

Nos. A10-1336 and A10-1505

State of Minnesota
 In Supreme Court

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.

RESPONDENT ANDREW C. GROSSMAN'S BRIEF

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STATEMENT OF THE ISSUES

I. Does Minnesota Statutes Section 575.05 authorize an injunction over property that cannot legally be applied to the judgment?

The Court of Appeals reversed a district court order that enjoined Respondent Andrew Grossman from transferring or otherwise disposing of any assets he may receive as an inheritance from his father's estate, which remains undistributed. That court held that Minnesota Statutes Section 575.05 did not authorize the injunction over property not yet in the hands of or due to the judgment debtor and that the district court had therefore abused its discretion in ordering the injunction. The Court of Appeals reversed the order applying the proceeds to the judgment for the same reasons. Fannie Mae did not appeal the reversal of the order applying the proceeds to the judgment and that reversal is now final.

Apposite Authorities:

Minn. Stat. § 575.05

Johnson v. Brajkovich, 229 Minn. 529, 40 N.W.2d 273 (1949)

Mpls. Fed. of Teachers v. Mpls. Pub. Sch., 512 N.W.2d 107 (Minn. App. 1994)

II. May a district court, before the beneficiary of a spendthrift trust actually receives trust proceeds, determine what the beneficiary may or may not do with his interest in the trust?

The Court of Appeals reversed a district court order that enjoined Respondent Andrew Grossman from transferring or otherwise disposing of any assets he may receive as an inheritance from his father's estate, which remains undistributed and is contained within a trust that contains a spendthrift provision. The Court of Appeals held that a

district court may not enter an order determining what the beneficiary of a spendthrift trust may or may not do with his interest in the trust before actual distribution.

Apposite Authorities:

In re Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43 (1985)

Hursh v. Lee, 214 Minn. 448, 9 N.W.2d 245 (1943)

Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161 (1936)

STATEMENT OF THE CASE

Respondent Fannie Mae brought this action in Hennepin County District Court in order to collect on a judgment it obtained against Appellant Andrew Grossman in district court in the State of Oklahoma. As part of its efforts to collect the judgment, Fannie Mae sought an *ex parte* temporary restraining order forbidding Andrew Grossman from 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, who died on January 11, 2010. (Fannie Mae's Mot. for TRO, filed Feb 10, 2010.) In support of the motion, Fannie Mae relied on Minnesota Statutes Section 575.05 which allows a judge to apply to a judgment property "in the hands of the judgment debtor or of any other person, or due to the judgment debtor" and to forbid a transfer or other disposition of such property pending further order of the court. (Mem. in Supp. of Mot. for TRO.) The district court, Honorable Cara Lee Neville presiding, granted the

motion and entered the TRO. (App. 5.)¹ The court set a hearing to determine whether the TRO should be converted into a temporary injunction. (App. 6).

Mr. Grossman opposed the temporary injunction on the ground that because the inheritance has not been distributed, it did not meet the requirement of Minnesota Statutes Section 575.05 that the property at issue be “in the hands of the judgment debtor” or “due to the judgment debtor.” (Mem. in Opp’n to Mot. for a Temporary Inj. 4, filed Feb. 26, 2010.) Mr. Grossman also argued that the inheritance he is to receive from his father is contained in a trust that has not yet been distributed, which contains a spendthrift clause.² (Mem. in Opp’n to Mot. for a Temporary Inj. 5.) Mr. Grossman argued that the trust’s spendthrift provision prevents its application to Fannie Mae’s judgment and thus prevents it from being subject to the temporary injunction. (*Id.*) The spendthrift clause provides as follows:

Neither the principal nor the income of any trust created hereunder shall be liable for the debts of any beneficiary, and, except as otherwise expressly provided herein with respect to the power granted to a beneficiary to appoint the principal of a trust created hereunder, no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust created hereunder, or the income produced thereby, prior to the actual distribution in fact by the trustee to said beneficiary.

(Confid. App. 18-19.)

¹ References to “App.,” “Add.,” or “Confid. App.” are to the Appendix, Addendum, and Confidential Appendix, respectively, filed with Appellant’s Brief.

² N. Bud Grossman’s estate is the subject of the N. Bud Grossman Revocable Trust Agreement (hereinafter sometimes “the Grossman trust.”) (Confid. App. 1-39.)

The district court converted the TRO into a temporary injunction. (Add. 6.) In its Order and Memorandum, the court held that Mr. Grossman had a present interest in the trust that satisfied Section 575.05 and that the spendthrift provision did not prevent the court from ordering the injunction. (Add. 9.) The injunction prohibited Mr. Grossman from

[i]n 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.)³

Fannie Mae then moved the district court for application of Mr. Grossman's nonexempt assets to the judgment, including

any interest in money, property, or other assets that [Mr. Grossman] 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 under any will of N. Bud Grossman).

(Fannie Mae's Notice of Mot. and Mot. for Application of Assets to J., filed March 4, 2010.) Mr. Grossman opposed the motion on the same grounds as he had opposed the temporary injunction. (Mem. in Opp. to Fannie Mae's Mot. for Application of Assets to J. 20, filed March 11, 2011.) The district court granted the motion and ordered the

³ This order is sometimes referred to as the injunction order and sometimes referred to as the June 2, 2010 order.

appointment of a receiver to “take custody of and liquidate all inheritance proceeds of the N. Bud Grossman Trust which are eligible for distribution to Grossman, as they come due, and shall apply the proceeds thereof to satisfy Fannie Mae’s judgment.” (App. 8.)⁴

Mr. Grossman separately appealed both of the orders discussed above to the Court of Appeals. (App. 15, 17.) The appeals were consolidated. (App. 22.) The Court requested briefing regarding the appealability of the June 16, 2011 order applying the trust proceeds to the judgment, questioning whether it was a final order. (App. 23.) The parties briefed the issue and a panel of the court deferred the question as to whether the June 16 Order should be reviewed to the panel assigned to consider the consolidated appeal:

The issue on appeal from the June 2 temporary injunction is interrelated with the issue that appellant raises on appeal from the June 16 order in the proceedings supplementary to execution. The panel to be assigned to consider the appeal on the merits will have discretion to extend review to the June 16 order pertaining to appellant’s interest in the N. Bud Grossman Trust. *See* Minn. R. Civ. App. P. 103.04 (appellate court may review any matter as the interest of justice may require).

