1955-1 C.B. 464; *cf.* Rev. Rul. 2013-17, 2013-2 C.B. 201. Notably, however, that ruling involved a nonresident decedent and nonresident surviving spouse who held a U.S.-based bank account with right of survivorship. *See id.* This fact

ultimately distinguishes the ruling, factually rendering it inapplicable.

The ruling even states that “[the transfer certificate provision] shall not apply if there is an executor or administrator appointed, qualified, and acting *within the United States*,” further stating that “[t]his latter provision refers to property in the possession or control of such executor or administrator.” *Id.* (emphasis added). Under the facts presented in the ruling, the surviving spouse was a nonresident living outside of the United States. *Id.* Here, however, Ms. Rivero—the “executor” by federal statute—is living and working in the United States. (Exh. A to Ms. Rivero’s Mot. Sum. Jud., ECF No. 22-1 ¶¶ 2, 10). Thus, even under the rule set forth in the Revenue Ruling (which was based upon prior law), Ms. Rivero’s status of acting within the United States would dictate a different outcome. Moreover, even where it could be said to apply, the revenue ruling appears to only apply to Treas. Reg. § 20.6325-**1(c)**, not Treas. Reg. 20.6325-1(b)(3), which is the controlling provision at issue here.⁵

II. Conclusion

The Court should grant Ms. Rivero’s Motion for Summary Judgment. The Fidelity Account transferred on Mr. Medrano’s death by operation of law. Fidelity admits that “Ms. Rivero is the absolute owner of the property in the Account at this time.” (Def’s Resp., ECF No. 23 p. 4). A transfer certificate is, therefore, not applicable.

Moreover, Fidelity effectively asks this Court to ignore controlling regulatory provisions. The Court should decline the invitation.

WHEREFORE, Ms. Rivero requests that this Court grant her Motion for Summary Judgment. She further requests that this Court deny Fidelity’s 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

⁵ See *supra*, note 3.

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 3rd day of September 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.

By: /s/ Jason B. Freeman

Jason B. Freeman