2018 IL App (2d) 161028-U
No. 2-16-1028
Order filed March 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DAWN BERGSCHNEIDER n/k/a Dawn Barr,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellee and Cross-Appellant,	)	
and	)	No. 03-D-2873
ALAN BERGSCHNEIDER,	)	
Respondent-Appellant and Cross-Appellee.	)	Honorable Linda E. Davenport, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: In ex-husband's appeal, the trial court did not err in determining that the parties' marital settlement agreement's annual bonus provision encompasses various incentive awards. In ex-wife's cross-appeal, the trial court did not err in failing to award her additional support for the years 2009 and 2010, but did err in its determination concerning 2011. Affirmed in part and reversed in part. Cause remanded.

¶ 2 In this post-dissolution case, petitioner, Dawn Bergschneider, n/k/a Dawn Barr, filed a contempt action, seeking additional child support under the parties' marital settlement agreement (MSA) based on respondent's, Alan Bergschneider's, bonus income. Alan petitioned for

contribution to college expenses and moved to modify child support. Following a hearing, the trial court found Alan in indirect civil contempt for failing to pay the bonus child support during 2012, 2013, and 2014 and ordered him to pay Dawn $184,541 after apportioning credits for Dawn's contributions to college expenses. The court ruled on the parties' motions to reconsider and entered a finding of "no just cause to delay enforcement or appeal." See Illinois Supreme Court Rule 304(a) (eff. March 8, 2016). Alan appeals, arguing that the trial court erred in interpreting the parties' MSA concerning bonus child support for the years 2013 and 2014. Dawn cross-appeals, arguing that the trial court erred in failing to consider Alan's bonus income for the years 2009, 2010, and 2011. We affirm in part, reverse in part, and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 The parties married in 1993 and had four children: Dylan (born July 22, 1992), Ryan (born May 24, 1995), Erin (born February 14, 1998), and Sara (Born March 1, 2000). In 2003, Dawn, age 32, petitioned for dissolution of her marriage to Alan, age 33. At this time, Alan, a certified public accountant, earned about $130,000 per year working for Sears Roebuck and Company. Dawn, who is also a certified public accountant, did not work and was the children's primary caregiver.

¶ 5 On September 2, 2004, the parties' marriage was dissolved and the trial court approved the parties' MSA and joint parenting agreement. The court ordered Alan to pay Dawn $2,883 in monthly child support (all four children were minors at this time), and it reserved the issue of contribution to the children's college education expenses.

¶ 6 The MSA contains a provision addressing bonus child support, which is the primary issue in this appeal. It states:

> "In the event that [Alan] shall receive *an annual bonus for work and effort performed in his employment,* [Alan] shall pay to [Dawn] within seven (7) days of his receipt thereof, forty percent (40%) or the statutory guideline amount applicable of the net amount received as bonus child support. The net amount shall be determined as provided by law in Section 505 of the Illinois Marriage and Dissolution of Marriage Act." (Emphasis added.)

¶ 7 In 2005, Dawn petitioned for a rule to show cause, alleging that Alan had failed to pay bonus child support on his incentive award. On August 24, 2005, in an agreed order, Alan was ordered to pay $1,000 as additional child support from his 2004 bonus.

¶ 8 In 2008, Dawn petitioned to modify child support and for indirect civil contempt. On October 16, 2008, the trial court found a substantial change in circumstances in Alan's base gross income, which had increased to $175,000, and further found that he had willfully refused to comply with the dissolution judgment. The court increased Alan's child support obligation to $3,931 per month, found him in indirect civil contempt for failure to pay certain daycare expenses, and ordered that Alan pay certain arrearages.

¶ 9 A. Proceedings Leading to Current Appeal

¶ 10 On October 8, 2015, Dawn petitioned for adjudication of indirect civil contempt and attorney fees, arguing that Alan had failed to pay bonus child support, as provided for in the MSA, where, since the dissolution, Alan had received substantial bonuses for effort and work performed in the course of his employment.

¶ 11 On December 14, 2015, Alan petitioned for contribution to college educational expenses, alleging that Ryan was enrolled in his third year at Indiana University (IU) and that Alan had paid about 100% of his college expenses and about 50% of his transportation expenses, totaling

$101,182 thus far. To reach graduation, Ryan needs an additional $60,000 to $100,000. Erin was to graduate high school in 2016, and Sara will graduate in 2018. Both intend to enroll in college and will incur similar expenses. Alan alleged that Dawn, who was employed by Hinsdale Nurseries, has significant assets from which she could contribute to the children's college educational expenses. Alan sought an order requiring Dawn to contribute to the children's college expenses.

¶ 12 On February 2, 2016, Dawn moved to compel compliance with outstanding discovery and for attorney fees, alleging that she had identified additional years for which Alan had failed to pay bonus child support and that, overall, Alan had failed to pay bonus child support on any income since 2008. For example, Dawn claimed that Alan earned over $1.3 million in 2014.

¶ 13 On June 23, 2016, Alan moved to modify child support, requesting that it be reduced to 20% of his net monthly income (or $2,760.58) because the parties' three oldest children were emancipated. He also noted that he had paid for all of Ryan's college expenses and will be paying Erin's expenses starting in the fall of 2016.

¶ 14 B. Hearing

¶ 15 An evidentiary hearing commenced on August 18, 2016. A rule to show cause was issued against Alan. The parties stipulated to reserving 2008 income.

