

**Life after *Stephens*: What's Active
Appreciation and How Does it
Affect Property Division in
Divorce?**

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Introduction¹

Let's talk first about what these materials *are*. They are an update to current practitioners and staff on mid-level and advanced changes in Nebraska's divorce property division jurisprudence from approximately July 2017 through October 2019. Specifically, these materials are intended to help collaborative team professionals understand major changes to property classification and division under Nebraska law in the last few years that may affect collaborative resolutions. Though there are many other complex topics these materials could discuss in relation to Nebraska's "dual classification"² property division rules, they are beyond the scope of what is written here.

Now let's talk about what this section *is not*. This is not a complete or definitive guide to the current state of Nebraska's property division law. Instead, this section will focus on how *Stephens v. Stephens*³ has changed the property division landscape for practitioners. For more comprehensive resources and research, readers should consult one or more sections of the recently published Nebraska State Bar Association's Family Law Practice Manual.⁴ That 1000-page tome is available for less than \$200 and is the most recent treatise on Nebraska family law and related issues. If you are practicing family law in Nebraska or intend to in the future, this author recommends you go buy it immediately and not think twice.

Finally, these materials use the terms "separate property" and "non-marital property" interchangeably. Those terms are distinguished from "marital property" and items of property included within the "marital estate." Please forgive any unintended complexity because of this terminology.

¹ Michael W. Milone © 2019

² Cf. *Meints v. Meints*, 258 Neb. 1017, 1023, 608 N.W.2d 564, 569 (2000); see also 3 Brett R. Turner, *Equit. Distrib. of Property*, appendix A at 274 (3d ed. 2005).

³ 297 Neb. 188, 899 N.W.2d 582 (2017).

⁴ See Nebraska State Bar Association, *Family Law Practice Manual* (1st ed. 2019), <https://www.nebar.com/store/ViewProduct.aspx?id=13613826> (last visited October 9, 2019).

1. Life Before *Stephens* - Basic Propositions of Nebraska Law on Property Division and “Tracing” in Divorce

Property division in Nebraska is an equitable process.⁵ In other words, in a divorce action the purpose of a property division is to distribute the marital assets equitably between the parties.⁶ To determine whether particular property is part of the marital estate, Nebraska courts determine: (1) whether the item in question is property, (2) whether it was accumulated and acquired during the marriage, and (3) whether it is the result of the joint efforts of the parties.⁷ As a general rule, a spouse will be awarded one-third to one-half of the marital estate in litigated cases.⁸

Equitable property division under Neb. Rev. Stat. § 42-365 is a three-step process.⁹ The first step is to classify the parties’ property as marital or non-marital.¹⁰ The second step is to value the marital assets and marital liabilities of the parties.¹¹ The third step is to calculate and divide the net marital estate between the parties.¹² The ultimate test in determining the appropriateness of a property division is fairness and reasonableness as determined by the facts of each case.¹³ The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court’s determination of how the property will be divided in an action for dissolution of marriage.¹⁴

⁵ *Walker v. Walker*, 9 Neb. App. 694, 697, 618 N.W.2d 465, 469 (2000).

⁶ Neb. Rev. Stat. § 42-365 (Reissue 2016).

⁷ *Davidson v. Davidson*, 254 Neb. 656, 662, 578 N.W.2d 848, 854-55 (1998).

⁸ *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

⁹ *Stanosheck v. Jeanette*, 294 Neb. 138, 146, 881 N.W.2d 599, 606 (2016); see also *Osantowski v. Osantowski*, 298 Neb. 339, 351, 904 N.W.2d 251, 262 (2017).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.¹⁵ Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.¹⁶ Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.¹⁷ Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.¹⁸ If the separate property remains segregated or is traceable into its product, commingling does not occur.¹⁹

Nebraska's Supreme Court once held that tracing property is an unworkable proposition because the parties tend to suggest tracing only when there is an improvement in value.²⁰ This may very well be true. Nevertheless, the law is that if premarital property can be sufficiently identified and traced, it is typically set off to the spouse who brought the property into the marriage.²¹ Nebraska courts have recognized and used a tracing analysis in property division disputes in a number of notable reported cases.²²

Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.²³ The burden of proof rests with the party claiming

¹⁵ *Stanosheck v. Jeanette*, 294 Neb. 138, 148, 881 N.W.2d 599, 606-07 (2016).

