STATE OF MINNESOTA

IN SUPREME COURT

A16-1421

Court of Appeals

Chutich, J.
Dissenting, Anderson, J., Gildea, C.J.
Took no part, Thissen, J.

In re the Marriage of:

Francis Stephen Gill,

Appellant,

vs.

Filed: October 24, 2018
Office of Appellate Courts

Gretchen Zwakman Gill,

Respondent.

Michael V. Ciresi, Michael A. Sacchet, Ciresi Conlin LLP, Minneapolis, Minnesota; and

Karim El-Ghazzawy, Basil El-Ghazzawy, El-Ghazzawy Law Offices, LLC, Minneapolis, Minnesota, for appellant.

Alan C. Eidsness, Lisa T. Spencer, Henson & Efron, P.A., Minneapolis, Minnesota, for respondent.

S Y L L A B U S

When marital property is sold after the district court's valuation date but before the dissolution of marriage, and the consideration for the sale is an amount paid at the time of the sale plus the contractual right to receive future amounts, all of the consideration is classified as marital property.

Affirmed.

O P I N I O N

CHUTICH, Justice.

This case considers whether future, contingent earn-out payments are marital or nonmarital property under Minnesota Statutes section 518.003, subdivision 3b (2016). While married to respondent Gretchen Zwakman Gill (Gretchen), appellant Francis Stephen Gill (Stephen) purchased an ownership interest in a company.[1] Stephen later sought a dissolution of marriage. After the district court's valuation date for marital property but before the dissolution, Stephen and the other owners of the company sold the company and their ownership interests in that company. The purchase agreement gave the company and its owners the right to receive (1) an up-front payment of $180 million and (2) two potential future earn-out payments, ranging from $0 to $170 million in value.

The parties dispute whether the earn-out payments are marital or nonmarital property. The district court concluded that the earn-out payments are nonmarital property because they are property acquired by a spouse after the valuation date. *See* Minn. Stat. § 518.003, subd. 3b. The court of appeals reversed. Because the parties' interest in the company was marital property that was acquired before the valuation date, the consideration for the sale of the company, which occurred before the dissolution and included an amount paid at the time of the sale and a contractual right to receive future amounts, is also marital property. We therefore affirm the court of appeals, including its

[1] Because the parties have the same last name, we use, for clarity, each party's first name, as provided in the record.

instructions on remand to the district court to equitably divide any received earn-out payments.

FACTS

Stephen and Gretchen married in 1993. Stephen was the president of a company, and Gretchen worked full-time in advertising. Gretchen became a stay-at-home mother in 1994, after the birth of their first of four children, while Stephen continued his career.

In 2008, Stephen and a business partner purchased, as equal partners, a little over 50-percent ownership interest in Talenti, a company that makes gelato, for about $1.5 million. Stephen also became the Chief Executive Officer of Talenti, overseeing "all aspects" of the company, "from production, human resources, marketing, operations, sales, and finances." The district court found that "[i]t is undisputed that Stephen's leadership in all aspects of Talenti was a major factor in its success."

While married to Gretchen, Stephen created Wyndmere LLC (Wyndmere) to hold his interest in Talenti. Wyndmere then acquired a membership interest in David Goliath Group LLC (David Goliath), Talenti's parent company that its members created in 2013 to hold their membership interests.[2] Stephen transferred 20 percent of his interest in Wyndmere to trusts for the parties' children, keeping the remaining 80 percent in his own name. Gretchen is not a named member of Wyndmere, but the parties agree that she has a

[2] David Goliath also had four other members, who together owned over 61 percent of the company: Fialko LLC (38.7043 percent), Hochshuler, LLC (18.2914 percent), Majody Helms, LLC (3.3 percent), and Kent Pilakowski (1 percent).

marital interest in Stephen's 80-percent ownership interest because he acquired it during their marriage. *See* Minn. Stat. § 518.003, subd. 3b.

After Talenti reached capacity at its manufacturing facility, David Goliath's members, including Wyndmere, hoped to sell the company. In mid-2013, Unilever N.V. and Conopco Inc. (collectively, Unilever) contacted David Goliath about purchasing the company. Negotiations occurred over the next year. Ultimately, David Goliath and Unilever agreed to "an aggregate maximum purchase price" of $350 million, split between a $180 million upfront payment and two additional contingent payments worth a maximum total of $170 million. A letter of intent memorialized their agreement in July 2014.

While negotiations to sell David Goliath were underway, Stephen and Gretchen separated after 21 years of marriage. After Stephen petitioned for a dissolution of the marriage in August 2014, the district court set September 5, 2014, as the valuation date for marital property. *See* Minn. Stat. § 518.58, subd. 1 (2016) (providing that "[t]he court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference"). The valuation date is unchallenged on appeal.

On December 2, 2014—that is, after the valuation date, but before the dissolution was final—Stephen and the other members of David Goliath sold all of their membership units and the assets of David Goliath to Unilever. Gretchen was aware of the sale and

nothing in the record shows that she opposed the sale.[3] At the time of the sale, Wyndmere owned 38.7043 percent of David Goliath. The sale terms, which were set out in a purchase agreement, were consistent with the terms of the July 2014 letter of intent.[4] In exchange for David Goliath's assets and membership units, Unilever made an upfront payment of $180 million to David Goliath upon closing and gave it and its members a right to receive a proportional share of two future earn-out payments, with the value of those payments based on the annual performance of Talenti.

Specifically, the purchase agreement provided in relevant part:

> SECTION 1.01. The Asset Purchase. . . . (b) As additional consideration for the Assets, the Company shall also be eligible to receive from Asset Buyer (i) an amount equal to the First Earn-out Payment . . . and (ii) an amount equal to the Second Earn-out Payment . . . .
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> SECTION 1.02. The Distribution. . . . [I]mmediately following the consummation of the Asset Purchase, [David Goliath] shall effect a distribution to the Members of (a) the Asset Purchase Payment and (b) the right to receive (i) an amount equal to the First Earn-out Payment . . . and (ii) an amount equal to the Second Earn-out Payment . . . .
>
> SECTION 1.03. The Membership Unit Purchase. . . . (b) As additional consideration for the Membership Units, the Members shall also be eligible to receive from Unit Buyer (i) an amount equal to the First Earn-out Payment . . . and (ii) an amount equal to the Second Earn-out Payment . . . .

