

## Nebraska's Active Appreciation and the Importance of Premarital Agreements

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A recent case issued by the Nebraska Supreme Court has estate planning and family law attorneys talking. The case is *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017), and the result of this case may very well be more litigation to resolve the questions it is bound to raise. The solution to avoid being the person paying the legal fees associated with that litigation is a well-drafted premarital agreement.

In *Stephens*, the Nebraska Supreme Court analyzed whether the appreciation in Mr. Stephens' business during the course of his twenty-three year marriage should be considered marital property subject to division with Ms. Stephens upon their divorce. In resolving this issue, the Court adopted the "active appreciation" rule, which presumes that all appreciation earned during a marriage is marital property subject to equitable division between both spouses. Once a spouse establishes that both (1) appreciation accrued during marriage, and (2) such appreciation was due to the active efforts of *either* spouse, the rule then shifts the burden of proof to the other spouse - that is, the spouse who holds title to the property - to show that the appreciation was caused by circumstances other than the active efforts of one of them during their marriage.

The *Stephens* case raises several important questions. What constitutes "active efforts" of a spouse? How does the active appreciation rule apply to other types of assets, such as farmland or investment accounts? Does this rule apply to inherited property, even when separate title is maintained?

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Future case law will provide answers to these questions.

Clearly, preventing certain property from being subject to division in the event of divorce is no longer as simple as keeping that property titled in an individual's sole name during marriage. For individuals who own significant assets, or who have any equity ownership in a business, and who are contemplating marriage, it is more important than ever to enter into a premarital agreement. Not only will a well-drafted premarital agreement address the treatment of separate property in the event of divorce, it will also address the division of the *appreciation* of that separate property. In the absence of a valid premarital agreement addressing these issues, individuals may find themselves in the middle of risky and costly litigation.

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