¹⁶ *Brozek v. Brozek*, 292 Neb. 681, 698, 874 N.W.2d 17, 31 (2016).

¹⁷ *Id.*; see also *Burcham v. Burcham*, 24 Neb. App. 323, 345, 886 N.W.2d 536, 555 (2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Rezac v. Rezac*, 221 Neb. 516, 519, 378 N.W.2d 196, 198 (1985).

²¹ *Charron v. Charron*, 16 Neb. App. 724, 729, 751 N.W.2d 645, 649-50 (2008).

²² See, e.g.: *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003); *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005); *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007), modified on other grounds on rehearing by *Shafer v. Shafer*, 743 N.W.2d 781 (Neb. App. 2008); *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

²³ *Marshall v. Marshall*, 298 Neb. 1, 16, 902 N.W.2d 223, 236 (2017).

property is non-marital.²⁴ Where there is nothing in the record to show the source of premarital funds, they will be considered part of the marital estate.²⁵ A party claiming separate property is traceable within the marital estate must be able to “identify the different permutations that his premarital property underwent during the marriage.”²⁶ The necessary proof can come through the parties’ own testimony, bank records, and relevant transfer or transactional documents.²⁷ Parties seeking to trace separate property within the marital estate may not simply present the court with a “hodgepodge of figures.”²⁸ But where property can be sufficiently traced and identified, separate property can retain its separate character despite changes in form over time.²⁹

Early on, the Nebraska Supreme Court blended its classification and tracing analyses in the landmark case of *Van Newkirk v. Van Newkirk*.³⁰ There, the court held otherwise separate property could be transformed into marital property where both spouses contributed to the improvement or operation of separate property or a non-owning spouse significantly cared for the other’s separate property during marriage.³¹ This created what many Nebraska family lawyers colloquially called “the *Van Newkirk* exception.” But the same court limited its holding by finding that appreciation in separate property due principally to inflation and market forces and not to any “significant efforts” by the parties remained separate and was not included in

²⁴ *Stanosheck v. Jeanette*, 294 Neb. 138, 148, 881 N.W.2d 599, 606-07 (2016).

²⁵ *Id.*; *Shockley v. Shockley*, 251 Neb. 896, 902, 560 N.W.2d 777, 782 (1997).

²⁶ *Brozek v. Brozek*, 292 Neb. 681, 699, 874 N.W.2d 17, 31 (2016).

²⁷ *Id.* at 699-701, 874 N.W.2d at 31-32.

²⁸ *Id.*

²⁹ *Spady v. Spady*, Neb. App. A-15-426 (June 7, 2016) (NDPP) (citing *Quinn v. Quinn*, 13 Neb. App. 155, 689 N.W.2d 605 (2004)); *Minor v. Minor*, Neb. App. A-06-1006 (Mar. 4, 2008) (NDPP) (citing *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002)).

³⁰ 212 Neb. 730, 325 N.W.2d 832 (1982).

³¹ *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982).

the marital estate.³² *Van Newkirk* acted as an early precursor to the active vs. passive appreciation standard discussed in *Stephens*. And for the next 35 years, the “*Van Newkirk* exception” proved to be a cumbersome and inconsistent way for trial courts to equitably divide a marital estate; it was destined to fail.