The agreement specified that the earn-out payments would be calculated according to a formula that was based on the amount by which annual sales exceeded an established

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[3] The district court found that "[Gretchen] credibly testified that [Stephen] told her that 100% of Talenti was being sold the following Monday" and that "[t]he sale of Talenti was completed the following Monday . . . ."

[4] The only difference between the letter of intent and the purchase agreement was that the purchase agreement allocated earn-out payments between assets and membership units.

"floor" ($120 million in net sales), multiplied by a set multiplier (1.75), and subtracting certain variable costs. The payments would become "final and binding"[5] after the end of the first and second "earn-out years" (calendar years 2015 and 2016). After becoming "final and binding," Unilever would be required to pay each member, including Wyndmere, its respective share of the earn-out payments. All David Goliath members, regardless of whether they (or their individual members) worked for Unilever after the sale, would receive earn-out payments according to the same formula.

Separate from the purchase agreement, Stephen also negotiated an employment agreement with Unilever. He agreed to work as Talenti's Chief Executive Officer at an annual salary of $362,500 in 2015 and $375,625 in 2016.

The district court dissolved the parties' marriage on January 4, 2016. Gretchen disputed the district court's classification of the earn-out payments as nonmarital property. After a 3-day trial focusing primarily on the valuation and division of marital assets and debts, the district court concluded that the earn-out payments were nonmarital property acquired by a spouse after the valuation date. *See* Minn. Stat. § 518.003, subd. 3b. Interpreting the purchase agreement, the court explained that the earn-out payments were "consideration" for "an opportunity for Talenti ownership to prove that Talenti could be a different, higher-grossing company in the future." And the court found that the payments "represent[ed] compensation for the value added to Talenti by [Stephen] post-valuation

[5] An earn-out payment only became "final and binding" after the parties agreed to, or established through arbitration, the calculated total of each achieved earn-out payment. The purchase agreement included a timeline and process for calculating the earn-out payments and challenging the calculated earn-out payments.

date." If obtained, the court reasoned, the earn-out payments would "be a result of [Stephen's] significant post-marital labor and should be awarded to him as his non-marital property."

Looking to the sale of the parties' marital asset that occurred 3 months after the valuation date, the district court determined that the "full marital value" of Stephen's marital interest in David Goliath was 80 percent of Wyndmere's share of $180 million—the value of the upfront payment that Unilever was willing to pay in the purchase agreement. The court reasoned that the upfront payment compensated for work completed during the marriage, unlike the earn-out payments, which compensated for *future* work.

Accordingly, the district court concluded that the earn-out payments are nonmarital property and Gretchen has no marital interest in the payments.[6] The court supported its conclusion with findings of fact related to the timing of the sale (after the valuation date); the intent for the earn-out payments to compensate for future, post-marital efforts by Stephen; Stephen's important role in the company; and the amount of work that Stephen would have to do for the company to achieve the earn-out payments after the dissolution.

Gretchen filed a post-trial motion challenging the district court's conclusion that the earn-out payments from the sale of their marital interest in David Goliath were non-martial property. The district court denied Gretchen's motion.

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[6] "The case was tried in November 2015, with the first earn-out payment to be computed on 2015 year-end information. Accordingly, the record does not reveal whether and in what amounts the earn-out payments were made. Resolution of the legal issue presented on appeal does not depend on the amount." *Gill v. Gill*, 900 N.W.2d 717, 719 n.1 (Minn. App. 2017).

Gretchen appealed, challenging the district court's ruling on the earn-out payments. The court of appeals reversed, concluding that, as a matter of contract interpretation, the earn-out payments are marital property. *Gill v. Gill*, 900 N.W.2d 717, 722 (Minn. App. 2017). The court reasoned that the purchase agreement unambiguously "identified both the initial $180 million and the earn-out payments as 'consideration' for the purchase of [David Goliath]," setting the sales price at "*no less than* $180 million, and *no more than* $350 million." *Id.* at 720–21. And "[w]hile dependent on future performance, the earn-out payments are part of the sale price, reflecting the value of [David Goliath] at the valuation date," rather than "compensation for [Stephen's] continued work at the company." *Id.* at 721–22. Consequently, the court reversed and remanded the case to the district court "with instructions to equitably divide the earn-out payments as marital property." *Id.* at 722. Stephen sought review, which we granted.

ANALYSIS

We now consider whether the earn-out payments are marital or nonmarital property under Minnesota Statutes section 518.003, subdivision 3b. "Whether property is marital or nonmarital is a question of law" that we review de novo. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). We also interpret contracts and statutes de novo. *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 501 (Minn. 2018). But we defer to the district court's underlying findings of fact and do not set the findings aside unless they are clearly erroneous. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). We do not overturn a district court's evaluation and division of property unless the court abuses its discretion. *Id.* at 100. "[I]f we are left with the definite and firm conviction that a mistake has been made, we may find

the trial court's decision to be clearly erroneous, notwithstanding the existence of evidence to support such findings." *Olsen*, 562 N.W.2d at 800 (citation omitted) (internal quotation marks omitted).

A court must first classify property as "marital property" before valuing and dividing that property between spouses. Minn. Stat. § 518.58, subd. 1 (requiring a court to "make a just and equitable division of the *marital property*" (emphasis added)). "Marital property" is:

> [P]roperty, real or personal, including vested public or private pension plan benefits or rights, *acquired* by the parties, or either of them, to a dissolution, . . . *at any time during the existence of the marriage* relation between them . . . *but prior to the date of valuation* under section 518.58, subdivision 1.

Minn. Stat. § 518.003, subd. 3b (emphasis added). "All property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses . . . ." *Id.*

Each spouse has "a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution." Minn. Stat. § 518.003, subd. 3b. "Vesting" here relates to "when parties have common ownership in assets." *Janssen v. Janssen*, 331 N.W.2d 752, 755 n.3 (Minn. 1983).

