

Nos. A10-<sup>1336</sup>~~1366~~ and A10-1505

**STATE OF MINNESOTA  
IN SUPREME COURT**

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Fannie Mae,

Appellant,

v.

Andrew C. Grossman,

Respondent,

Heather Apartments Limited Partnership  
d/b/a Vantage Lakes Apartments, Andrew C. Grossman,  
The Home Depot Supply, Inc., Complete Pest Control, Inc.  
A Touch of Class Painting and Remodeling Company, LLC,  
Sotelo Co., LLC, Wilmar Industries, a Division of Interline Brands, Inc,  
K & K Quality Roofing & Construction, and Sonshine Services, L.L.C.,

Defendants.

\_\_\_\_\_  
**APPELLANT FANNIE MAE'S REPLY BRIEF**  
\_\_\_\_\_

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## ARGUMENT

Grossman's response to Fannie Mae's initial brief does not deny the validity of the judgment against him, does not dispute that he transferred personal assets to unreachable offshore trusts to evade his creditors, and does not question the trial court's finding that he is likely to likewise transfer any assets he may receive from the Grossman trust. Instead, Grossman relies on essentially two arguments in contesting the trial court's injunction against him:

- The trial court overreached its authority and violated the spendthrift trust provision in the Grossman trust, not because of what the injunction requires or even when it takes effect, but simply because of when the injunction was *issued*; and
- The injunction somehow affects the corpus of the spendthrift trust itself, despite the fact that neither the trust nor the trustee is subject to the injunction or is even a party in the action.

Minnesota law does not support Grossman's arguments, and this Court should reverse the decision of the Minnesota Court of Appeals and reinstate the trial court's injunction.

### **I. The District Court Had the Authority to Enjoin Grossman From Disposing of Any Assets He May Receive From His Father's Trust**

Although the parties have provided the Court with substantial analysis and authority on this first issue, the issue boils down to a simple inquiry: Does a court have the power—either under section 575.05, or the rules of procedure, or its inherent power—to

require a judgment debtor in a case before it to retain any money the debtor may receive from a particular source? Both the language of the statute and the logic of the judicial process require that the answer to that question is “yes.”

**A. Section 575.05 permits the district court to prospectively enjoin Grossman from disposing of property even if he has not yet received specific monetary assets from the trust**

Grossman’s central argument on this issue relies on his conclusion that section 575.05 “does not allow a court to issue orders affecting property not within a person’s possession or control.” Grossman Br. at 11. But the order at issue here does *not* in fact affect property that is not within Grossman’s possession or control. The order affects Grossman’s interest in trust assets only *after* they are distributed from the trust to Grossman; indeed, the Court of Appeals itself characterized the injunction as “an order that will have no effect until appellant receives the proceeds.” Fannie Mae v. Heather Apartments Ltd. P’ship, 799 N.W.2d 638, 641 (Minn. App. 2011).

Given this true character of the trial court’s order, Grossman spends most of its discussion of section 575.05 arguing a legal conclusion that does not address the situation presented here. Indeed, Grossman spends far more space trying to find an independent basis to undercut the application of section 575.05 than the Court of Appeals did. As noted in Fannie Mae’s original brief, the Court of Appeals spent only a single paragraph addressing section 575.05, and it tied its holding on that issue directly to the spendthrift trust issue. See 799 N.W.2d at 641 (“section 575.05 does not authorize orders *affecting proceeds of a spendthrift trust* that may be distributed to a beneficiary in the future”) (emphasis added).

Grossman also misreads and as a result overlooks the significance of Lange v. Fidelity & Casualty Co., 290 Minn. 61, 185 N.W.2d 881, 887 (Minn. 1971). Although Grossman accuses Fannie Mae of “summarily dismiss[ing]” the significance of assignability in Lange, Grossman Br. at 12 n.5, he fails to address the fact that the Lange court’s observation that the cause of action at issue was assignable (unlike an interest in a spendthrift trust) was entirely independent of its discussion of section 575.05. See 290 Minn. at 69-70, 185 N.W.2d at 886-87. As noted in Fannie Mae’s original brief, the point that the Lange court made was that section 575.05 permits a receiver to pursue a debtor’s potential assets even if the debtor does not. Id. This is consistent with the Court’s comments about creditors’ possible remedies where a beneficiary unreasonably delays receiving assets from a trust by one means or another. See In re Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43, 46 (Minn.1985). Thus, contrary to Grossman’s suggestion, the assignability of the claim in the Lange case in no way undercuts the support that Lange provides for the trial court’s exercise of section 575.05 authority.