Around 2015, Nebraska’s appellate courts began to shift their prior classification and tracing jurisprudence in the area of property division by more squarely discussing active and passive appreciation. For example, the Nebraska Supreme Court held in 2015: “[a]ppreciation in separate property is marital property to the extent that it was caused by marital funds or marital efforts; otherwise, it remains separate property.”³³ The Nebraska Supreme Court also recognized that an increase in value in the separate property of a spouse, not attributable in any manner to any contribution of funds, property, or effort by either of the spouses, constitutes separate property.³⁴ At the time, Nebraska’s appellate courts limited this shift in thinking to retirement accounts.³⁵ That all changed when the Nebraska Supreme Court released its opinion in *Stephens v. Stephens*³⁶ in July 2017.

2. What *Stephens* Changed – Evaluating Active vs. Passive Appreciation of Property During a Marriage

*Stephens v. Stephens*³⁷ involved Robert L. Stephens’ divorce from and property dispute with his wife, Janet E. Stephens. Before the parties’ marriage, Robert co-founded a construction company; he continued to operate that business as a co-owner during the marriage.³⁸ Robert had a significant

³² *Id.*

³³ *Coufal v. Coufal*, 291 Neb. 378, 383, 866 N.W.2d 74, 78 (2015) (citing 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:54 (3d ed. 2005)).

³⁴ *Id.* (citing Annot., 24 A.L.R. 4th 453, 456-57 (1983)).

³⁵ *Id.*; see also *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

³⁶ 297 Neb. 188, 899 N.W.2d 582 (2017).

³⁷ *Id.*

³⁸ *Id.* at 190-92, 899 N.W.2d at 586-87.

role in the leadership, operations, and direction of his construction company over time.³⁹ Robert also purchased stakes in and helped run or manage various other business ventures during the marriage.⁴⁰ Robert argued, under the *Van Newkirk* exception, that portions of his various business interests were separate property that the trial court could not award to Janet because the parties had not contributed to their active appreciation during the marriage.⁴¹ The trial court agreed in part with Robert's argument and applied *Van Newkirk* to rule in his favor.⁴² Janet appealed and won.

The Nebraska Supreme Court reversed the trial court and took its opportunity to create new standards defining and incorporating "active" and "passive" appreciation into Nebraska's property division jurisprudence. The Court determined appreciation caused by marital contributions is "active" appreciation, and it constitutes marital property.⁴³ In contrast, "passive" appreciation is appreciation caused by separate contributions and non-marital forces.⁴⁴ The Court went on to define marital contributions broadly to include the efforts of either the owning or the non-owning spouse and expressly disapprove of its prior holdings that failed to "recognize as a marital asset appreciation through the active efforts of the owning spouse."⁴⁵

The Court went on to establish a new burden of proof framework for cases involving active appreciation of separate property.⁴⁶ Accrued earnings or appreciation of non-marital property are now *presumed*⁴⁷ *marital* unless the party seeking a non-marital classification proves: "(1) the growth is

³⁹ *Id.*

⁴⁰ *Id.* at 192-94, 899 N.W.2d at 587-89.

⁴¹ *Id.* at 190, 899 N.W.2d at 586.

⁴² *Id.* at 196, 899 N.W.2d at 589-90.

⁴³ *Id.* at 202, 899 N.W.2d at 593.

⁴⁴ *Id.*

⁴⁵ *Id.* at 205-06, 899 N.W.2d at 595.

⁴⁶ *Id.* at 206, 899 N.W.2d at 595; *see also* Illustration 1 at the end of these materials.

⁴⁷ See Neb. Rev. Stat. § 27-301 (Reissue 2016).

readily identifiable and traceable to the nonmarital [property] and (2) the growth is not due to the active efforts of *either spouse*.”⁴⁸

Applying these principles to family businesses, the Court held a company’s value for purposes of active appreciation is attributable only to the efforts of first-tier management or similar persons with control over the company’s value because they directly influence decision making.⁴⁹ But the Court then went much further by holding that even favorable market conditions or the mere association of a party with a business is not passive inasmuch as it can increase goodwill or create opportunities that a skilled, owning spouse can detect and seize.⁵⁰ One leading treatise author has recognized this language by the Court as an *extremely broad* view of the active appreciation rule that may transform otherwise non-marital property into marital property.⁵¹