The idea of marital property is "grounded in the principle that marriage is a partnership and that each partner should get out of the marriage a fair share of what was put into it." *Baker v. Baker*, 753 N.W.2d 644, 650 (Minn. 2008). In *Nardini v. Nardini*, we explained:

> [M]arriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which

> is financial . . . . [T]he extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance but, rather, by the whole complex of financial and nonfinancial components contributed.

414 N.W.2d 184, 192 (Minn. 1987) (citation omitted). When a marriage ends, each spouse, "based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured." *Id.* We have therefore interpreted "marital property" expansively, so as not to ignore the presumption that "each spouse contributed to the acquisition of property while they lived together as husband and wife." *Janssen*, 331 N.W.2d at 756 (noting that we avoid a "technical, strict construction of property" to enable "equitable settlements between parties"); *see also Nardini*, 414 N.W.2d at 191.

To overcome the "presumption of marital property," a spouse must prove, by the preponderance of the evidence, that the property is "nonmarital property." *Baker*, 753 N.W.2d at 649–50. "Nonmarital property" is defined under section 518.003, subdivision 3b:

> [P]roperty real or personal, acquired by either spouse before, during, or after the existence of their marriage, which
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> (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;
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> (b) is acquired before the marriage;
>
> (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
>
> *(d) is acquired by a spouse after the valuation date*; or
>
> (e) is excluded by a valid antenuptial contract.

(Emphasis added.) We have interpreted "nonmarital property" narrowly because the Legislature created only "five enumerated exceptions" to the "expansive definition of what constitutes marital property." *Janssen*, 331 N.W.2d at 755; *see also* Minn. Stat. § 645.19 (2016) ("Exceptions expressed in a law shall be construed to exclude all others.").

Accordingly, whether property is classified as marital depends in large part on timing—when the asset was acquired. If property was acquired during marriage and before the court's valuation date,[7] then that property is presumed to be marital and the court may value and divide that marital property equitably. *See* Minn. Stat. §§ 518.003, subd. 3b, 518.58, subd. 1.

Stephen claims that because he received the contractual right to the earn-out payments 3 months "after the valuation date," the earn-out payments are nonmarital property. *See* Minn. Stat. § 518.003, subd. 3b(d). But as we set forth below, the earn-out payments were received in exchange for marital property—Wyndmere's interest in David Goliath. Consequently, the district court must equitably divide any proceeds received from the consensual sale of the parties' marital property after the valuation date but during the dissolution proceeding.

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[7] The valuation date serves two purposes: it establishes (1) whether property is marital or nonmarital (and subject to the court's equitable division or not), and (2) the date that a court estimates the value of marital assets. *Accord* Brett R. Turner, *Determining the Date for Valuing Marital Property in Divorce Actions*, 13 Divorce Litig. 17 (Feb. 2001) ("It is important . . . to distinguish clearly between the date of valuation of marital property and the date upon which the parties' active efforts cease to create divisible property. The latter date, known generally as the date of classification, is influenced by completely different policy considerations."). The dissent incorrectly focuses on valuation rather than classification.

The Legislature has expressed in section 518.58 that the proceeds from a sale of marital property that occurs during dissolution proceedings are marital property subject to the court's equitable division. Under subdivision 3, if "it is necessary to preserve the marital assets of the parties," a court can order the parties to sell a marital asset during the "pendency of a proceeding" and then equitably divide the "funds received from the sale during the pendency of the proceeding." And under subdivision 1a, if one spouse violates the fiduciary duty owed to the other spouse by selling a marital asset without the consent of the other spouse during dissolution proceedings, a court may divide the "entire value of an asset and a fair return on the asset to the party who transferred, encumbered, concealed, or disposed of it." Although these subdivisions are silent about how a district court may treat the proceeds of a sale of marital property when both spouses agree to the sale, the Legislature recognized in this language that any proceeds received from the sale of marital property during a dissolution proceeding are marital property.

Similarly, we recognized in *Nardini* that a court may equitably divide the proceeds of a sale of marital property that occurs during dissolution proceedings if doing so places both parties in the "optimum position." *See* 414 N.W.2d at 188 (stating that a "court can order the sale or liquidation of the [marital] asset and make a just and equitable division of the proceeds of sale or liquidation"). A court-ordered sale of a marital asset, we explained, "has the advantage of certainty [in value] and may be necessary for equitable division when an indivisible asset constitutes the bulk of the marital property." *Id.* We see no reason to treat the proceeds of a consensual sale of marital property differently from the proceeds of a court-ordered sale of marital property. A sale of marital property during dissolution

proceedings, regardless of when that sale occurs, results in the proceeds from the sale also being marital property, the value of which is defined by the contract selling that asset.

Here, the district court correctly looked to the purchase agreement from the sale of Wyndmere's interest in David Goliath that occurred 3 months after the valuation date to value Wyndmere. It clearly erred as a matter of law, however, by failing to include the contractual right to the earn-out payments as marital property because the earn-out payments, like the upfront payment, were proceeds from the sale accruing to Wyndmere, a marital asset.

Because Wyndmere received a contractual right to receive the earn-out payments from the pre-dissolution sale of a marital asset that was acquired before the valuation date, we conclude that the earn-out payments, as direct proceeds from the sale, are marital property subject to the court's valuation and equitable division. In 2008, while the parties were married, Stephen purchased an interest in Talenti and created Wyndmere for the purpose of holding that interest. After David Goliath became the parent company of Talenti, Wyndmere became a member of David Goliath (during the marriage), holding Stephen's membership interest in David Goliath. Because Stephen created Wyndmere during the parties' marriage, 80 percent of Wyndmere is presumptively marital property. *See* Minn. Stat. § 518.003, subd. 3b.

Before the dissolution, Stephen and the other members of David Goliath sold David Goliath and their ownership interests in it, including the parties' marital interest in David

Goliath through Wyndmere, to Unilever.[8] The sale converted the parties' marital asset from an indirect membership interest in David Goliath into a contractual right to receive proceeds from the sale of David Goliath. In other words, Wyndmere received the contractual right to the upfront payment and the potential earn-out payments only by selling the parties' marital asset, which was acquired during the marriage and before the valuation date. *See* Minn. Stat. § 518.003, subd. 3b.