Grossman’s suggestion that Fannie Mae “intimates” that proceeds from the Grossman trust are *presently* due to Grossman, see Grossman Br. at 13-14 (citing Fannie Mae Br. at 13-15), simply mistakes Fannie Mae’s argument. The pages that Grossman cites from Fannie Mae’s brief clearly talk about the trial court’s power to address assets that *may become due* to Grossman, not assets that are presently due to him. See, e.g., Fannie Mae Br. at 13 (“Should any proceeds of the trust become ‘due’ to Mr. Grossman

and he has a right to demand them, they are his ‘property.’”); *id.* (“if any payment from the Grossman trust becomes legally “due” to Mr. Grossman”).<sup>1</sup>

**B. The law-of-the-case doctrine has no bearing on the issue before the Court.**

Grossman next argues that the trial court could not anticipatorily enjoin Grossman from disposing of any assets he receives from the Grossman trust because such assets cannot be applied to the judgment until the assets are received, and the law-of-the-case doctrine bars any such application. See Grossman Br. at 15-16. This argument is premature, circular, and contrary to law.

First, the law-of-the-case doctrine Grossman invokes does not apply here. Because temporary injunctions by their nature involve preliminary and incomplete evaluations of facts and law, “an order granting or refusing a temporary injunction neither establishes the law of the case nor constitutes an adjudication of the issues on the merits.” Ind. Sch. Dist. v. Engelstad, 274 Minn. 366, 370, 144 N.W.2d 245, 248 (1966) (citing Village of Blaine v. Ind. Sch. Dist. No. 12, 265 Minn. 9, 121 N.W.2d 183 (1963)). In addition, as the Court of Appeals noted, the order on which Grossman bases his law-of-the-case argument—the June 16 order directing application of assets to the judgment—was incomplete and was not even a fully litigated appealable order. See Court of Appeals 10/19/10 Order at 3. Because it was an inchoate order, the law-of-the-case doctrine could not apply. See Lange v. Nelson-Ryan Flight Serv., Inc., 263 Minn. 152, 156, 116

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<sup>1</sup> Because Grossman misapprehends and thus misstates Fannie Mae’s position, his suggestion that this is an improper “new” argument” fails as well. See Grossman Br. at 14.

N.W.2d 266, 269 (Minn. 1962) (holding doctrine requires “that issues once fully litigated be set at rest”).

Moreover, Grossman’s invocation of the law-of-the-case doctrine here ignores the doctrine’s exceptions. Although the law-of-the-case doctrine generally prevents the relitigation of an issue that has been previously adjudicated and appealed, the doctrine does not apply where there has been a change in the law in the meantime, see, e.g., Brezinka v. Bystrom Bros., Inc., 403 N.W.2d 841, 843 (Minn. 1987), or where the evidence is substantially different the second time around, see, e.g., Cayse v. Foley Bros., Inc., 260 Minn. 248, 253, 110 N.W.2d 201, 204.(1961). Here, both of these exceptions would apply. Should this Court reverse the Court of Appeals decision and vindicate the trial court’s authority to issue the original injunction, that would represent an intervening change in the law permitting the trial court to revisit the application issue. And if and when Grossman actually comes into possession of assets from the Grossman trust, that would be a change in the facts that would permit reconsideration of the appropriate equitable relief in any event.

In sum, the law-of-the-case doctrine has no application here and has no effect on this Court’s power under section 575.05 to issue the injunction.

**C. Both the Rules of Civil Procedure and the district court’s inherent powers permit it to enter the injunction at issue here**

Even assuming *arguendo* that section 575.05 did not grant the trial court the authority to grant the injunction here, the trial court nevertheless properly granted the

injunction based on the procedural powers granted by the Minnesota Rules of Civil Procedure and based on its inherent powers.

**1. These sources of authority are properly before the Court.**

Grossman is mistaken in arguing that Fannie Mae waived the issues of the trial court's authority under the Rules and under its inherent power because it did not adequately brief them. See Grossman Br. at 16 (citing Melina v. Chaplin, 327 N.W.2d 19, 21 (1982)) (finding waiver where appellants had appealed from order taxing costs but did not argue the issue in their brief). In fact, Fannie Mae fully briefed the law concerning these sources of authority in its opening brief. See Fannie Mae Br. at 15-16.<sup>2</sup>

Moreover, the nature of the issue—the source of the trial court's authority—puts the issue on a unique footing. Parties do not normally cite to courts, and courts do not routinely recite in their decisions, every possible source of authority for or procedural rule underlying every action the court takes. For example, the Court of Appeals made and issued its decision in this case pursuant to authority granted it by Minn. Stat. § 480A.06 and Minn. R. Civ. App. P. 103.03, 104.01, and 136.01, but Grossman did not

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<sup>2</sup> As Grossman's own parenthetical descriptions indicate, the other two waiver cases he cites elsewhere in his brief address the same, inapposite issue of whether an issue raised in the appeal has been sufficiently argued in the party's brief:

In re Application of Olson for Payment of Services, 648 N.W.2d 226, 228 (Minn. 2002) (issue that was discussed only tangentially in one argument heading and in one footnote was insufficient to constitute an "argument" on appeal and therefore waiver applied); McIntire v. State, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (failure to raise issue in primary brief results in waiver; issues not argued in appellant's initial brief may not be revived in a reply brief).

