

FILED

October 20, 2026

released at 3:00 p.m.

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 26-ICA-35– *Kelli Mallory v. Kevin Mallory*

WHITE, J., concurring:

I concur with the majority’s opinion that the family court abused its discretion by classifying the Highland Drive home as marital property subject to equitable distribution based upon *Hinerman v. Hinerman*, 194 W. Va. 256, 460 S.E.2d 71 (1995). I also concur with the majority that, given the facts of the instant appeal, *Hinerman* is clearly distinguishable. Simply, this appeal does not involve the type of extenuating circumstances the Supreme Court of Appeals of West Virginia faced in *Hinerman*. I further concur that the family court failed to make the findings of fact necessary to apply the *Hinerman* exception. While the court made numerous findings reciting the parties’ testimony, the court did not find that Wife purchased the home “in contemplation of marriage.”¹ The court made no findings as to an engagement date, or when the parties began contemplating marriage, and the court seemingly ignored the “marriage soon after purchase” requirement. In its order, the court mentioned the month and year of the parties’ marriage, but it failed

¹ Findings of fact are intended to represent a judge’s own determination of the facts based upon the evidence presented, which may include witness testimony; they are not meant to be a transcript of witness testimony. *See S. Side Lumber Co. v. Stone Const. Co.*, 151 W. Va. 439, 152 S.E.2d 721 (1967). “The judge must sift the evidence produced at trial and gather enough information to paint a true picture of the attendant facts and circumstances. The trial judge must then make a realistic appraisal of what the picture discloses.” *Brown v. Gobble*, 196 W. Va. 559, 569, 474 S.E.2d 489, 499 (1996). “Under these circumstances, the findings in a bench trial must be sufficiently detailed, reasoned, and logical to enable the reviewing court to trace a persuasive path between the evidence and the judgment . . . Where the determinative factor at trial is the credibility of the witnesses, this requires a trial court to specify what witnesses were not credited and why.” *Id.* (internal citations omitted).

to make findings that satisfy this requirement or that explain how a marriage that occurred more than two years after the purchase can be considered “soon after the purchase.”

I write separately, however, because it is my opinion that the family court misapplied the law by reading *Hinerman* as establishing a factor-based test for the separate property exception and by assigning more weight to one factor than it assigned to the others. Rather, a review of *Hinerman*, and subsequent cases applying it, demonstrates that the test is elemental, meaning that before a court may apply the *Hinerman* exception, it must make specific findings of fact demonstrating that *each* of the four elements identified in *Hinerman* has been satisfied and afford each of those elements equal weight in its decision. By contrast, in a factor-based test, a court is provided a number of factors to consider in reaching a decision, satisfying each of the factors may not be required, and the court may have the discretion to weigh the factors differently.

In *Hinerman*, the SCAWV identified the four elements on which it based its decision, and the Court applied them equally. In the cases that followed, both the SCAWV and this Court have indicated that each of these four elements must be satisfied before a court may apply the *Hinerman* exception, and both Courts have afforded the elements equal weight in reaching a decision. *See Chafin v. Chafin*, 202 W. Va. 616, 505 S.E.2d 679 (1998) (per curiam); *Shawn H. v. Elise H.*, No. 24-ICA-95, 2024 WL 4052868 (W. Va. Ct. App. Sept. 4, 2024) (memorandum decision). *See also Fry v. Fry* No. 22-ICA-47, 2023 WL 1463353 (W. Va. Ct. App. Feb. 2, 2023) (memorandum decision). Courts do not have the

discretion to choose which of the elements apply or to deem one more significant than another; it is all or nothing. The final order on appeal demonstrates that the family court applied *Hinerman* incorrectly, which, alone, is reversible error.

Accordingly, I concur in the majority's decision to reverse the family court's December 30, 2025, order, and to remand this matter for further proceedings. However, it is my opinion that *Hinerman* should be applied as an elemental test.