To determine the scope of the contractual rights that Wyndmere received from the sale of the parties' marital asset, we look to the sale's purchase agreement. We interpret contractual language de novo. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). "When the [contractual] language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (citation omitted). "We have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." *Valspar*, 764 N.W.2d at 364–65 (citation omitted).

[8] The district court's findings show that the sale was fair and reasonable. The sale was between a willing buyer and seller; both parties were aware of the sale and did not contest it; the timing of the sale was to maximize the company's value, not to disadvantage a spouse in a dissolution proceeding; and the negotiated sale price at the valuation date was the same, if not close to, the actual sale price. [Accordingly, our analysis is premised on a sale of a marital asset that replaces a marital asset with a sale price that reflects a "fair and reasonable value" for "that marital asset." *See Nardini*, 414 N.W.2d at 189 (requiring a court's valuation to reflect a "fair and reasonable value" for the company)].

The unambiguous language of the purchase agreement provides that all of David Goliath's members,[9] including Wyndmere, received, in exchange for their interest, a right to a proportional share of (1) an upfront payment of $180 million, and (2) two (possible) future earn-out payments. *All* members of David Goliath were entitled to the earn-out payments, regardless whether the member (or in the case of David Goliath's LLC members, a member of the member) continued to work for Talenti. Thus, under the purchase agreement *every* person with a financial interest in David Goliath shared in the payments. The contract's plain language shows that the earn-out payments are part of the purchase price, not compensation for Stephen's future work.[10] A contrary holding would mean, perversely, that Gretchen would be the *only* person with an interest in David Goliath who would not share in the earn-out payments.

The purchase agreement identified the earn-out payments as "additional consideration" for both the purchase of David Goliath and each membership interest. *See*

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[9] *Members* received the right to future earn-out payments, not *individuals*. Stephen only acquired the earn-out payments through Wyndmere, which is marital property. Stephen received separate consideration and compensation for his post-sale, and post-dissolution, work in his employment agreement with Unilever.

[10] The contract's plain language is consistent with the parties' representation of the sale during sale negotiations and on tax returns. Summarizing an agreement reached after months of negotiations, a July 2014 letter of intent stated that David Goliath and its members agreed to sell David Goliath and their membership units for $350 million, made in three payments. Additionally, on tax returns filed under the penalty of perjury, the buyers and sellers described the sale as an "installment sale," with a "Maximum Selling Price Unit & Asset Sale" of $350 million. Stephen and Gretchen also reported a "capital gain" for an installment sale on their 2014 joint tax return. This evidence supports the conclusion that the earn-out payments were part of the full purchase price of between $180 million and $350 million.

Consideration, *Black's Law Dictionary* (10th ed. 2014) ("Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something" and is "necessary for an agreement to be enforceable"). In exchange for David Goliath's assets and membership units, Unilever provided David Goliath and its members, including Wyndmere, not just the upfront payment, but also a right to receive the earn-out payments.

Wyndmere's right to receive its proportional share of earn-out payments, whatever their exact value, is more than a "mere expectancy" interest; it is an enforceable contract right.[11] *See Janssen*, 331 N.W.2d at 754 (holding that nonvested, unmatured pension benefits are marital property, even though the receipt and value of such benefits depend on post-marital labor and the benefits were not received until after the dissolution). Concluding otherwise would "ignore the presumption" that "each spouse contributed to the acquisition of property while they lived together as husband and wife." *Id.* at 756.

Although the value of the earn-out payments, ranging from $0 to $170 million, was not certain and the payments were not received before the dissolution, the *right to receive* the payments was acquired before dissolution, on the date of closing. *See Rohling v. Rohling*, 379 N.W.2d 519, 522 (Minn. 1986) (determining that retirement funds were marital because the spouse "acquired the right to receive the funds" during the marriage);

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[11] Contrary to the dissent's characterization of our analysis, after interpreting the entire purchase agreement as a whole, we conclude that Wyndmere received an enforceable contract right to the earn-out payments. Notably, at oral argument, Stephen agreed that Wyndmere, and the other members selling their ownership interests, had an enforceable contractual right to receive earn-out payments.

Janssen, 331 N.W.2d at 754 ("[T]he interest appellant holds becomes more than a mere expectancy-it becomes a *chose in action,* a contractual right: a property interest."); *Faus v. Faus*, 319 N.W.2d 408, 413 (Minn. 1982) ("[T]he *right to receive increases in value* of the pension units was vested during the period of coverture because it was an already existing term of the pension plan." (emphasis added)). In other words, although the *amount* of the earn-out payments, if any, was not then ascertainable, the contractual *right* to receive the payments was certain.[12]

Stephen attempts to overcome the presumption that Gretchen is entitled to an equitable distribution of the earn-out payments by arguing that the earn-out payments are nonmarital property that he acquired "after the valuation date," Minn. Stat. § 518.003, subd. 3b, as compensation for his post-marital labor. But he fails to prove, by a preponderance of the evidence, that the payments are nonmarital property. *Id.* Stephen ignores that Wyndmere was marital property acquired before the court's valuation date and the sale of Wyndmere replaced the parties' marital asset with proceeds from the sale that the court could equitably divide between the spouses during the dissolution proceeding.

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[12] Although Wyndmere's contractual right to receive the earn-out payments resulted from the sale of the parties' marital asset after the court's valuation date, that contract right (to receive the proceeds of the sale) replaced the parties' marital asset during the dissolution proceedings. Accordingly, the dissent's assertion that we are "reviving a decades-old statutory scheme" is incorrect; we are merely applying the existing statutes to ensure the equitable division of one of the parties' largest marital assets and applying the contract value resulting from the sale of that asset. *See Janssen*, 331 N.W.2d at 756 (interpreting "marital property" expansively, as not to ignore the presumption that "each spouse contributed to the acquisition of property while they lived together as husband and wife"); *see also id.* at 755 n.2 (avoiding a "technical, strict construction of property" to enable "equitable settlements between parties").