Grossman Br. at 14.

invoke any of those sources of authority in his briefs and the Court of Appeals did not cite any of them in its decision. Likewise, in the trial court here, Fannie Mae requested, Grossman opposed, and the trial court granted what each called a “temporary injunction.” See, e.g., ADD-06 (trial court’s order); Fannie Mae’s Reply in Support of Motion for Temporary Injunction (Mar. 2, 2010). But section 575.05 does not use the term “temporary injunction” or talk about injunctions at all; it merely talks about “orders.” See Minn. Stat. § 575.05. Fannie Mae thus necessarily invoked and the trial court necessarily exercised its inherent equitable powers and its authority under Rule 65 to grant injunctions.

“If the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based.” Brecht v. Schramm, 266 N.W.2d 514, 520 (Minn.1978) (citing Schoeb v. Cowles, 279 Minn. 331, 336, 156 N.W.2d 895, 898 (1968)). The issue of the source and extent of the trial court’s authority is a pure issue of law, and the record before the Court is fully sufficient for the Court to address it. See Jacobson v. \$55,000 in U.S. Currency, 728 N.W.2d 510, 523 (Minn. 2007) (holding that a claimant is not procedurally barred from raising on appeal a claim that is a refined version of a claim made to the district court as long as the claim can be evaluated based on the record). The issue is properly before the Court.

Judicial efficiency also supports this conclusion that the Court may consider these issues. The temporary injunction order at issue here is interlocutory, and the factual findings underlying it are by their nature provisional. See Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274, 137 N.W.2d 314, 321 (1965). As a result, although this

Court's decision will establish the applicable rule of law, neither the trial court's order nor the appellate courts' review of the specific application of that rule of law to the circumstances here will have any binding effect on future proceedings in the case. See Blaine, 265 Minn. at 13, 121 N.W.2d at 187 (“an order granting or refusing such remedy [a temporary injunction] neither establishes the law of the case nor constitutes an adjudication of the issues on the merits”).

Thus, assuming *arguendo* that this Court affirmed the Court of Appeals decision that the trial court lacked authority under section 575.05 to issue the current injunction, Fannie Mae would be free to seek the same injunction from the trial court based on the trial court's powers under the rules of civil procedure and its inherent authority. Requiring the parties to start the injunction process over again would serve neither the parties' interests nor judicial economy. This Court can and should resolve in the present appeal the trial court's authority—from whatever source—to issue the present injunction.

**2. The Rules of Civil Procedure grant the trial court the authority to issue the injunction here.**

As discussed in Fannie Mae's opening brief,<sup>3</sup> the Minnesota Rules of Civil Procedure provide tools that the trial court may use “to secure the just, speedy, and inexpensive determination of every action.” Minn. R. Civ. P. 1. These tools include the power to issue temporary injunctions that preserve the status quo in anticipation of further proceedings. See Minn. R. Civ. P. 65.02; Pickerign v. Pasco Mktg., Inc., 303 Minn. 442, 444, 228 N.W.2d 562, 564 (1975). The June 2, 2010 Order did just that: it

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<sup>3</sup> See Fannie Mae Br. at 16.

required Grossman to refrain from disposing of any trust assets he received until further order of the court. See ADD-6-7.

Other than objecting to Fannie Mae's argument based on waiver, discussed immediately above, Grossman does not dispute that the Rules grant the trial court this authority. This Court should therefore uphold the trial court's power to issue the injunction pursuant to the rules of procedure.

**3. The trial court's inherent power includes the power to issue the injunction at issue here.**

The trial court also had the authority to issue the injunction pursuant to its inherent powers to vindicate and put into force the judgment in favor of Fannie Mae. This Court has described the inherent powers of the judiciary as follows:

The judicial power of this court has its origin in the constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice.

Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court. .... Its source is the constitutional doctrine of separation of powers as expressed and implied in our constitution. See, Minn. Const. art. 3, § 1; art. 6, § 1. Its scope is the practical necessity of ensuring the free and full exercise of the court's vital function -- the disposition of individual cases to deliver remedies for wrongs and "justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws." Minn. Const. art. 1, § 8; Galloway v. Truesdell, 83 Nev. 13, 20, 422 P. 2d 237, 242 (1967).

Clerk of Court's Compensation v. Lyon County Comm'rs, 308 Minn. 172, 176-77, 241 N.W.2d 781, 784 (1976) (quoting In re Disbarment of Greathouse, 189 Minn. 51, 55, 248 N.W. 735, 737 (1933)) (footnotes and some citations omitted). These inherent powers

extend to the realm of injunctions. See, e.g., Channel 10, Inc. v. Ind. Sch. Dist., 298 Minn. 306, 327-328, 215 N.W.2d 814, 829 (1974) (“courts have the inherent power to amend, modify, or vacate an injunction where the circumstances have changed and it is just and equitable to do so”). Fannie Mae respectfully submits that the trial court’s action here—issuing an injunction to protect the integrity and effectiveness of its own judgment—represents the essence of an inherently judicial function and is fully within the inherent powers of the judiciary.