(App. 27.)

In support of reversal of both orders, Mr. Grossman argued that (1) the district court’s order violated the trust’s spendthrift provision and long-standing Minnesota law upholding and enforcing such provisions; (2) that the orders were contrary to Minnesota Statutes Section 575.05 because they pertained to property not yet in the hands of the

⁴ This order is sometimes referred to as the June 16, 2010 order and sometimes referred to as the application order.

judgment debtor or due to the judgment debtor; and (3) that the district court abused its discretion in entering the temporary injunction because its order was contrary to the law and because Fannie Mae did not have a substantial chance of success on the merits. (Appellant's Br. in Court of Appeals 6-14, filed Sept. 27, 2010.) In support of the district court's rulings, Fannie Mae argued that the district court had the authority to issue the injunctions under Minnesota Statutes Section 575.05, that the spendthrift provision did not prohibit the district court's actions because the orders were directed at Mr. Grossman and not at the trust (or the trustee) itself, and that the issuance of the injunction was not an abuse of the district court's discretion. (Resp't's Br. in Court of Appeals 7-19, filed Nov. 1, 2010.)

The panel considering the appeal exercised its discretion to review both of the district court's orders. (Add. 3.) The Court of Appeals reversed both orders on the grounds that (1) Minnesota Statutes Section 575.05 did not give the district court authority to order the application of inheritance proceeds to the judgment that were not yet in the hands of the debtor or due to the debtor; and that (2) the orders were contrary to long-standing Minnesota law upholding the inviolability of spendthrift trusts. (Add. 4-5.) Fannie Mae filed a petition for review seeking review of only that portion of the Court of Appeals decision that overturned the district court's June 2, 2010 order granting the temporary injunction. (Fannie Mae's Pet. for Further Review 1, filed July 2, 2011.) Thus, Fannie Mae does not urge reversal of that portion of the Court of Appeal's order reversing the district court's June 16, 2010 application order.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that the district court exceeded its authority under Minnesota Statutes Section 575.05. Section 575.05, by its terms, does not apply to trust proceeds that a beneficiary might receive in the future. The statute allows a district court to order that “any of the judgment debtor’s property in the hands of the judgment debtor or of any other person, or due to the judgment debtor” be applied to satisfy the judgment. To justify such an order, there must be clear and convincing proof that the property belongs to judgment debtor. The undistributed assets contained in the Grossman Trust are not the property of Mr. Grossman and are not now due to Mr. Grossman. Minnesota Statutes Section 575.05 does not allow the court to reach assets that do not belong to the judgment debtor.

The statute also does not allow a court to issue an injunction over property that cannot legally be applied to the judgment. Fannie Mae appeals only the reversal of the district court’s June 2, 2010 order, which relied upon Section 575.05 to enter an injunction preventing Mr. Grossman from transferring or otherwise disposing of any interest he may have in his father’s inheritance. Fannie Mae did not appeal the reversal of the district court’s June 16, 2010 order which actually ordered the trust proceeds applied to the judgment as they come due. The time to petition for review of that portion of the order has passed. Minn. R. Civ. App. P. 136.02. Thus, the reversal of that order has become final, and it is the law of the case that Mr. Grossman’s interest in the Grossman Trust cannot legally be applied to the judgment before actual distribution. Thus, Fannie Mae asks this Court to hold that it is appropriate under Section 575.05 to

enter an injunction prohibiting the transfer of property that cannot legally be applied to the judgment. This is a blatantly improper use of the protections of Section 575.05.

This request is not only contrary to the plain language and intent of Section 575.05, it turns current debtor-creditor law on its head. Fannie Mae's position literally would allow creditors to seek injunctions prohibiting the transfer of any property the judgment debtor could receive in the future. A careful creditor thus would be able to create perpetual preference in favor of itself.

Perhaps aware that its request flouts the plain language and intent of Section 575.05, Fannie Mae argues for the first time before this Court that the injunction is appropriate pursuant to the district court's "inherent authority" and the Minnesota Rules of Civil Procedure. This argument fails due to Fannie Mae's failure to raise it at the district court level or before the Court of Appeals. It also fails on the merits, however. A court's "inherent authority" does not extend to actions that are contrary to a directly applicable statute.

Fannie Mae's position suffers several other flaws. It bases its entire argument on a "fact" that has never been established (and indeed has never before been asserted by Fannie Mae), namely that the injunction was appropriate because the trust proceeds are currently "due" to Mr. Grossman and that the injunction will have no effect until the proceeds are distributed to Mr. Grossman. Neither of these assertions is correct. Contrary to Fannie Mae's explicit representation to this Court (Appellant's Br. at 12), the district court's injunction is not limited to trust proceeds "as they become due." To the contrary, it explicitly applies to any interest that Mr. Grossman has in the trust right now.