Here, the district court should have, as part of the judgment and decree, determined the "appropriate percentage" of earn-out payments that would be allocated to Stephen and Gretchen "only if and when [such payments] are paid" to Wyndmere. *Janssen*, 331 N.W.2d at 756 (citing *In re Marriage of Hunt*, 397 N.E.2d 511, 519 (Ill. 1979)). The exact value of the earn-out payments would then be determined by the terms of the purchase agreement after the end of each earn-out period.

Stephen also asserts that the earn-out payments, unlike the upfront $180 million payment, are compensation for his work after the dissolution. He relies primarily on our decision in *Rogers* and subsequent court of appeals decisions to make this argument. *See Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980).

But *Rogers* is a valuation case, unrelated to classifying property as marital or nonmarital property. *See id.* at 852. The question in *Rogers* was related to the court's valuation of an ongoing closely-held marital business, which required estimation. *See id.* The husband in *Rogers* owned 85 percent of a business that was essentially a one-person operation, and he continued to own and operate the business after the marital dissolution. *Id.* at 851. In *Rogers*, we rejected the district court's estimated business valuation because the valuation method that it adopted did not exclude "the value of personal services rendered by the owner." *Id.* at 853 (citation omitted) (internal quotation marks omitted). Here, unlike in *Rogers*, a purchase agreement defines the value of proceeds from the sale of marital property, and the court does not need to estimate the value of that marital property. Moreover, the value of the future payments here does not depend on the

compensation paid for an individual's personal services but instead reflects the achievements of the company as a whole.

To be sure, the district court's factual findings suggest that Stephen's post-dissolution efforts affected whether the future payments would be made and the amount of the payments. But as we discussed above, the issue here is whether the right to those payments was received during the marriage, *see* Minn. Stat. § 518.003, subd. 3b; and it was. That the size of those payments might be influenced by Stephen's post-dissolution efforts does not convert the right to receive those payments into nonmarital property.

To the extent that the district court may consider one spouse's efforts and control over a marital asset, it considers these facts when equitably *dividing* the marital assets, not when *classifying* particular property as marital or nonmarital. *See* Minn. Stat. § 518.58, subd. 1 (requiring a court to consider each spouse's role "in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker" when *dividing* marital property).

Even when considering a spouse's efforts, the court cannot consider those efforts in isolation. It must base its equitable division "on all relevant factors."[13] Minn. Stat. § 518.58, subd. 1. Here, a relevant factor that must be considered is that Gretchen has a marital interest in Wyndmere's contractual right to receive the earn-out payments—a right

[13] These factors include "the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." Minn. Stat. § 518.58, subd. 1. The district court must also "conclusively presume" that each party "made a substantial contribution to the acquisition of income and property while they were living together as husband and wife." *Id.*

received by *all* members that sold their ownership interest in David Goliath regardless of whether they or their members contributed post-sale efforts to achieve the earn-out payments.

Stephen maintains that we must defer to the district court's finding that the earn-out payments are "additional consideration" for Stephen's future labor. We disagree. We need not defer to the district court's purported findings of fact because they are instead conclusions of law based on the district court's interpretation of the purchase agreement.[14] *See Graphic Arts Educ. Found. v. State*, 59 N.W.2d 841, 844 (Minn. 1953) ("[T]he labeling of a conclusion of law as a 'finding of fact' is not determinative of its true nature, and it need not be considered a finding by the appellate court."). We interpret contracts de novo and do not defer to the district court's interpretation of the contract. Because we conclude that the purchase agreement plainly exchanged the parties' marital interest in David Goliath for not just the upfront payment but also a contractual right to receive any achieved earn-out payments, we hold, as a matter of law, that the earn-out payments are marital property.

[14] To the extent that Stephen and the dissent rely upon findings of fact other than the district court's interpretation of the purchase agreement, those factual findings are not relevant to classifying the earn-out payments as marital or nonmarital property. In particular, the district court's findings of fact related to Stephen's efforts to achieve the earn-out payments are not relevant to the classification of those payments as marital or nonmarital. Instead, the relevant findings of fact relate to timing—when Stephen acquired Wyndmere, when Wyndmere and the other members of David Goliath sold it to Unilever, and when the marriage was dissolved. We defer to those findings.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals. On remand, the district court must (1) value any earn-out payments received by Wyndmere and (2) equitably divide any earn-out payments received.

Affirmed.

THISSEN, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

D I S S E N T

ANDERSON, Justice (dissenting).

The court holds that the district court erred by valuing a marital asset as of the valuation date, as the dissolution statutes require, rather than following the court's newfound rule for classifying proceeds from the sale of a marital asset. Although the district court concluded that respondent Gretchen Zwakman Gill (wife) received her full marital share of the marital asset as of the valuation date—$27 million—the court concludes that she also is entitled to future, contingent earn-out payments, as set forth in a purchase agreement signed after the valuation date, even though the district court found that any earn-out payments would be the result of appellant Francis Stephen Gill's (husband) significant postmarital efforts to "grow the company beyond its value at the time of sale." The court's holding that the value of marital property as of the valuation date must include the value of a contractual right acquired after the valuation date requires considerable legal gymnastics, which includes disregarding the district court's factual findings, ignoring the valuation date, rewriting the statutory definition of "marital property," and misconstruing the purchase agreement based on scattered, isolated phrases. Therefore, I respectfully dissent.

"Our review of the trial court's conclusions in dissolution cases is limited." *Olsen v. Olsen*, 562 N.W.2d 797, 799–800 (Minn. 1997). "Whether property is marital or nonmarital is a question of law, but a reviewing court must defer to the [district] court's underlying findings of fact." *Id.* at 800. "Assigning a specific value to an asset is a finding of fact; disputes as to asset valuation are to be addressed to the trier of fact, and conflicts

are to be resolved in that court." *Hertz v. Hertz*, 229 N.W.2d 42, 44 (Minn. 1975). On appeal, we view the evidence in the light most favorable to the district court's findings, *Borchert v. Borchert*, 154 N.W.2d 902, 903 (Minn. 1967), and we will not set aside those findings unless they are clearly erroneous, *Hertz*, 229 N.W.2d at 44.