Practice Pointer: *Stephens* makes the issue of proving both the *existence* and *value* of separate property critical to separate property disputes. All family law practitioners should be asking their clients about the existence of potentially separate property at the intake stage or the earliest opportunity after that time. If a client indicates they possess separate property, practitioners should issue the discovery needed to determine the nature and status of the property. After establishing separate property exists, practitioners must take care to obtain evidence proving every form that separate property took during the marriage. Because separate property rarely remains in one place and in the same form over long marriages, this may be complex. Next, practitioners must at least be able to prove the value

⁴⁸ *Stephens*, 297 Neb. at 206, 899 N.W.2d at 595 (emphasis added).

⁴⁹ *Id.* at 207, 899 N.W.2d at 596.

⁵⁰ *Id.*; see also 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:57 (3d ed. 2005).

⁵¹ See, 3 Brett R. Turner, *Equit. Distrib. of Property* § 10:29.2 (3d ed. January 2019 update) (stating under *Stephens v. Stephens*, the Nebraska Supreme Court adopted “an especially broad definition of active appreciation.”).

of each piece of separate property at the beginning of the marriage and the end of the marriage. These two values will help establish the separate property's appreciation. Finally, practitioners must be able to produce evidence outlining each spouse's contribution to the separate property's appreciation.

If this process sounds time-consuming and complex, *that's because it is*. Practitioners should discuss the complicated realities of performing a tracing analysis at the beginning of each client's divorce case. Proving each link in the transactional chain of a piece of separate property is a delicate process that nearly always requires solid documentary evidence to support a client's testimony. Sometimes, documents needed to verify a piece of separate property's history will be incomplete, lost, or destroyed. And producing this kind of historical, financial evidence is often expensive. If a client lacks the commitment, financial incentive, or proof needed to complete a tracing and *Stephens* analysis, the client's money is better spent working on other aspects of the case and pursuing settlement where available.

3. What's on the Horizon - How Other Jurisdictions and Authorities Analyze Active vs. Passive Appreciation

Since releasing *Stephens*, the Nebraska Supreme Court has not published any cases explaining what kind of actions a spouse must take such that appreciation in otherwise separate property is "active," making that appreciation divisible marital property. It also remains unclear whether appreciation in otherwise separate property must be considered entirely active, entirely passive, or whether it can be both active and passive in part. To answer these kinds of questions, current practitioners must turn instead to treatises and cases from other jurisdictions.

a. All Active, All Passive, or a Mixed Theory of Appreciation?

A small minority of states have adopted a unitary theory of *appreciation*, holding that if any appreciation in separate property is active then all such appreciation must be considered divisible marital property.⁵² Other states have adopted a unitary theory of *property*, holding that an asset must be given a single classification as either marital or separate property.⁵³ These states may just tend toward over-simplifying the complex world of property division and active appreciation analyses; on the other hand, many litigants may frequently miss their burden of proof.⁵⁴ These unitary theories of appreciation and property are inconsistent with the current state of Nebraska law, which allows property to be classified as both marital in part and non-marital in part.⁵⁵ When compared to the other jurisdictions above, Nebraska's dual classification system appears to allow for the most equitable, prudent outcomes in property division involving mixed evidence of appreciation. For that reason, Nebraska's mixed system is unlikely to significantly change despite the holding in *Stephens*.

b. The Elements of Appreciation – What Do Courts Consider?

In order to find active appreciation in separate property, three elements are required: (1) separate property increases in value during a marriage; (2) the parties make marital contributions to that property; and (3) a causal connection exists between those marital contributions and part or all of the appreciation.⁵⁶

As a starting point, any spouse claiming active appreciation of otherwise separate property must show appreciation in the property's value

⁵² 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:55 (3d ed. January 2019 update) (collecting cases)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Marshall v. Marshall*, 298 Neb. 1, 16, 902 N.W.2d 223, 236 (2017).