The Court of Appeals also correctly upheld the spendthrift clause and reversed the district court's order entering a temporary anticipatory injunction preventing Mr. Grossman from "in any way transferring or disposing of any interest in money, property, or other assets he has received, is due to receive, or will receive as a result of the death of his father." The inheritance proceeds in question are contained in the Grossman Trust, which includes a spendthrift clause. The spendthrift clause, by its terms, prevents creditors of beneficiaries from reaching the income or principal of the trust until it is actually distributed:

Neither the principal nor the income of any trust created hereunder shall be liable for the debts of any beneficiary, and, . . . no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust created hereunder . . . prior to the actual distribution in fact by the trustee to said beneficiary.

(Confid. App. 18-19.) This Court has uniformly upheld and enforced these provisions for the last eighty years. The enforcement of these clauses furthers donative intent both for the grantor to dispose of property as he or she sees fit and to effectuate the grantor's desire to protect improvident or "spendthrift" beneficiaries.

These provisions have been upheld and enforced even as to trusts that have come to an end while the property remains undistributed. Thus the spendthrift clause prohibits any order that controls the disposition of Mr. Grossman's interest in the trust. The Court of Appeals correctly held that the district court's injunction was in derogation of the spendthrift clause and Minnesota law strictly enforcing such clauses.

Finally, Fannie Mae's invitation to this Court to undo hundreds of years of law regarding debtor-creditor remedies because of the advent of electronic banking must be rejected. Such fundamental changes to the lending relationship, the remedies of creditors, and to the power of a donor to dispose of his or her property as he or she sees fit, should come through the legislative process, if at all.

STANDARD OF REVIEW

A district court's decision to grant a temporary injunction is reviewed for abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993) (citation omitted). Under this standard, a decision should not be reversed on appeal "unless the district court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *Transit Team v. Metro. Council*, 679 N.W.2d 390, 399 (Minn. App. 2004) (citing *Almor Corp. v. Co. of Hennepin*, 566 N.W.2d 696, 701 (Minn. 1997)).

In reviewing a district court's order in a supplementary proceeding relating to purported assets under Section 575.05, the reviewing court must determine whether there was clear and convincing proof that the property was in the judgment debtor's possession or due to the judgment debtor. *Johnson v. Brajkovich*, 229 Minn. 529, 531, 40 N.W.2d 273, 274. If clear and convincing proof was lacking, the order must be overturned. *Id.*

The proper application of the spendthrift clause is a legal question, subject to *de novo* review. See *In Re Trust Created by Hill*, 499 N.W.2d 475, 482 (Minn. App. 1993).

ARGUMENT

I. THE COURT OF APPEALS' APPLICATION OF MINNESOTA STATUTES SECTION 575.05 WAS CORRECT. THE DISTRICT COURT'S INJUNCTION WAS UNAUTHORIZED AND WAS PROPERLY REVERSED.

A. The Plain Language of Minnesota Statutes Section 575.05 Does Not Allow the Injunction Issued By the District Court.

The Court of Appeals' interpretation of Minnesota Statutes Section 575.05 is straightforward and correct. On its face, Section 575.05 applies only to "the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the judgment debtor. . . ." The Court of Appeals correctly applied this language and held that the statute does not allow a court to issue orders affecting property not within a person's possession or control, as there has been no showing here that any trust proceeds are currently due to Mr. Grossman or in his possession or control, much less "clear and convincing" proof of the same. *See Johnson*, 229 Minn. at 531, 40 N.W.2d at 274; *Hanson v. Daniel Hayes Co.*, 161 Minn. 251, 201 N.W. 603 (1924).

The standard enunciated in *Johnson* applies to proceedings under Section 575.05.

Section 575.05 provides:

The judge may order any of the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment. . . The judge may appoint a receiver of the debtor's unexempt property, or forbid a transfer or other disposition thereof, or any interference therewith, until further order therein.

Regardless of whether the judge is applying the property to the judgment or entering an anticipatory injunction forbidding a transfer thereof pending further order of the court,

proof that the property belongs to the judgment debtor is still necessary. *Johnson*, 229 Minn. at 531, 40 N.W.2d at 274 (requiring clear and convincing proof of ownership); *Hanson*, 161 Minn. at 252, 201 N.W. at 603 (order for payment of money reversed due to absence of showing that debtor had money in his personal possession or under his control). Nothing contained in the statute allows a court to impose a lesser standard for the entry of an injunction than for the application of the property to the judgment.

In support of the district court's authority to enter the injunction without proof that the property in question was in the hands of or due to Mr. Grossman, Fannie Mae compares Mr. Grossman's interest in the trust to a contingent right of action and argues that the district court's order applying proceeds of the trust that have not yet been paid is therefore proper. In support of its argument, Fannie Mae cites the case *Lange v. Fidelity & Casualty Co.*, 290 Minn. 61, 185 N.W.2d 881 (Minn. 1971). The *Lange* case allowed a receiver to pursue an assignable cause of action belonging to the debtor. *Lange*, 290 Minn. at 69, 185 N.W.2d at 887. Critically, in *Lange*, the Supreme Court's decision pivoted on the fact that the claim was assignable.⁵ *Id.* In sharp contrast, there is no demonstration here that Mr. Grossman's interest in the trust is assignable. To the contrary, the trust instrument itself explicitly provides that the interest is not assignable, "no beneficiary shall have any power to sell, assign, transfer, encumber . . . his or her

⁵ Fannie Mae summarily dismisses the significance of the fact that the cause of action in *Lange* was assignable. In *Lange*, this Court held that disallowing involuntary assignments of causes of action would be inconsistent with statutes governing proceedings supplementary to the execution of a judgment. *Lange*, 290 Minn. at 68, 185 N.W.2d at 886-887. The unwillingness of the debtor in *Lange* to pursue the cause of action is a red herring here, where there is no evidence that the trust proceeds are due to Mr. Grossman.

