

Estates: What are the rights of the beneficial owner of a securities portfolio?

Once an estate has been settled, full ownership of securities may be shared among the heirs in accordance with the wishes stated in the deceased's will: some heirs thus become beneficial owners (often the surviving spouse) and others become bare owners (often the children). In that case, we call it a securities account held in divided ownership.

The AMF Ombudsman's Office regularly receives requests dealing with this issue. A discussion of this dispute calls attention to the different powers of the parties with an interest in this account, and in particular to those of the beneficial owner.

The facts

Mrs P. inherited beneficial ownership of her deceased husband's standard securities account. After she had been widowed for five years, she wanted to be free to switch the securities in this account, that is, to sell certain securities in order to buy others within the same account. Yet, despite several attempts to contact Bank A., the account keeper, she received no response.

Bank A. finally told her that, pursuant to the securities account agreement and, more specifically, to the article concerning beneficial ownership and bare ownership of the securities account, orders —and buy, sell, transfer and fund transfer orders in particular — must be signed jointly by the beneficial owner and the bare owner, unless one of them has been given power of attorney or there is a reciprocal proxy.

Mrs P. was concerned that some of the portfolio securities were losing value. As she was not able to switch any of the securities in the account on her own, she asked me to intervene so that Bank A. would allow her to do so.

The analysis

Bear in mind that beneficial ownership means the right to use an asset and to receive the revenue derived therefrom. As such, the beneficial owner alone bears the burden of the wealth tax (*impôt sur la fortune*, or ISF), where there is legal beneficial ownership. The beneficial owner does not have the right to dispose of the asset — by selling it, for example — as opposed to bare ownership, which entails the right to dispose of this asset but not to use it or receive the revenue derived therefrom.

I questioned the account keeper and reminded it that the beneficial owner alone has the right, established by Court of Cassation case law, to switch the securities in this portfolio.

Since the judgment issued on 12 November 1998¹, the Court of Cassation has confirmed the beneficial owner's right to switch the securities in the portfolio without having to seek permission from the bare owner: "*while the beneficial owner of a securities portfolio is authorised to manage this portfolio as a whole by selling certain securities, provided they are replaced, he is nevertheless responsible for preserving the substance of the portfolio and for restoring it to the bare owner*".

With its founding and subsequently consistent case law, the Court of Cassation sought to address the economic concerns of portfolio managers, who have a duty to act and quickly anticipate in order to most effectively manage their securities portfolios.

¹ Court of Cassation, 1st Civil Division, 12 November 1998, no. 96-18.041 published in the *Bulletin des arrêts de la Cour civile* (digest of decisions by the civil division).

The recommendation

After I intervened, Bank A. authorised Mrs P., as beneficial owner, to switch the securities in the account of her deceased husband. This means that she now has the right to buy and sell securities. She can do so without having to request permission from the bare owner, who must nevertheless be kept informed, and provided that the proceeds from these sales are immediately reinvested in the same portfolio, thus preserving its substance, which must be assessed on a case-by-case basis.

The lesson to be learned

A securities account held in divided ownership is governed by specific legal operating rules which may be adjusted by a rider among the heirs. It is essential to have a clear understanding of these concepts to assess all the consequences.

We therefore note that it is impossible for the beneficial owner to sell a securities portfolio without the bare owner's consent, but case law has consistently recognised that the beneficial owner may switch the securities in the portfolio under certain conditions. Conversely, for a traditional disposal (purchase or sale without replacement) the securities account can only operate with the joint signature of the beneficial owner and the bare owner unless one of them has been given power of attorney or there is a reciprocal proxy.

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