⁵⁶ 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:56 (3d ed. January 2019 update).

occurred.⁵⁷ Proving appreciation necessarily requires a spouse to show the starting value of the property at issue on the date of marriage, usually through documentary evidence, regardless of the nature of the property.⁵⁸ Failing to prove starting value of the property at issue is a critical failure of proof and may stop an appreciation analysis from proceeding.⁵⁹ If the necessary evidence of value exists, the difference between the value of the property at issue on the date of marriage and the date of divorce is its appreciation.⁶⁰

Because *Stephens* states trial courts should *presume* appreciation is caused by married parties' active efforts as a starting point, these elements of the appreciation analysis can be easily met in Nebraska at this point. But active efforts can take many forms, including things like uncompensated work to improve marital assets, active management of assets over time, and homemaking services.⁶¹ The extent of these efforts required to create active appreciation varies by jurisdiction, with some requiring a showing of significant or substantial efforts by a spouse.⁶²

But there are at least two kinds of appreciation that will generally not be considered active: (1) appreciation caused only by market forces; and (2) appreciation caused by the actions of third parties.⁶³ Appreciation caused by favorable market conditions or third parties may be proven by expert testimony – perhaps from an accountant or economist – with reference to

⁵⁷ *Id.*

⁵⁸ *Id.*; see also *Burgardt v. Burgardt*, 27 Neb. App. 57, 926 N.W.2d 452 (2019).

⁵⁹ *Id.*; see also *Elman v. Elman*, 2002 UT App 83, 45 P.3d 176, 181 (Utah Ct. App. 2002).

⁶⁰ *Id.*

⁶¹ 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:56 (3d ed. January 2019 update).

⁶² *Id.*

⁶³ 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:57 (3d ed. January 2019 update).

publicly available evidence and market indexes like the Consumer Price Index.⁶⁴ Two cases highlight these categories of passive appreciation.

In *Dave v. Steinmuller*,⁶⁵ the Court of Special Appeals of Maryland found that the appreciation of a wife's investment portfolio was passive appreciation, and therefore nonmarital property, even though the husband had spent time deciding which stocks she should purchase, speaking with her financial advisor, and held veto power over the financial advisor's decisions.⁶⁶ The court reasoned that although the husband showed that he had spent considerable time managing the wife's portfolio, "he was unable to provide sufficient probative evidence of how his efforts resulted in the increase of value of the portfolio."⁶⁷ Furthermore, the court noted that although the husband had the power to approve the stockbroker's suggestions, the portfolio was officially managed by the brokerage firm.⁶⁸ Because the husband could not link the appreciation of the investments specifically to his efforts, and not market forces, the court rejected his argument that the investment portfolio was marital property.⁶⁹

In *Baker v. Baker*,⁷⁰ the Supreme Court of Minnesota found that the appreciation of a husband's stock was not active appreciation when he relied on a stock broker to make investment decisions regarding his portfolio.⁷¹ The extent of the husband's involvement with his portfolio was "selecting and changing investment advisors; authorizing money managers to make discretionary decisions about the investments; [and] retaining discretion to

⁶⁴ *Id.*; see also *Sommers v. Sommers*, 203 A.D.2d 975, 611 N.Y.S.2d 971 (4th Dep't 1994); *Allen v. Allen*, 263 A.D.2d 691, 693 N.Y.S.2d 708 (3d Dep't 1999).

⁶⁵ 157 Md. App. 653, 853 A.2d 826 (2004).