Grossman’s only substantive response regarding the inherent power of the trial court posits that the legislature’s enactment of section 575.05, which provides for certain procedures for the discovery and recovery of judgments, necessarily deprives courts of their inherent power to enforce their own judgments. Grossman Br. at 16-17. This argument fails for at least three reasons.

First, as reflected in the quotation above, the structure of the Minnesota Constitution dictates that the state’s legislative branch may not by statute abolish or circumvent powers inherent in the function of the state’s judicial branch. Put conversely, the judiciary’s inherent powers are not dependent on the legislature’s consent; if they were the powers would not be “inherent.” See Black’s Law Dictionary 787 (7th ed. 1999) (defining “inhere” as “to exist as a permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something”). This Court has repeatedly noted that the inherent powers of the judiciary cannot be preempted by statute. See, e.g., In re Welfare of JR, Jr., 655 N.W.2d 1 (Minn. 2003) (“we have recognized our inherent authority to take an appeal in the interests of justice even when the filing or service requirements set

forth in a rule or statute have not been met”) (citations omitted). So here, Minnesota Statute § 575.05 cannot bar courts from exercising their inherent powers to protect and enforce their judgments.

Second, the only case that Grossman cites for support on this issue, Clerk of Court’s Compensation v. Lyon County Comm’rs, 308 Minn. 172, 241 N.W.2d 781 (1976), actually undercuts his argument. Contrary to Grossman’s assertion, the Lyon court did *not* hold that “the district [court] lacked inherent authority to set a salary for its clerk when a procedure for such was explicitly provided by statute.” Grossman Br. at 17 (emphasis in original). What the Lyon court *actually* held was that the judiciary lacked inherent authority to set the salary because the Minnesota *Constitution* granted that authority to the legislature. 308 Minn. at 182, 241 N.W.2d at 787 (“Inherent judicial power...cannot be exercised in the face of the express constitutional provision in Minn. Const. art. 6, § 4, that the clerk’s salary be controlled by the legislature.”). Here, Grossman does not and cannot cite any analogous state constitutional provision that grants the power to issue injunctions against judgment debtors to any entity other than the state judiciary. The Minnesota Constitution does not, and the Minnesota legislature cannot, remove from the judiciary the inherently judicial authority to issue injunctions in aid of its own judgments.

Third, assuming *arguendo* that the Minnesota legislature had the authority to limit the inherent powers of the judiciary, Grossman’s argument that section 575.05 “prevents” the court from issuing an injunction against a judgment debtor like Grossman, Grossman Br. at 16-17, is mistaken. Section 575.05 imposes no such limit. Even if the Court were

to conclude that section 575.05 does not itself *authorize* courts to issue anticipatory injunctions, nothing in the statute *prohibits* courts from issuing such injunctions, and Grossman cites no statutory language that suggests otherwise. This Court should therefore uphold the trial court's power to issue the injunction pursuant to its inherent powers.

**II. The Character of the Grossman Trust as a Spendthrift Trust Does Not Affect the District Court's Authority to Enjoin Grossman as the Beneficiary of that Trust.**

As with the previous issue, the question here turns in the end on a single simple question: Does the entry of an injunction directed solely at the conduct of the beneficiary of a spendthrift trust after receiving proceeds from the trust encumber or otherwise affect either the trust itself or the trust's assets? Fannie Mae submits that it does not.

In every spendthrift trust case that either party has cited to this Court, relief has been sought against the trust, the trustee, or both, and in every case the trust or the trustee was a party to the case. Here, Fannie Mae has not sought and the trial court has not granted any relief against the trust or the trustee, and neither is a party to the case. Other than the Court of Appeals decision here, Grossman cites no spendthrift trust case from any jurisdiction that has endorsed the rule he urges: that a spendthrift trust protects a trust beneficiary from a court order aimed at the beneficiary's post-distribution conduct with respect to trust assets. This Court should reverse and reinstate the trial court's injunction.