interest in any such trust created hereunder . . . prior to the actual distribution in fact by the trustee to said beneficiary.” (Confid. App. 17-18.) And both this Court and courts in other states that uphold spendthrift trusts have repeatedly held that a beneficiary’s interest in a spendthrift trust is not assignable prior to distribution. *Hursch v. Lee*, 214 Minn. 448, 9 N.W.2d 245 (1943); *Baker v. V. Bank & Trust Co.*, 342 F.2d 12 (2d Cir. 1965); *Johnson v. Morawitz*, 292 F.2d 341 (10th Cir. 1961); *Kelley v. Lincoln Nat’l Bank*, 235 F.2d 23 (D.C. Cir. 1956); *Waterbury v. Munn*, 32 So. 2d 603 (Fla. 1947). Mr. Grossman’s interest in the trust is not assignable and thus is not subject to the judgment.

Fannie Mae’s reliance on the *Lange* case belies the fundamental premise of its entire argument in support of the application of Minnesota Statutes Section 575.05, i.e., that the proceeds of the Grossman trust are somehow already due to Mr. Grossman. They are not. As noted by Fannie Mae, “property” is defined as “[t]he right to own, possess, and enjoy a determinate thing . . . ; the right of ownership.” (Appellant’s Br. 13 (citing Black’s Law Dictionary 1232 (7th ed. 1999).) In *Lange*, there was no dispute that the bad faith cause of action belonged to the insured and thus was his to assign. Here, the trust instrument, and Minnesota law (discussed in detail *infra*) make abundantly clear that Mr. Grossman does not have a property right in the trust proceeds until they are actually distributed.

Fannie Mae also intimates, for the first time in its brief to this Court, that the trust proceeds are presently Mr. Grossman’s property because they are “due” to him. (Appellant’s Br. at 13-15.) There has been no demonstration, however, at any stage of this proceeding that any trust proceeds are presently due to Mr. Grossman. Moreover,

Fannie Mae has never before raised the argument that the trust proceeds are constructively “due” to Mr. Grossman, and therefore his “property.”⁶ Issues not argued in briefs are deemed waived on appeal. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). In order for an issue to be sufficiently raised by a party to obtain review, it must be substantively addressed in the argument portion of the primary appellate 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). Additionally, when a district court has not reached an issue, it is not subject to appellate review. *Hoyt Inv. Co. v. Bloomington Comm. & Trade Cntr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988).

Fannie Mae’s use of the word “anticipatory” underscores the fallacy of its position that the trust proceeds are Andrew Grossman’s property. The adjective anticipatory derives from the word “anticipate.” Am. Heritage College Dictionary 58 (3d ed. 1993). “Anticipate” is defined as “to feel or realize beforehand; foresee.” *Id.* Thus, the district court’s injunction is unauthorized precisely because it is “anticipatory.” It anticipates Mr. Grossman’s interest in the trust before it is his property.

⁶ Fannie Mae did argue at the district court level that the interest was vested. (Fannie Mae’s Reply Mem. in Supp. of Mot. for Temp. Injunction 1-2, filed March 2, 2010.) This is a distinct argument and in any event was not renewed at the Court of Appeals.

B. Fannie Mae Seeks an Injunction over Property that Cannot Legally be Applied to the Judgment.

Fannie Mae appeals the reversal of the district court's order granting an injunction over Mr. Grossman's interest in the Grossman trust. It did not, however, appeal the reversal of the district court's order actually applying that interest to the judgment. Thus the Court of Appeal's ruling that the interest cannot be applied to the judgment is final and has become the law of the case. *See Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994) (discussing law of the case doctrine).

Fannie Mae thus asks this Court to hold that it is appropriate under Section 575.05 to enter an injunction prohibiting the transfer of property that cannot actually be applied to the judgment. This turns the plain language and intent of Section 575.05 on its head. If the property cannot be applied to the judgment, an injunction should not issue preventing its disposal. Allowing such an injunction is not only contrary to the plain language and intent of Section 575.05, it turns current debtor-creditor law on its head.

It has long generally been the law that "restraints on voluntary and involuntary transfers go together; that is, if a man can transfer a trust interest his creditors can reach it, and vice versa." Charles Bunn, *Spendthrift Trust in Minnesota*, 18 Minn. L. Rev. 493 (1934). Fannie Mae's position literally would allow creditors to seek injunctions prohibiting the transfer of any property the judgment debtor could receive in the future regardless of the nature of the debtor's present interest in the property. For example, if such an order were allowed to stand, a creditor could seek an injunction prohibiting a debtor from transferring or otherwise disposing of any interest he might have in any

living relatives' potential inheritance or even in any future raises or bonuses. As discussed in detail below, creditors do not extend credit based on potential inheritances; they extend credit based on present assets and net worth. There is simply no reason to extend the protection of creditors beyond current levels to include interests in property that is not yet due to or in the hands of the debtor. To hold otherwise would allow a careful creditor to create perpetual preference in favor of itself through the use of "anticipatory" injunctions. Section 575.05's limitation to property of the judgment debtor exists for a very good reason. It would smack of a violation of due process of law to allow a creditor to exercise effective control through injunction over property, the exact form, identity and future date of possession of which are complete unknowns. In short, the protections of the law are designed to prevent a creditor from reaching property that is not effectively or constructively within the control of the debtor.