⁶⁶ *Dave v. Steinmuller*, 157 Md. App. 653, 669, 853 A.2d 826, 835 (2004).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 753 N.W.2d 644, (2008)

⁷¹ *Baker v. Baker*, 753 N.W.2d 644, 648 (Minn. 2008).

direct investments but exercising that discretion on only one occasion.”⁷² The court reasoned that the crux of the analysis in determining whether property is marital or nonmarital was the “effort expended to generate property during the marriage.”⁷³ Because the husband did not put substantial effort into the management of his investment portfolio, his investments remained nonmarital property traceable to his original investment of separate property.⁷⁴

As noted in a leading treatise, the ultimate criterion in determining the nature of appreciation is control over an asset’s value or transfer.⁷⁵ Minor investors, employees, and others with little influence over an asset’s value or transfer are less likely to be considered to have caused active appreciation.⁷⁶ High-level supervisors, executives, and business owners are more likely to be considered to have caused active appreciation, especially where those people are using special expertise to direct an asset’s day-to-day operation or management.⁷⁷ Apart from *Stephens*’ language on first-tier management, Nebraska has not yet addressed this issue or developed any schema for analyzing how a party’s control over an asset’s value affects the appreciation analysis.

⁷² *Id.* at 652.

⁷³ *Id.* at 651.

⁷⁴ *Id.* at 652.

⁷⁵ 1 Brett R. Turner, *Equit. Distrib. of Property* § 5:57 (3d ed. January 2019 update).

⁷⁶ *Id.*

⁷⁷ *Id.*

4. Life After *Stephens* - Avoiding Disputes on Whether Asset Appreciation Is Active or Passive

a. Recent Nebraska Cases – Tracing Requires Substantial Evidence and More than Just A Party’s Testimony

In *Burgardt v. Burgardt*,⁷⁸ the evidence demonstrated that a husband possessed a 401K account at the time the parties were married. While the husband testified the 401K was worth \$130,000 at the time the parties were married, he provided no documentation to support his claim.⁷⁹ The testimony at trial raised further questions as to the accuracy of the husband’s 401K valuation.⁸⁰ Since an initial value could not be determined, it was impossible to determine what, if any, of the 401K was traceable to the time of the divorce.⁸¹ The Nebraska Court of Appeals concluded that since the husband had not sufficiently proved the initial value of the 401K account, he had failed to meet his burden of proving that a nonmarital asset still existed.⁸² Because of this failure of proof, the husband could not perform a valid tracing analysis and attempt to argue that a portion of the 401k’s appreciation was passive, and therefore separate property.⁸³

In *Onstot v. Onstot*,⁸⁴ a husband testified that he purchased a family home 9 years prior to his marriage. He testified to the purchase price and what he believed was the amount of the original mortgage.⁸⁵ He then testified about what he believed the value of the home was on the date of marriage but provided no evidence regarding the balance of the mortgage at that time.⁸⁶

⁷⁸ 27 Neb. App. 57, 926 N.W.2d 452 (2019).

⁷⁹ *Id.* at 60-61, 926 N.W.2d at 457-58.

⁸⁰ *Id.*

⁸¹ *Id.* at 65-67, 926 N.W.2d at 460-61.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 298 Neb. 897, 906 N.W.2d 300 (2018).

⁸⁵ *Id.* at 899-900, 906 N.W.2d at 304.

⁸⁶ *Id.*

No party provided documentation to confirm the husband's testimony regarding the date of purchase, the purchase price, the mortgage balance, or the value of the house at the time of the marriage.⁸⁷ The Nebraska Supreme Court found the equity in the home at the time of the parties' marriage would ordinarily be a non-marital asset, which if properly established should be set aside to the husband.⁸⁸ However, given the lack of documentation that any equity existed at the time of the parties' marriage, the Court found that the husband failed to meet his burden of proving that the home was a non-marital asset.⁸⁹ Because the husband could not establish that the home was separate property in the first place, he could not later argue that any appreciation in its value was passive and therefore also separate property.

The Nebraska Court of Appeals, in a string of recent unpublished cases, has doubled down on apparently heightened evidentiary requirements for presenting a tracing analysis that could support an argument about passive vs. active appreciation under *Stephens*.⁹⁰ Very recently, the Court of Appeals issued a published decision that advanced similar reasoning to find a party presented insufficient evidence to trace allegedly pre-marital student loan debt.⁹¹

⁸⁷ *Id.*

⁸⁸ *Id.* at 903-904, 906 N.W.2d at 306.