**A. The Basic Principles Comprising the Spendthrift-Trust Doctrine Are Not Disputed and Are Consistent with the Injunction Here**

The parties here agree on most of the basic principles governing spendthrift trusts in Minnesota. Grossman does not dispute that:

- A spendthrift trust is a trust in which the power of alienation has been suspended. Morrison v. Doyle, 582 N.W.2d 237, 240 (Minn. 1998) (citing In re Moulton's Estate, 233 Minn. 286, 290, 46 N.W.2d 667, 670 (1951)).
- The intent of the donor to the trust “controls the availability and disposition of his gift.” Erickson v. Erickson, 197 Minn. 71, 78, 266 N.W. 161, 164 (1936); Morrison, 582 N.W.2d at 241.
- Consideration for the interests of the trust beneficiary plays no part in the interpretation or application of spendthrift trusts. Moulton's Estate, 233 Minn. at 291, 46 N.W.2d at 670.
- As long as the assets of the spendthrift trust remain in the trust, the income and principal “may not be reached by creditors either at law or by equitable proceeding.” Erickson, 197 Minn. at 77–79, 266 N.W. at 163–64; see Grossman Br. at 20.
- Once the proceeds of a spendthrift trust come into the hands of a beneficiary, those proceeds become the beneficiary's property and are subject to the claims of creditors. Moulton's Estate, 233 Minn. at 295, 46 N.W.2d at 672.

As discussed at length in Fannie Mae’s initial brief, the trial court’s injunction is completely consistent with all of these established principles. The injunction respects the intent of the donor, takes no action against either the trust or its assets, and addresses only the conduct of the beneficiary, and even then does so *only* if and when he actually receives a distribution from the trust. See Fannie Mae, 799 N.W.2d at 641. Neither the trust nor the trustee is a party to the case, and the trial court’s injunction, both by its terms and under Rule 65, does not and cannot address the conduct of the trust or the trustee. Although the injunction is “anticipatory” in the sense that it has no effect until and unless the trust actually distributes assets to Grossman, it has no present effect on the trust or its assets and thus is not an “anticipatory alienation” forbidden under the spendthrift trust doctrine. Compare Grossman Br. at 14, 18, 25.

The spendthrift trust doctrine does not bar the trial court’s injunction against Grossman.

**B. Despite Grossman’s Varied Arguments to the Contrary, the Injunction Here Does Not Encumber or Otherwise Affect the Trust or Grossman’s Current Interest in It.**

Recognizing the obstacles posed by the fact that the injunction addresses only Grossman’s own conduct, not the conduct of the trust, Grossman tries through several different formulations to argue that the injunction nevertheless somehow imposes some actual present burden on the Grossman trust itself. All of these formulations make in essence the same argument, and all of them ultimately fail. Because these arguments turn on what the trial court’s injunction does and does not do, Fannie Mae notes again the language of the injunction itself:

Andrew C. Grossman, individually and through any legal entity that he controls, is hereby enjoined from in any way transferring or disposing of any interest in money, property, or other assets that he has received, is due to receive, or will receive as a result of the death of his father, N. Bud Grossman (including, but not limited to, any interest in any trust established by N. Bud Grossman or any money or property distributed or to be distributed from the estate of N. Bud Grossman or under any will or last testament of N. Bud Grossman), pending further order from this Court.

(Add. 6-7.) As to the Grossman trust, this language addresses *only* the post-distribution conduct of beneficiary Grossman, not the pre-distribution affairs of the trust.

Grossman's response first mistakenly asserts that the injunction "gives Fannie Mae access to the trust proceeds before distribution." Grossman Br. at 17. In reaching this conclusion, Grossman reasons as follows:

Fannie Mae repeatedly argues that the injunction is proper because it is of no effect until the trust distributes. This is simply wrong. The injunction, by its terms, is of full force and effect at this moment and prohibits Mr. Grossman from doing anything with his interest in the trust. Thus, Fannie Mae has effectively gained control of the trust contrary to its explicit terms.

Id. at 19 (footnote omitted). But Grossman's conclusion does not follow from his premise. Whether through the injunction or otherwise, Fannie Mae does not "control" the trust. The injunction grants Fannie Mae no power to require the trust to make or to forego making any payment to Grossman, to Fannie Mae, or to anyone else. Likewise, nothing in the injunction grants Fannie Mae "access" to the assets of the trust under any commonly accepted meaning of that word. See Webster's New Collegiate Dictionary 49 (1985) (defining "access" as "freedom or ability to obtain or make use of"); Metro Gold, Inc. v. Coin, 757 N.W.2d 924, 929 (Minn. App. 2008) ("no one except Peterson could access the account"). Fannie Mae cannot obtain the assets of the Grossman trust; it

cannot withdraw them, or transfer them, or make any other use of them. Fannie Mae has no access to the trust assets, nor does the trial court, nor indeed does Grossman himself. Only the trustee has such access, and the trustee is not a party and is not bound by the injunction.