C. The District Court's Inherent Authority Does not Extend to Acts Contrary to Directly Applicable Statutes.

Perhaps aware that its request flouts the plain language and intent of Section 575.05, Fannie Mae argues for the first time before this Court that the injunction is appropriate pursuant to the district court's "inherent authority" and the Minnesota Rules of Civil Procedure. This argument fails due to Fannie Mae's failure to raise it at the district court level or before the Court of Appeals. As noted above, issues not argued in briefs are deemed waived on appeal. *Melina*, 327 N.W.2d at 20.

This newly raised argument also fails on the merits, however. A district court's inherent authority has never been expanded to allow it to do that which it is prevented

from doing by statute (in the case of Section 575.05, to apply property to the judgment absent clear and convincing proof that it is in the hands of the judgment debtor or due to the judgment debtor). The cases cited by Fannie Mae offer no support for its position. One, *Patton v. Newman Corp.*, 538 N.W.2d 116, 119 (Minn. 1995), discusses a district court's inherent authority to order appropriate sanctions for spoliation of evidence. In that case, there was no applicable statute governing sanctions for spoliation. The other, *Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976), held that the district lacked inherent authority to set a salary for its clerk when a procedure for such was explicitly provided by statute. The situation here is much more like the *Lyon County* case than the *Patton* case. There is a statute at issue that governs when an injunction can issue affecting property (whether by injunction or by application to judgment). That statute is Section 575.05 and it does not allow an injunction over property that is not yet in the hands of the judgment debtor or due to the judgment debtor.

D. The Court of Appeals Correctly Held that Granting the Injunction was an Abuse of Discretion.

To obtain an injunction, the party must show a substantial chance of success on the merits. *Mpls. Fed. of Teachers v. Mpls. Pub. Sch.*, 512 N.W.2d 107 (Minn. App. 1994). Thus, for the injunction to be proper, Fannie Mae must show it has a substantial chance of success on the merits in having Mr. Grossman's interest applied to the judgment. Because the Court of Appeals reversed the district court's order applying that

interest to the judgment and that decision is final, Fannie Mae cannot show a substantial chance of success on the merits. In fact, it has already lost on the merits.

In arguing that it was nearly certain to prevail on the merits and that the district court's granting of the injunction was therefore proper in its brief to this Court, Fannie Mae misstates the issue that was before the district court. The "merits" at issue are not whether Fannie Mae is allowed to collect its judgment (obtained in a different action in a different state); rather the issue is whether Fannie Mae should have been allowed to reach Mr. Grossman's interest in a spendthrift trust prior to distribution. The Court of Appeals ruled it could not, and that is now final. Thus, because Fannie Mae has no chance of success on the merits, the injunction should not issue.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE GRANTING OF THE INJUNCTION DEFEATED THE SPENDTHRIFT PROVISION IN VIOLATION OF LONG-STANDING MINNESOTA LAW.

A. Long-Standing Minnesota Law Prohibits Any Anticipatory Alienation of a Beneficiary's Interest in a Spendthrift Trust.

The Court of Appeals correctly applied long-standing Minnesota law upholding spendthrift provisions when it overturned the district court's order restraining trust beneficiary Andrew Grossman from transferring or disposing of any interest in a trust established by his late father. This Court has long upheld spendthrift provisions that prevent creditors from reaching the proceeds of a trust before the beneficiary actually receives those proceeds. *Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); *In re Trust Created by Moulton*, 233 Minn. 286, 300-303, 46 N.W.2d 667, 674-76 (1951); *Hursh*, 214 Minn. at 454, 9 N.W.2d at 248; *Erickson v. Erickson*, 197 Minn. 71, 77-79,

266 N.W. 161, 163-64 (1936). And despite Fannie Mae's repeated efforts to paint the district court's injunction otherwise (i.e. not taking effect until the trust distributes to Mr. Grossman), the injunction does exactly what spendthrift clauses are supposed to prevent: it gives Fannie Mae access to the trust proceeds before distribution. Quite literally, although the proceeds remain in trust, Fannie Mae, through the district court's injunction, has determined their fate. Fannie Mae repeatedly argues that the injunction is proper because it is of no effect until the trust distributes. This is simply wrong.⁷ 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.

Minnesota's strong protection of spendthrift clauses, despite the fact that by their nature they defeat a creditor's claims, stems from Minnesota's long-standing policy of upholding donative intent. *See Morrison*, 582 N.W.2d at 240-41. That donative intent has explicitly been recognized to include the intent to protect the beneficiary from his or her creditors. Note, *Spendthrift Trust – Destructibility*, 5 Minn. L. Rev. 543 (1920-21) (recognizing intent to protect "improvident" relatives). Thus Fannie Mae conclusion that the Court of Appeals "expanded" the protection of spendthrift trusts to beneficiaries is a non sequitur. Spendthrift trusts have always protected beneficiaries from their creditors to the extent of their interest in the trust. Applying the law, as the Court of Appeals did

⁷ Although the Court of Appeals did use this language (Add. 3), it was speaking of both the injunction and the application orders. (*Id.*) This language is technically correct only when applied to the application order.

here, to forbid a creditor from encumbering a beneficiary's interest before distribution required no expansion of existing law.

The spendthrift provision at issue in this case prevents the assets of the trust from being liable for the debts of any beneficiary and prohibits any beneficiary from assigning, transferring or encumbering his interest in the trust “prior to actual distribution in fact by the trustee.” (Confid. App. 18-19.) The district court's order directly encumbered property in the trust before actual distribution and thus violated the spendthrift clause. The Court of Appeals correctly applied existing Minnesota law to enforce the clause and reverse the district court's order. The Court of Appeals did not create a new rule of law or expand existing law; it simply applied a well-established, longstanding rule of law in a very straightforward manner.