⁸⁹ *Id.*

⁹⁰ See, e.g.: *Nasalik v. Nasalik*, Neb. App. A-16-1029 at 5 (Feb. 27, 2018) (NDPP) (Even if inherited funds are stored in a joint account, where there is a logical path to trace the funds after an initial transfer and the account value remains over the total value of the inherited funds a Court may find that the funds are non-marital property.); *Wolverton v. Wolverton*, Neb. App. A-18-853 (June 25, 2019) (NDPP) (wife failed to sufficiently trace pre-marital assets allegedly transferred throughout the course of the marriage; Nebraska Court of Appeals affirmed trial court's determination that all such property should be divided as marital). *Riegel v. Lemond*, Neb. App. A-18-607 at 14-16 (July 9, 2019) (NDPP) (husband's testimony, standing alone, is insufficient to definitively demonstrate the value of his inheritance, the purchase price of the marital home, or whether his inheritance was utilized to purchase the marital home; husband's testimony standing alone also insufficient to find that his student loan debt constituted marital debt).

⁹¹ *Anderson v. Anderson*, 27 Neb. App. 547, 565-66, ___ N.W.2d ___ (2019).

b. Where we Go from Here - Avoiding Tracing and Appreciation Fights in Domestic Cases and Planning for Cleaner Breaks

Given the void of Nebraska law on the issue of active vs. passive appreciation after *Stephens*, practitioners should adjust their focus to planning around the issue in both settlement and litigation. This author suggests two potential solutions: (1) using more pre-marital agreements to settle the issue of property division in cases involving non-marital assets of substantial value; and (2) transferring non-marital assets subject to significant appreciation to third party managers or fiduciaries.

First, Nebraska already has developed legal structures in place for drafting binding pre-marital agreements.⁹² Free resources exist to help even new practitioners draft these agreements well before any property dispute might erupt.⁹³ There is no reason why parties with valuable non-marital assets cannot simply plan for and contract around property division involving active appreciation before marriage. Second, Nebraska has adopted the Uniform Trust Code,⁹⁴ allowing practitioners to draft a wide variety of third-party fiduciary arrangements. When used effectively, an ordinary trust arrangement removes married parties from the active management of separate property and reduces the risk that their active efforts will cause that property to appreciate. These tools, combined with a measure of forethought, should go a long way to avoiding expensive fights about active appreciation.

⁹² See Neb. Rev. Stat. § 42-1001 *et seq.* (Reissue 2016) (codifying Nebraska's Uniform Premarital Agreement Act)

⁹³ See, e.g., Hannah C. Sommers, Nebraska Lawyer Magazine, *Precise Premarital Planning: Finding Your "Happily Ever After" in the Face of Divorce* (July/August ed. 2018), available at https://cdn.ymaws.com/www.nebar.com/resource/resmgr/nebraskalawyer_2017plus/2018/july-august/TNL-0718d.pdf (last visited October 11, 2019).

⁹⁴ See Neb. Rev. Stat. § 30-3801 *et seq.* (Reissue 2016).

Illustration 1 – Post-*Stephens* Burden of Proof Framework on Active vs. Passive Appreciation in Property Division

Either spouse must prove a piece of property (“Property”) exists within the marital estate by a preponderance of the evidence.

The owning spouse must prove by a preponderance of the evidence that the Property qualifies as separate – e.g. acquired by gift, inheritance, or before marriage.

If the Property has changed forms during the marriage, the owning spouse must perform a tracing analysis to prove by a preponderance of the evidence that the Property or its value still exists within the marital estate. This analysis should include providing relevant transactional documents.

Any appreciation in the Property during the marriage is *presumed* to be caused by active efforts of a spouse, and therefore *presumed* to be marital growth. The owning spouse must prove by a preponderance of the evidence that the appreciation is passive.