Moreover, Grossman's argument is internally inconsistent. Grossman claims that the injunction "prohibits Mr. Grossman from doing anything with his interest in the trust." Grossman Br. at 17. But if the Grossman trust is indeed a spendthrift trust, as Grossman claims, then Grossman has no way of "doing anything with his interest in the trust" in any event. As the parties agree, the central feature of a spendthrift trust is that the beneficiary of the trust has no power to transfer, alienate, or otherwise affect his or her interest in the trust. E.g., Morrison, 582 N.W.2d at 240 ("A spendthrift trust is a trust in which the power of alienation has been suspended.") (citing Moulton's Estate, 233 Minn. at 290, 46 N.W.2d at 670); id. at 240 n.3 ("The power of alienation is the power to sell, transfer, assign or otherwise dispose of property.") (quoting Black's Law Dictionary 1171 (6th ed. 1990)). As a result, Grossman cannot reasonably object that the injunction here prohibits him from "doing anything with his interest in the trust" because he *already* lacks the power to "do anything" with his interest in the trust. Tellingly, Grossman's argument is framed entirely in generalities; his brief does not identify a single specific thing that Grossman claims he could do with his interest in the trust that the injunction prevents him from doing.

Grossman also argues in effect that because the donor intended Grossman to receive proceeds from the trust, anything that protects Grossman's use of those proceeds

must be in service of the donor's intent. Grossman cites no case supporting this suggestion, relying entirely on a single law review article. But even that article does not say that a donor's intention to "protect" trust beneficiaries means that a creditor cannot reach post-distribution trust proceeds in the beneficiary's hands; the article merely offers a general observation that spendthrift trusts are "popularly used, with some judicial approval, to provide support for incompetent or improvident relatives." *Note, Spendthrift Trusts—Destructibility*, 5 Minn. L. Rev. 543, 544 (1920-21). And Grossman fails to note that the same article two pages later specifically rejects Grossman's suggestion that spendthrift trusts protect beneficiaries: "The only reason for upholding the validity of a spendthrift trust is not consideration for the beneficiary, but respect for the right of the settlor to dispose of his property as he sees fit when not repugnant to the law...." *Id.* at 546 n.10.

Minnesota precedent likewise contradicts Grossman's argument. The donor's intent is paramount in addressing "the availability and disposition of his gift." *Erickson*, 266 N.W. at 164. But "availability" and "disposition" are not at issue here; nothing in the injunction affects the availability of the trust assets to the trustee or the trustee's power to distribute those assets in conformance with the terms of the trust. What is at issue here is whether the court can affect the conduct of the trust beneficiary *after* such a distribution, which does not implicate spendthrift trust policy. As this Court has stated, "[i]t is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law." *Moulton's Estate*, 233 Minn. at 291, 46 N.W.2d at 670 (quoting *Morgan's Estate*, 72 A. 498, 499 (Pa. 1909)).

Third, Grossman argues that “[t]he district court’s order directly encumbered property in the trust before actual distribution and thus violated the spendthrift clause.” Grossman Br. at 20; see also *id.* at 21 (“it [the order] would encumber Mr. Grossman’s interest in the trust prior to actual distribution in fact. “). In fact, the injunction here imposes no encumbrance of any kind on the trust or its assets. An encumbrance is a “claim or liability that is attached to property or some other right that may lessen its value, such as a lien or a mortgage; any property right that is not an ownership interest.” Black’s Law Dictionary 547 (7th ed. 1999). Here, the injunction does not provide, and Fannie Mae does not assert, any claim against, liability of, or property right in the trust or any of its assets. Again, the trust is not a party in this case, and the proceedings cannot bind the trust or affect the trust’s rights or interests. The injunction merely forbids the trust’s beneficiary, Grossman, from transferring any assets from the trust *if and when they are distributed to him*. There is no encumbrance on the trust.

Fourth, Grossman claims that the injunction “would directly render the principal of the Grossman trust liable for Mr. Grossman’s debt to Fannie Mae.” Grossman Br. at 21. But again, nothing in the injunction renders the corpus or property of the trust liable to Fannie Mae at all, much less “directly.”<sup>4</sup> The injunction does not authorize Fannie Mae’s attachment, transfer, garnishment, or invasion of the trust corpus in any way; the only obligations that the injunction imposes are on the trust beneficiary: Grossman himself. And again, at the risk of belaboring this critical point, the injunction here could

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<sup>4</sup> See Black’s Law Dictionary 1211 (7th ed. 1999) (defining “principal” as “the corpus of a trust or estate”).

not render the trust corpus liable to Fannie Mae because neither the trust nor the trustee is a party to the action. See Minn. R. Civ. P. 65.04; Heyman v. Kline, 444 F.2d 65, 66-67 (2d Cir. 1971) (applying analogous Federal Rule 65(d)). The importance of this point is reinforced by the very two cases Grossman cites for support in this section of his brief. In each of those cases, a party sought to recover assets that were *currently in the trust* and to that end *named the trustees as parties*. See In re Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43, 45 (Minn. 1985) (appellant “served a garnishment summons upon trustees of the McLaughlin trust, attempting to recover a default judgment entered against” a trust beneficiary); Erickson v. Erickson, 197 Minn. 71, 72, 266 N.W. 161, 161 (1936) (naming trustees as defendants and seeking to impress a lien on the trust). Indeed, even the out-of-state cases that Grossman cites to support his arguments each focused on a claim against a trust or a trustee, not a claim against beneficiary, as Grossman’s own parenthetical descriptions demonstrate. See Grossman Br. at 25 (collecting cases).