At issue here is husband's 80 percent ownership interest in Wyndmere, LLC, through which he held an indirect ownership interest in Talenti Gelato. The court explains that whether property is marital depends on timing—that is, "when the asset was acquired." There is no dispute that the interest in Wyndmere was acquired during the marriage and before husband commenced the dissolution proceeding. Consequently, husband agreed that his interest in Wyndmere was a marital asset. The dispute at trial focused primarily on the valuation of that asset.

The district court is required to "value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference." Minn. Stat. § 518.58, subd. 1 (2016). In this case, the district court set the valuation date as September 5, 2014. Wife has not challenged this valuation date on appeal. It is undisputed that the sale of Talenti closed on December 2, 2014, which was 3 months after the valuation date. As required by Minn. Stat. § 518.58, subd. 1, the district court correctly determined that the "relevant factor" in valuing the parties' interest in Wyndmere is "the value of Talenti *as of the valuation date*." (Emphasis added.)

The district court's valuation of Talenti was based on the price that Unilever paid for Talenti. According to the district court, "Unilever paid $180 million in cash to acquire 100% ownership interest of Talenti" in the transaction; "Unilever also agreed to pay

potential earnouts for 2015 and 2016, contingent on Talenti meeting certain future sales targets." After evaluating the testimony of the witnesses involved in Talenti's operations, as well as the documentation of the transaction, the district court found that the $180 million figure represented "the present value of the business" as of the valuation date. The district court found that Unilever, which was the only "actual strategic buyer available" for Talenti, "wanted to buy the company for what it was reasonably valued at in 2014," which was $180 million. According to the district court, Unilever was not willing to "buy the company for more on the hope that Talenti would be significantly bigger in the future." The court misconstrues the facts and our standard of review by suggesting that the true value of Talenti was actually $350 million and that the $180 million sale price merely represented "an up-front payment."[1] The district court specifically found that "Talenti was sold in whole on December 2, 2014, for $180 million."

Husband has not disputed that his interest in Talenti was a marital asset and that wife was entitled to receive one-half of his share of the $180 million sale price. Wife received over $27 million for her marital share of Talenti, as well as her share of the parties'

[1] According to the district court, "[a]fter months of stop-and-start negotiations, the parties reached a handshake agreement for the sale of the company in June 2014," which "constituted an agreement by Unilever to purchase 100% of Talenti for a total of $180 million at closing," with "the potential for two unknown and contingent payouts." Additionally, Unilever had agreed to the June 2014 meeting "on the understanding that Talenti was not going to try to negotiate for more than $180 million as the present value of the business"; further, Talenti needed to "avoid[] alienating the only logical acquisition option" it had. The district court found that the June 2014 "meeting nearly broke down early on" when one of Talenti's owners "made a comment suggesting he believed the $180 million figure should be open to continued consideration in spite of the understanding that the sale price was no longer negotiable."

other marital assets. The district court found that "the evidence reflects that Wife received full marital value for Talenti as of the date of valuation."

The district court declined to consider the future, contingent earn-out payments in determining the value of Talenti as of the valuation date. After addressing the numerous risks, impediments, and possible setbacks that Talenti faced following the sale, the district court found that there was "a great deal of uncertainty with respect to whether the earnouts will be obtained." The district court also found that the earn-out payments, if obtained, would represent the financial "reward" for the intense efforts that would be required to demonstrate that Talenti "could grow much larger" and become "a significantly more valuable company than the one [Unilever] acquired in 2014." According to the district court, husband would be "the key, integral person to Talenti continuing to grow"—"the lynchpin to Talenti moving forward." Because the earn-out payments, if obtained, would be the result of husband's "significant, post-marital labor," the district court found that the earn-out payments "represent compensation for the value added to Talenti by Husband post-valuation date." Although the court stresses that husband "received separate consideration and compensation for his post-sale, and post-dissolution, work in his employment agreement with Unilever," the district court found that his salary was "not the equivalent of the value of his employment services to Unilever."

The court frames the issue here in terms of whether the right to receive "future, contingent earn-out payments" under the purchase agreement constitutes "marital or nonmarital property" under Minn. Stat. § 518.003, subd. 3b (2016). The Legislature has defined "marital property" as property that is acquired by either spouse "at any time during

the existence of the marriage" but "prior to the date of valuation." Minn. Stat. § 518.003, subd. 3b. In contrast, "nonmarital property" includes property that is "acquired by a spouse after the valuation date." *Id.*, subd. 3b(d).

The court's analysis focuses on the "right to receive" the earn-out payments under the purchase agreement. We have held that, at a minimum, a spouse needs to acquire the "right to receive" the property during the marriage and before the valuation date in order for a property interest to be classified as marital property. *Rohling v. Rohling*, 379 N.W.2d 519, 522 (Minn. 1986). Further, the right to receive property must become "more than a mere expectancy"—in other words, a "contractual right"—prior to the valuation date. *Janssen v. Janssen*, 331 N.W.2d 752, 754 (Minn. 1983). Therefore, even presuming that a right to receive uncertain, future, contingent earn-out payments qualifies as "property" under the dissolution statutes, a dubious proposition at best, the purchase agreement could not possibly have created any "contractual right" to the earn-out payments until, at the earliest, December 2, 2014, when the sale of Talenti closed, which was 3 months *after* the valuation date. Consequently, the district court made the straightforward, unassailable determination that the earn-out payments are nonmarital property because, among other reasons, any right to receive the earn-out payments was property "acquired by a spouse after the valuation date." *See* Minn. Stat. § 518.003, subd. 3b(d) (defining "nonmarital property"). Although the court recognizes that "whether property is marital or nonmarital" depends on whether the property was acquired before the valuation date, it ignores the

valuation date by holding that wife acquired a marital interest in a right under a contract that did not exist on the valuation date.[2]