Fannie Mae, as it must, acknowledges that the law in Minnesota is clear that a spendthrift trust which has not yet been distributed is not subject to claims of creditors. (Appellant's Brief 17-19); *see In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43, 45 (1985); *Erickson v. Erickson*, 197 Minn. 71, 74. 266 N.W. 161, 162 (1936). Fannie Mae pretends, however that the district court's order prohibiting Mr. Grossman from transferring or otherwise disposing of his interest in the trust does not violate the spendthrift clause in the trust. Fannie Mae is wrong.

The spendthrift provision in the Grossman Trust provides:

Neither the principal nor the income of any trust created hereunder shall be liable for the debts of any beneficiary, and, except as otherwise expressly provided herein with respect to the power granted to a beneficiary to appoint the principal of a trust created hereunder, no beneficiary shall

have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust created hereunder, or the income produced thereby, prior to the actual distribution in fact by the trustee to said beneficiary.

(Confid. App. at 18-19 (emphasis added).) The district's court's injunction directly violates this clause in two ways. First, it would directly render the principal of the Grossman trust liable for Mr. Grossman's debt to Fannie Mae. Mr. Grossman's interest in the trust would be subject to an injunctive order in favor of Fannie Mae despite the fact that it remains in the trust. Second, it would encumber Mr. Grossman's interest in the trust prior to actual distribution in fact. Mr. Grossman's interest would be encumbered now with his debt to Fannie Mae.

As the Court of Appeals' observed, Minnesota courts have long upheld spendthrift provisions such as this in an "extreme" and "wholehearted fashion." (Add. 5 (citing Erwin N. Griswold, *Spendthrift Trusts* § 195 at 214-17 (2d ed. 1947).) And indeed, long-standing Minnesota caselaw confirms that spendthrift provisions are enforceable under Minnesota law to absolutely bar creditors from reaching the trust. *Morrison*, 582 N.W.2d at 243; *In re McLaughlin*, 361 N.W.2d at 45; *In re Moulton's Estate*, 233 Minn. at 290-91, 46 N.W.2d at 669-70. This court has long enforced these provisions because "donors may dispose of their property as they see fit, including exempting their gifts from the claims of donees' creditors." *In re McLaughlin*, 361 N.W.2d at 45 (citing *Erickson*, 197 Minn. 70, 266 N.W. 161).

In both *McLaughlin* and *Erickson*, the Minnesota Supreme Court held that spendthrift clauses prohibit creditors from making any claim on the income or residue of

a trust (even one that has come to an end) until the funds are actually paid over to the beneficiary. *Erickson*, 197 Minn. at 77, 266 N.W. at 163; *McLaughlin*, 361 N.W.2d at 46. In other words, under the protection of a valid spendthrift clause, both trust income and principal are “protected in transmission” until actually paid to the beneficiary. *Id.* Thus, in *Erickson*, the Minnesota Supreme Court reversed an order that required judgments for alimony and support be paid out of a trust created for the benefit of the debtor. The trust in question provided for the distribution of the estate of the debtor’s father (who was deceased at the time of the action) and contained a spendthrift clause. *Erickson*, 197 Minn. at 72, 266 N.W. at 161-62.

In *McLaughlin*, the Minnesota Supreme Court held that a spendthrift clause prevented an attempt to garnish a trustee even though the trust had terminated. 361 N.W.2d at 46. The *McLaughlin* court specifically rejected exactly the argument Fannie Mae made in the trial court here (App. 14-17), that because the trust proceeds vested at the time of Mr. Grossman’s father’s death, the spendthrift provision is no longer applicable. *McLaughlin*, 361 N.W.2d at 46. The Court looked to the language of the trust instrument which shielded the trust proceeds “while undistributed in fact.” *Id.* Similarly, the language of the trust shields the proceeds “prior to actual distribution in fact.” (Confid. App. 19.)

Rejecting the argument that the spendthrift clause no longer applied because the beneficiaries’ interests were vested, the *McLaughlin* court observed that the debtor in that case was “one of several beneficiaries whose interests have yet to be ascertained,” and that “[a]lthough terminated, the trust continues for a reasonable time during which

trustees have the power to perform acts necessary to wind up the trust.” 361 N.W.2d at 46 (citing G. Bogert, *The Law of Trusts and Trustees* § 1010 (Rev. ed. 1983)). Finally the Court observed that not until a final accounting is made will the trust proceeds be distributed “in fact.” *Id.*

The Minnesota Supreme Court’s holdings are consistent with the treatise Bogert, *Trusts and Trustees*:

It would seem that to the extent spendthrift trusts are valid, their protection should extend to the right of the beneficiary to receive income or principal from the trustee until it is actually paid or delivered into the beneficiary’s hands.

George Gleason Bogert et. al., *Trusts and Trustees* § 222 (3d ed.) And indeed eighty years of Minnesota case law confirms that Minnesota is a state that holds spendthrift provisions valid “without limit or qualification.” *See*, Helen S. Shapo et al., *The Law of Trusts and Trustees* § 227 (3d ed. 2007). Accordingly, “creditors have no rights or remedies as far as the trust property and the beneficiary’s interest in it . . . while the trust property is in the hands of the trustee.” *Id.* Because Judge Neville’s order unquestionably gave Fannie Mae a remedy relating to Mr. Grossman’s interest in the trust, it violated the spendthrift clause.

B. Reversing The District Court’s Anticipatory Injunction Was an Appropriate Application of Existing Law Regarding Spendthrift Trusts.