Thus, contrary to Grossman’s assertion, the McLaughlin court did not “specifically reject[] exactly the argument Fannie Mae made in the trial court here.” Grossman Br. at 22. The attempted garnisher in McLaughlin sought to garnish the assets of the trust while those assets were still *in* the trust, before distribution. 361 N.W.2d at 44-45. Here, the injunction addresses only the beneficiary himself, and has effect only when and if any distribution is made. Grossman fails to cite, and research has failed to uncover, a single Minnesota case in which a court denied a creditor recovery based on a spendthrift trust provision where neither the trust nor the trustee was a party to the case.

In sum, every permutation of the argument that Grossman offers this Court runs into the same barrier: the injunction here does not in fact affect the trust or its assets in any way, both because of the injunction's own terms and because neither the trust nor the trustee is before the court. No matter how many ways Grossman asserts that "Judge Neville's order unquestionably gave Fannie Mae a remedy relating to Mr. Grossman's interest in the trust," Grossman Br. at 23, the fact is that the order did no such thing.

**C. The Difference between Actions Affecting a Trust and Actions Affecting a Beneficiary is Critical to the Spendthrift Trust Doctrine.**

Grossman's assertion that "[t]he entity to which the order is directed – the trustee or the beneficiary – makes no practical difference," Grossman Br. at 25, is wholly unsupported by any case law, and Grossman offers none. As the case law detailed in Fannie Mae's opening brief makes clear, Minnesota's case law holds that the entity from whom recovery is actually sought, the trust or the beneficiary, makes a critical difference at every stage—from applying the trust based on the intent of the donor, e.g., Moulton, 46 N.W.2d at 67 ("consideration for the beneficiary does not even in the remotest way enter into the policy of the law") to the distributing the proceeds, id. at 672 ("After [a spendthrift trust's] income comes into the hands of [a beneficiary], it then of course becomes part of her general estate and subject in like manner as her other property to claims of creditors.") (quoting First Nat'l Bank v. Olufson, 232 N.W. 337, 339 (1930)). Thus, contrary to what the Court of Appeals posited, an injunction that affects only the conduct of the beneficiary does not "defeat the spendthrift provision." 799 N.W.2d at 642.

**D. The Timing of the Effect on the Trust Proceeds, Rather than the Timing of the Order Creating that Effect, is the Critical Inquiry Under the Spendthrift Trust Doctrine.**

In a very real sense, Grossman's position boils down to an argument based on timing. Grossman argues that because the trial court issued the order addressing Grossman's conduct *before* Grossman actually received any proceeds from the trust, the spendthrift trust provision bars the injunction. But this argument focuses on the timing of the wrong event; what is determinative is *not* the time that the order enjoining Grossman's conduct is issued, but the time that the order will have an actual *effect* on Grossman's treatment of the trust proceeds. Grossman does not dispute that a court may enjoin the conduct of a spendthrift trust beneficiary with respect to trust proceeds once those proceeds have been distributed to the beneficiary. Moulton's Estate, 233 Minn. at 295, 46 N.W.2d at 672. Here, the injunction here does just that: it addresses the conduct of beneficiary Grossman *after* he receives any proceeds from the trust. The fact that practical necessity dictated by Grossman's previous conduct required the court to issue the injunction *before* that Grossman's receipt of such proceeds does not alter the substance of the order or create a present effect on the trust itself.

Put another way, Grossman does not and cannot deny that if the court issued an injunction at the moment he received proceeds from the trust barring him from disposing of those proceeds, the injunction would be perfectly proper. The injunction actually issued here, however, has exactly the same effect at exactly the same time: it bars disposition of proceeds at the moment Grossman *actually* receives a distribution.

Focusing on the timing of the order rather than the timing of the order's actual effect, as

Grossman urges, improperly elevates form over substance and is inconsistent with this court's holdings in spendthrift trust cases.

**E. Grossman's Suggestion That the Court Leave This Issue to the Legislature is Inappropriate and Impractical in the Circumstances Here**

Grossman argues that the Court should not consider the multiple policy considerations supporting the trial court's injunction but should instead leave such issues to the legislature, relying wholly on Stawikowski v. Collins Elec. Const. Co., 289 N.W.2d 390, 395 (Minn. 1979). See Grossman Br. at 26-27. The Stawikowski case, however, arose in a much different context from the case here. Prior to Stawikowski, this Court had interpreted a state statute to bar unemployment benefits under certain conditions. 289 N.W.2d at 391 (citing Anson v. Fisher Amusement Corp., 254 Minn. 93, 93 N.W.2d 815 (1958)). In the Stawikowski case itself, the plaintiff urged the court to change its interpretation of the statute, although the legislature had not changed the statute itself. Id. The court declined to do so, citing its previous decision and Minn. Stat. § 645.17 ("When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language."). 289 N.W.2d at 395.