The court does not dispute that any right to the contingent earn-out payments was a right acquired *after* the valuation date, but the court nonetheless concludes that the earn-out payments constitute marital property because the right to receive those payments derived from "the pre-dissolution sale of a marital asset." But the court's creation of a new rule, intended to "ensure the equitable division" of marital assets, is unnecessary and overreaching. Under Minn. Stat. § 518.58, subd. 1, the district court already has discretion to "adjust the valuation" of a marital asset to reflect any "substantial change" in the value of the asset after the valuation date in order "to effect an equitable distribution" of the asset, as well as discretion to "make a just and equitable division of the marital property" between the parties.[3] Thus, the court is not "merely applying the existing statutes," as it contends; rather, the court is adopting a new hard and fast extra-textual rule—that all proceeds from the sale of marital property before dissolution constitute marital property as a matter of law—regardless of whether this produces an equitable result. *See Staab v. Diocese of*

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[2] The court compares the present dispute to *Janssen*, where we held that "a nonvested, unmatured pension right" was marital property, even though the ultimate value of those benefits depended on postmarital labor. *See* 331 N.W.2d at 754. The distinction here is that the right to any earn-out payments was not "acquired" until after the valuation date because the contract setting forth the eligibility for the earn-out payments did not exist as of the valuation date; therefore, any contractual right to those payments fell outside the definition of "marital property" in Minn. Stat. § 518.003, subd. 3b.

[3] The district court even has discretion, when necessary, to award a portion of the nonmarital property of one spouse to the other spouse to avoid "an unfair hardship." Minn. Stat. § 518.58, subd. 2.

St. Cloud, 853 N.W.2d 713, 721 (Minn. 2014) (stating that we cannot add words to a statute that is "silent on the issue in question").

Here, the district court did exactly what it was required to do under Minn. Stat. § 518.58, subd. 1: value the marital asset "for purposes of division between the parties as of the valuation date." Under our deferential standard of review, there is no credible argument that the district court's $180 million valuation of Talenti as of the valuation date is clearly erroneous. *See Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001) (affording "broad deference" to the district court's valuation of an asset "because 'valuation is necessarily an approximation in many cases' " (citation omitted)). The district court expressly found that the "$180 million sale price" fell "within an expected industry range with prices paid for other companies in comparable situations." *Cf. Hertz*, 229 N.W.2d at 44 (explaining that the district court's valuation of an asset need fall only "within a reasonable range of figures"). The court cannot simply substitute its own findings on value—basically, that the earn-out payments were a component of Talenti's value—for the district court's findings on value. "Respect must be paid to the applicable standard of review." *Gjovik v. Strope*, 401 N.W.2d 664, 668 (Minn. 1987) (stating that an appellate court "should not substitute its findings for that of the [district] court merely because it feels that the case was wrongly decided").

In addition to disregarding the district court's valuation of Talenti, the court ignores the district court's valuation date, which is the dispositive date for classifying assets under Minn. Stat. § 518.003, subd. 3b, and valuing marital assets under Minn. Stat. § 518.58, subd. 1. Under the plain language of Minn. Stat. § 518.003, subd. 3b, property acquired

"during the existence of the marriage"—that is, before the date of dissolution—is marital property only if the property was acquired "prior to the date of valuation." The court acknowledges that the district court made "findings of fact related to the timing of the sale (after the valuation date)," but then the court makes the valuation date irrelevant, explaining that "the issue here is whether the right to [the earn-out] payments was received *during the marriage*." (Emphasis added.) According to the court, as long as the purchase agreement was signed "before dissolution," any rights acquired under the agreement constitute marital property "regardless of when that sale occurs."

In support of this new rule, the court notes that we have "interpreted 'marital property' expansively"; however, we cannot change the plain language of the statute and decide that the relevant timeframe for classifying marital property in section 518.003 should be "before the dissolution" rather than "prior to the date of valuation." *Cf. Johnson v. Johnson*, 277 N.W.2d 208, 212 (Minn. 1979) (declining to redefine marital property subject to disposition by the district court because "any statutory revision should be left to the Legislature"). Moreover, there is no need to create a new timeframe for classifying proceeds where the district court already has discretion to change the valuation date if the court finds that "another date of valuation is fair and equitable." Minn. Stat. § 518.58, subd. 1. In classifying the earn-out payments as marital property, the court effectively, sua sponte, substitutes the dissolution date for the statutory valuation date. But then, at the same time the court changes the timing in order to achieve "an equitable distribution of the earn-out payments," the court refuses to consider husband's significant efforts necessary

to achieve the earn-out payments, concluding that the only relevant classification factors "relate to timing."[4]

Finally, even presuming that we can create our own valuation date out of thin air for the purpose of classifying an asset in a dissolution proceeding, the court errs by holding that being "eligible to receive" uncertain, future, contingent earn-out payments under the purchase agreement is a contractual right that should be treated as marital property. The "cardinal purpose" of contract construction "is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). Although the interpretation of an unambiguous contract presents a question of law, *Brookfield Trade Ctr., Inc. v. Cty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998), the interpretation of an ambiguous contract presents a question of fact, *Denelsbeck v. Wells Fargo & Co.*,

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[4] Even during the time period in Minnesota when marital property included all property acquired "during the existence of the marriage," without specifying "prior to the date of valuation," Minn. Stat. § 518.54, subd. 5 (1980)—the same timeframe the court adopts here—we directly encouraged district courts "to consider, as one of many equitable factors, that an asset may have been acquired by one spouse without contribution of the other after commencement of a dissolution proceeding," *Johnson*, 277 N.W.2d at 212. *Johnson* was decided under a statutory scheme that subjected all property acquired during the marriage to disposition by the district court, Minn. Stat. § 518.58 (1976), in contrast to the current statute, which defines property acquired during the marriage, but after the valuation date, as nonmarital property, Minn. Stat. § 518.003, subd. 3b. Although the court essentially revives a decades-old statutory scheme, it refuses to consider the equitable factors that courts used at that time to decide issues of property disposition. *See, e.g.*, *Johnson*, 277 N.W.2d at 212 (noting that the district court "expressly considered the efforts expended by appellant in acquiring the Arizona property subsequent to commencement of the dissolution proceeding and awarded appellant the entire interest in that property"); *Silverness v. Silverness*, 134 N.W.2d 901, 905 (Minn. 1965) (concluding that the trial court did not abuse its discretion by awarding to husband real property that he had acquired independently during their informal separation).