The Court of Appeals correctly applied these rulings in the present circumstance, an injunction restricting what a spendthrift trust beneficiary may do with his interest before distribution. To attempt to avoid this conclusion, Fannie Mae first engages in the

legal fiction that the district court's order has no effect until the trust distributes. It even mis-quotes the order as being limited to proceeds "as they come due"). (Add. 6-7)⁸ But this is clearly not the case, as the order by its own terms applies to Mr. Grossman's undistributed interest in the trust (i.e. any distribution that Mr. Grossman "will" receive). Fannie Mae next emphasizes the fact that it attempted to avoid the spendthrift clause by asking the district court to restrain the beneficiary rather than directly proceeding against the trustee. The Court of Appeals aptly recognized this as a distinction without a difference. Regardless of to whom the court directs its order, the effect is the same: the property of the trust is now subject to the claim of Mr. Grossman's creditor. This is in direct contravention of the spendthrift clause and this Court's previous holdings.

For example, this Court has previously held that a spendthrift clause prevents a beneficiary from entering into a contract to pay over the proceeds of a trust after receipt. *Hursch v. Lee*, 214 Minn. 448, 455, 9 N.W.2d 245, 248 (1943). In *Hursch*, this Court refused to enforce a contract entered into by beneficiaries of a spendthrift trust to pay over to their attorney one-third of the proceeds of the trust. The court held that the beneficiaries' attempt to contract a portion of their interest in the trust away before distribution was a violation of the spendthrift clause. *Id.* at 455, 9 N.W.2d at 248. Fannie Mae's efforts to distinguish this case by pointing out its complicated fact pattern does nothing to diminish the force of the holding or its applicability to this situation. Here, the effect of the district court's order is to subject Mr. Grossman's portion of the trust to

⁸ The reversed application order that Fannie Mae chose not to appeal did contain this exact language. (App. 8.)

Fannie Mae's control. The voluntary contract forbidden in *Hursch* has been replaced with a court order. The effect is the same, and the legal analysis should be as well, namely that the district court's orders are a violation of the spendthrift clause.

Any order that mandates the ultimate disposition of trust proceeds before actual distribution violates the spendthrift clause. The entity to which the order is directed – the trustee or the beneficiary – makes no practical difference. It is worth noting that at the district court level, Fannie Mae accomplished something it could not have had it moved against the trustee: it gained control of Mr. Grossman's interest in the trust. The Court of Appeals correctly disallowed procedure to trump substance.

Similarly, the unpaid proceeds of spendthrift trusts are routinely excluded from a debtor's bankruptcy estate. *See, e.g., Drewes v. Schonteich*, 31 F.3d 674, 676 (8th Cir. 1994). Indeed, creditors attempting to reach the proceeds of a spendthrift trust engage in a variety of procedural maneuverings. But in states where such trusts are upheld, the result is always the same. Any attempt to anticipate or inhibit the payment of the proceeds of a spendthrift trust to the beneficiary is invalid. *See Spencer v. Spencer*, 802 A.2d 215 (Conn. App. Ct. 2002) (beneficiary's interest in spendthrift trust cannot be considered by a court in adjusting alimony payments); *Domo v. McCarthy*, 612 N.E.2d 706 (Ohio 1993) (no attachable interest in trust property while in the hands of the trustee); *Heines v. Sands*, 312 S.W.2d 275 (Tex. Civ. App. 1958) (no garnishment of trustee); *Huestis v. Manley*, 8 A.2d 644 (Vt. 1939) (accrued income in the hands of the trustee is not subject to claims of creditors).

As the Connecticut Court of Appeals explained in the *Spencer* case, a spendthrift trust forbids “anticipatory alienations.” The court further explained:

Obviously creditors have no rights or remedies as far as the trust property and the beneficiary’s interest in it or the income thereof are concerned. They are limited to collection from sums after payment to the beneficiary, and to the products of such payment and to non-trust property.

Spencer, 802 A.2d at 222 (citing *Bogert, Trusts and Trustees* § 227 (2d ed., 1992)). Yet here the district court’s orders anticipate (in Fannie Mae’s own words) and alienate the potential payments to Mr. Grossman while the property remains in the trust. Specifically, Mr. Grossman’s interest is frozen by court order in favor of his creditor. An injunction has been issued that directly implicates Mr. Grossman’s interest in the trust. This order violates the law regarding spendthrift trusts.

C. Policy Changes Should Come from the Legislature, and the Policy Implications Here do not Favor Appellant’s Position.

Fannie Mae complains that the opinion below will make the collection of existing judgments more difficult. This is incorrect. It is Minnesota law that prevents the collection of judgments from property contained in spendthrift trusts, not the Court of Appeals’ opinion. What petitioner seeks is an exception to the inviolability of spendthrift trusts: e.g., allowing a court to exercise control over what the beneficiary of a spendthrift trust does with the proceeds before distribution, even though it cannot exercise control with respect to the trustee. But this exception would swallow the rule. The district court’s orders saddled Mr. Grossman’s pre-distribution interest in the trust with Fannie

Mae's judgment. The Court of Appeals correctly held that this was contrary to this Court's multiple holdings giving full effect to spendthrift clauses.