The Stawikowski analysis is inapplicable here for at least two reasons. First, unlike Stawikowski, this case does not involve the interpretation of a statute. As Grossman concedes, "the law in Minnesota enforcing spendthrift trusts is court-made." Grossmann Br. at 27. Second, even if the question before the Court did involve the interpretation of a statute, Minnesota's "court of last resort"—this Court—has yet not

construed this law. As the Court of Appeals correctly noted, this case presents an issue of first impression in this state. 799 N.W.2d at 641. Stawikowski is inapposite, and this case requires this Court to interpret Minnesota's court-made spendthrift trust doctrine.

### **III. The Trial Court's Order Does Not Threaten to Open Any Floodgates**

Finally, Grossman makes several "floodgates" arguments that warn about dire or dramatic consequences of adopting Fannie Mae's position. These arguments are almost entirely speculative, and none of them reflects any legitimate concern about any likely consequence of a reversal here. Indeed, as noted in Fannie Mae's original brief, Fannie Mae's position is entirely consistent with current Minnesota law governing spendthrift trusts. See Fannie Mae Br. at 12-15, 17-24. If any possible outcome in this case would alter the legal landscape, it would be broadening the protection of spendthrift trusts to directly protect trust beneficiaries, as Grossman urges.

Grossman argues that upholding the trial court's order "would allow a creditor to obtain legal control over any property that the judgment debtor might come into at any time in the future - even future bonuses or perhaps gambling winnings." Grossman Br. at 29. But as discussed above, the injunction here does not grant Fannie Mae "legal control" of anything. And Minnesota law already provides a number of remedies that in fact give judgment creditors just the kind of remedies that Grossman describes through procedures for garnishment, attachment, levy on property, and the like. See generally Minn. Stat. Ch. 550 (setting out various means of executing on judgments), Ch. 571 (permitting judgment creditor to obtain garnishment of judgment debtor's wages in advance of their receipt by debtor).

Grossman also creates an alarmist vision in imagining Fannie Mae's supposed "true motivations" in this action: "to completely reconfigure debtor-creditor law to allow creditors to reach any property debtors may at some point obtain in the future."

Grossman Br. at 29. This is sheer hyperbole: nothing in this case reconfigures debtor-creditor law, or indeed affects creditors or debtors at all outside the narrow confines of the spendthrift-trust doctrine. And as to motivation, Fannie Mae's sole motivation in this proceeding is to collect the \$8 million that courts have already held Grossman owes it. Indeed, if anyone's motivation should be questioned here, it should be Grossman's: nowhere in his brief does he deny the trial court's finding that he transferred millions of dollars into offshore accounts to evade his legitimate creditors.

Finally, Grossman speculates that upholding the trial court's injunction will expose "trust administrators" (presumably trustees) to "new liabilities." Grossman Br. at 30. But this suggestion makes no sense. As noted repeatedly above, the injunction here does not impose any duties on trustees, and could not do so given that neither the trust nor the trustee is a party to the action. Moreover, as Grossman himself notes, "once the assets are distributed the trustee also no longer has any legal duty to the beneficiaries." *Id.* The injunction here imposes no obligations on *anyone* until assets from the trust are actually distributed to the beneficiary, and thus *after* the trustee has been discharged from any legal duties relating to those assets. The injunction here therefore poses no threat of new liabilities to trustees.

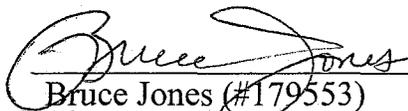
## CONCLUSION

For the reasons set forth above and in its original brief, Fannie Mae urges the Court

to reverse the Court of Appeals and reinstate the district court's injunction.

Dated: October 31, 2011

FAEGRE & BENSON LLP

A handwritten signature in cursive script, appearing to read "Bruce Jones", is written over a horizontal line.

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STATE OF MINNESOTA  
IN SUPREME COURT

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Fannie Mae,

Appellant,

v.

Andrew C. Grossman,

Respondent

CERTIFICATION OF  
BRIEF LENGTH

Appellate Court  
Case Number: A10-1366 and A10-1505

Heather Apartments Limited Partnership  
d/b/a Vantage Lakes Apartments, Andrew  
C. Grossman, The Home Depot Supply,  
Inc., Complete Pest Control, Inc., A Touch  
of Class Painting and Remodeling  
Company, LLC, Sotelo Co., LLC, Wilmar  
Industries, a Division of Interline Brands,  
Inc., K & K Quality Roofing &  
Construction, and Sonshine Services,  
L.L.C.,

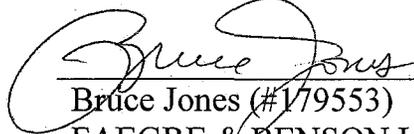
Defendants.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,955 words. This brief was prepared using Microsoft Word 2007 software.

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