666 N.W.2d 339, 346 (Minn. 2003). Contract language is "ambiguous if it is subject to more than one reasonable interpretation." *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009).

As an initial matter, I observe that there is a substantial question about whether husband's eligibility to receive uncertain, future, contingent earn-out payments under the purchase agreement should be treated as "property" under the dissolution statutes. *See* Minn. Stat. § 518.003, subd. 3b (" 'Marital property' means *property*, real or personal . . . ." (emphasis added)). The purchase agreement provides that, in addition to the $180 million payment, the members would be "*eligible to receive*" earn-out payments in 2016 and 2017 if Talenti met certain sales goals. (Emphasis added.) The district court described the earn-out payments as highly uncertain, given that "[t]he company would have to grow net sales at an annual rate of about 35 percent when the industry average was around two percent." In fact, the court candidly admits that "the value" of the earn-out payments could be "$0." Therefore, even if husband's eligibility to receive earn-out payments had arisen before the valuation date, it is difficult to view the uncertain, future, contingent earn-out payments whose value could be $0 as anything other than "a mere expectancy." *Janssen*, 331 N.W.2d at 754.

In any event, the court errs by concluding that, based on isolated language in the purchase agreement, the earn-out payments are marital property. One provision describes the eligibility to receive earn-out payments as "additional consideration," and a distribution clause states that members would have the "right to receive" a share of the contingent earn-out payments. Relying on these provisions, the court concludes that the "plain language"

of the purchase agreement unambiguously shows that the uncertain, future, contingent earn-out payments are "part of the purchase price" and not compensation for husband's postmarital work.

The court's focus on scattered references in the purchase agreement to conclude, as a matter of law, that the earn-out payments are part of the purchase price is far too simplistic and inconsistent with our historic approach to contract construction. The determination of whether a contract is ambiguous "depends, not upon words or phrases read in isolation, but rather upon the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole." *Art Goebel, Inc.*, 567 N.W.2d at 515. Words and phrases cannot be read "out of context with the entire agreement." *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121, 124 (Minn. 1973). In addition, the purchase agreement must be read together with husband's employment agreement because they are part of the same transaction. The parties labeled execution of the employment agreements with members of the management team as a "condition" to the "willingness" of the buyers to enter into the purchase agreement. "It is well established that [] contracts relating to the same transaction . . . will be read together and each will be construed with reference to the other." *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 82 N.W.2d 48, 54 (Minn. 1957).

In this case, the transaction was complicated, and the treatment of the earn-out payments is not simple. Reading the purchase agreement together with husband's employment agreement and reading those agreements as a whole, I conclude that the purchase agreement is, at the very least, ambiguous with respect to whether the parties intended the earn-out payments to be part of the purchase price or employee compensation.

To begin with, the district court found that "[t]he deal constituted an agreement by Unilever to purchase 100% of Talenti for a total of $180 million at closing"—not $350 million, as the court suggests. In fact, the district court found that the transaction almost collapsed at "the final meeting" when one of Talenti's owners tried to "negotiate for more than $180 million as the present value of the business." *See supra* at D-3, n.1.

Further, for accounting purposes, earn-out payments can be treated as either part of the purchase price or as employee compensation. *See generally* Kimberly S. Blanchard, *The Taxman Cometh: Handling Earn-Outs in Business Acquisitions*, Bus. L. Today, May/June 1997, at 59–60. The characterization depends "on the facts and circumstances." *Id.* at 60. The substance of the arrangement here is not clear from the language of the contract. While some factors admittedly favor treating the earn-out payments as part of the purchase price, a number of other factors favor treating the earn-out payments as compensation for husband's postmarital services to Talenti. For example, the district court found that husband's salary did not represent "the value of his employment services" under his employment agreement, the duration of husband's employment agreement matched the earn-out periods, and husband agreed to a covenant not to compete. *See id.* at 60–61. And even in situations where earn-out payments are tied to financial targets, which can suggest that they are not compensatory, "the question arises whether the achievement of the targets would likely be possible without the seller's continued services." *Id.* at 61. In this case, the district court specifically found that "the entire prospect of hitting the earnout targets" was contingent on husband's "significant" postmarital services.

Accordingly, under these circumstances, where the transaction is complex and the contract language is not clear, the court must defer to the findings of the district court, which found that the earn-out payments, if obtained, would "represent compensation for the value added to Talenti by Husband post-valuation date." The district court acknowledged that the passive investors in Talenti would also "reap a pro rata benefit from the earnouts," but characterized that as "a decision that [the members] agreed to amongst themselves." And the district court "did not find dispositive the fact that the Talenti tax documents referred to the complicated agreements as an 'installment sale.' " As support for its decision, the district court cited one of our prior dissolution decisions involving the valuation of the husband's interest in an engineering services company, which held that the "property acquired during marriage should be limited to that portion of the value of [the company] that is not dependent upon [the husband's] continued services." *Rogers v. Rogers*, 296 N.W.2d 849, 853 (Minn. 1980).

Because the language in the purchase agreement is ambiguous, we cannot reject the findings of the district court unless they are clearly erroneous. *See Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn. 1990). The court does not contend that the findings are clearly erroneous. Instead, the court simply disregards as irrelevant the district court's findings, including the finding that the opportunity to obtain the earn-out payments was intended to compensate husband for his "significant post-marital labor," which would be needed to "grow the company beyond its value at the time of sale"—that is, "nonmarital effort"—taking place after the dissolution of the marriage.

For all of these reasons, the court errs in overturning the decision of the district court and in classifying the uncertain, future, contingent earn-out payments as marital property, which must be divided between husband and wife, even though the district court, after a thorough and thoughtful consideration of the evidence, found that those payments, if earned, would be the result of husband's "intense post-marital efforts." The court contends that I have "incorrectly focus[ed] on valuation rather than classification," but it is the court that misclassifies a contractual right acquired after the valuation date as marital property. I simply conclude that the district court's valuation of the marital asset, as of the valuation date, is not clearly erroneous. Therefore, I would reverse the court of appeals and reinstate the decision of the district court.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.