Fannie Mae's dissatisfaction with the opinion below stems not from any dramatic expansion of the existing law regarding spendthrift trusts; it stems from what the existing law actually is. Fannie Mae and Amicus Minnesota Bankers Association (MBA) assert that the Court of Appeals' application of this Court's precedent enforcing spendthrift trusts is "bad policy." Policy changes, however, are generally the province of the legislature. See *Stawikowski v. Collins Elec. Const. Co.*, 289 N.W.2d 390, 395 (Minn. 1979), superseded by statute. In *Stawikowski*, this court exercised "judicial restraint" in deference to the legislature's "superior ability to deal with broad social and economic policy issues" and declined to revise its interpretation of a statute. *Id.* Fannie Mae correctly points out that the law in Minnesota enforcing spendthrift trusts is court-made. But, nevertheless, as in *Stawikowski*, the potential changes Fannie Mae and MBA propose to the enforcement of spendthrift trust as well as to current limitations on creditor remedies should be based on "data and experience" more readily available to the legislature through its hearing process. *Id.* This issue is particularly highlighted by Fannie Mae and the MBA's concern with the intersection of laws regarding electronic banking and creditor remedies. Exactly what creditor remedies should (or should not) be expanded due to changes in technology is a matter better left to the legislative process.

Interestingly, although the Minnesota legislature has not done so, many states already do legislatively limit the protection of spendthrift trusts to benefit creditors. See Cal. [Probate] Code § 15306.5 (West 2011) (allowing a court to order future payments

from spendthrift trust be paid to judgment creditor⁹); Ga. Code § 53-12-80 (2011) (invalidating spendthrift trusts as to certain classes of judgments); Ky. Rev. Stat. § 381.180 (2011) (same); La. Rev. Stat. § 9:2005 (2010) (same); Okla. Stat. tit. 60 § 175.25 (2011) (same); Wisc. Stat. § 701.06 (2011) (same).

Moreover, Fannie Mae and the MBA's complaints of bad policy are based on a false precept, i.e. that lenders extend credit based upon unvested interests in family inheritance. There has not been (and could not be) any assertion made that lenders actually extend credit based on a borrower's status as beneficiary of an undistributed trust. The MBA's description of the situation as "judgment debtors who happen to be trust beneficiaries" demonstrates that Fannie Mae and the MBA seek new legal remedies for a fortuitous situation that had no relation to the initial decision to loan money to or enter a business relationship with the debtor. In fact, it has been recognized as an argument in favor of enforcing spendthrift trusts that "creditors should not be misled by the appearance of wealth which a beneficiary may show because creditors can always inquire into the source of such income, demand a statement of assets as a condition to giving credit" George T. Bogert, *Trusts*, § 40 (6th ed. 1987).

Fannie Mae asks this Court to allow district courts to enter prospective injunctive relief against debtors "who may at some future point receive proceeds from a spendthrift trust." (Appellant's Br. 28.) How far would such relief go? Would it matter whether or not the grantor had died? Would it matter whether the interest remained contingent? How certain would the interest have to be? Fannie Mae's request underscores the

⁹ This was exactly the effect of the district court's orders here.

fundamental problem with its entire position. It sought and obtained anticipatory injunctive relief over property that the law does not yet recognize as belonging to the judgment debtor. Taken to its logical conclusion, Fannie Mae's view of the law 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. Aside from the obvious administrative problems this would create for courts and judgment debtors,¹⁰ it would also create perpetual preferences in favor of aggressive creditors in derogation of long-standing debtor creditor law. A creditor could exercise effective control over as-of-yet inchoate and unidentified property raising potential due process problems as well.

Fannie Mae and the MBA's true motivations here are revealed by their detailed discussion of the ease of money moving and hiding assets in modern society. They seek to do much more than create an exception to the spendthrift trust doctrine in Minnesota; they seek to completely reconfigure debtor-creditor law to allow creditors to reach any property debtors may at some point obtain in the future. The Court should decline their invitation. Creditors have other means of protecting themselves, such as, for example, requiring adequate security before lending money. It is not necessary or wise to reconfigure centuries of debtor-creditor law to create a "remedy" for the merely technological changes inherent in electronic banking.

¹⁰ It is easy to envision the difficulties determining the priority of claims over the property if multiple creditors in multiple states all had obtained anticipatory injunctions could arise. Or perhaps, creditors would start demanding "confessions of injunctions" in loan documents attaching to all property the debtor might receive in the future.

Finally, the evisceration of the spendthrift doctrine that Fannie Mae and the MBA seek would expose trust administrators to new liabilities. The law as it currently stands is simple. Assets in a spendthrift trust are off limits to creditors. Once those assets are distributed, they become like any other assets and are fully available. Not insignificantly, once the assets are distributed the trustee also no longer has any legal duty to the beneficiaries. *See generally*, Restatement (3d) of Trusts, § 76 (describing duties of trustee). Before distribution, however, the trustee owes the beneficiary a duty to protect the assets in the trust, *id.* § 76(2)(b), and to administer the trust according to its terms, *id.* § 76(1). If courts are allowed to issue anticipatory injunctions reaching a beneficiary's interest in an undistributed spendthrift trust, trustees may be under a duty to ascertain whether any such injunctions exist and take measures to protect the beneficiary's interest. By including the spendthrift clause, the donor intended to protect the beneficiary's interest from the claims of creditors. A Trustee would be under a duty to take necessary steps to protect and uphold that intent.

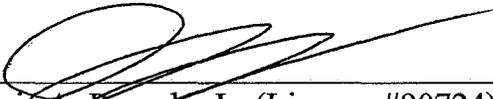
In sum, the difficulties the MBA and Fannie Mae have experienced due to the advent of electronic funds transfers are not a sufficient policy reason for this Court to undo the entire premise on which debtor creditor remedies are based – that creditors are limited to property in the hands of the debtor or due to the debtor – or to undo the legal effect of a frequently-used trust provision that has been upheld in Minnesota for the greater part of a century.

CONCLUSION

For the above stated reasons, Respondent Andrew Grossman respectfully requests that this Court affirm the judgment of the Court of Appeals in all respects.

BASSFORD REMELE
A Professional Association

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