¶ 16 1. Coleman's Compensation Plans

¶ 17 The focus of this appeal is Alan's compensation from Coleman, where he worked from late 2007/early 2008 through 2014. Numerous documentary exhibits were admitted into evidence. The documents addressing Coleman's compensation plans reflected that named executive officers' (Alan was ultimately Coleman's CFO) total compensation package consisted of four components: (1) salary; (2) annual bonus; (3) long-term incentives, consisting of

performance-based cash awards, options, and performance-based restricted stock unites (RSUs); and (4) limited perquisites and other personal and retirement benefits through the company's 401(k) plan.

¶ 18 Coleman's offer-of-employment letter to Alan, dated December 10, 2007, states that Alan's starting salary would be $175,000 and that he would be eligible to participate in the corporate bonus pool at the 25% level and the CCI Stock Option Plan (with shares to be determined, but equivalent to others at Alan's level).

¶ 19 A March 8, 2010, letter from Coleman (exhibit GG) confirms a recent grant to him of a RSU award under the company's long-term incentive program (LTIP), which was initiated in 2010. The letter explicitly noted that the award "is in addition to any awards you may earn from time-to-time under *annual* incentive program(s) we currently have in place or may develop in the future." (Emphasis added.) Further, the awards "are designed to *reward and retain* our key employees and ensure the company is managed for the long-term benefit of our shareholders." (Emphasis added.) They are based upon the company stock's performance "and your continued employment" and consist of cash and stock, with the awards "tied to our stock achieving three specific price targets over the next ten-year period."

¶ 20 The RSU award agreement (exhibit HH), dated March 2, 2010, between Coleman and Alan awarded Alan 26,625 RSU's, with each RSU equivalent to one share of stock. The following vesting schedule applied: 5,625 RSUs would vest when the company's stock price equaled $15.50 per share; an additional 9,750 RSUs would vest that the stock price reached at least $17.44 per share; and the remaining 11,250 RSUs would vest on the date the stock price equaled at least $19.33 per share. The foregoing was contingent on Alan's continued employment by, or in the service as a director of, the company until each respective vesting date.

Once each set of RSU's vested upon satisfaction of reaching each goal, 2/3 of the vested RSUs will be distributed as shares and 1/3 as cash (based upon the value of the shares upon vesting).

¶ 21 On March 2, 2010, Alan received from Coleman a non-qualified stock option (NQO) award. The NQO agreement (exhibit II), which incorporated the LTIP, provided that the LTIP committee selected Alan to receive an NQO of 15,000 covered shares with an exercise price of $4.42 per share. The shares would vest in 3 installments: 1/3 of covered shares would vest on the two-year anniversary of the grant date; 1/3 would vest on the three-year anniversary of the grant date; and 1/3 would vest on the four-year anniversary of the grant date.

¶ 22 Another document admitted into evidence is exhibit LL, a copy of the agreement and plan of merger between Coleman and Southwire Corporation that was filed with the federal Securities and Exchange Commission (SEC) on December 20, 2013. An article addressing covenants contains a provision, section 6.9, entitled "Employee Benefits." Section 6.9(c) addresses certain transition issues relating to the merger and their effect on "Bonus Plans." Section 6.9(c) references an exhibit that is not contained in the record, setting forth the included plans. Nevertheless, the provision as a whole references "performance targets," "long-term cash bonus," "performance award measures," etc., and provides that Coleman shall be allowed, upon a change in control, to deem all applicable performance targets to be fully achieved and pay each bonus plan participant amounts due with respect to the 2013 fiscal year.

¶ 23 Exhibit MM consists of a Schedule 14D-9 that was filed with the SEC on January 16, 2014, pursuant to Coleman's merger with Southwire. It explicitly states that Coleman uses various types of compensation "to reward specific types of performance." Cash bonus awards are used "as an incentive that provides a timely reward for attainment of exemplary corporate and individual performance in a particular period." Long-term cash incentive awards and

outstanding stock options and RSU's "provide a long-term incentive *** which adds value to compensation packages if the value of the Shares of our Common Stock rises and aligns the interests of our executives with those of our stockholders." Again, a named executive officer's total compensation package consists of four components: (1) salary; (2) annual bonus; (3) long-term incentives, consisting of performance-based cash awards, options and performance-based RSUs; and (4) limited perquisites and other personal and retirement benefits through participation in the company's 401(k) plan. The document explains that a base salary provides "a fixed element of guaranteed compensation to our named executive officers and to enhance our retention efforts." Named executive officers were also eligible for "annual bonus opportunities" in certain amounts. To earn the bonus, the executives were subject to certain company-wide performance goals in 2013 and the targets "were set at levels designed to be possible, but not probable, to achieve." The next compensation category, long-term incentives (cash incentive awards, stock options, and RSUs) was introduced "to provide incentives to our executives to increase our long-term performance, including our overall Company enterprise value. Stock options "motivate our officers to return value to stockholders through future appreciation of our stock" and encourage them "to focus energies on long-term corporate performance. The vesting requirements are designed to encourage retention of our officers." Similarly, RSUs, which are referred to as "*performance-based* restricted stock units," "ensure that the Company is managed for the long-term benefit of stockholders and to *reward executives* for maximizing long-term performance." (Emphases added.)

¶ 24 2. Alan

¶ 25 Alan testified that, at the time the parties divorced in 2004, he worked at Sears, earning about $130,000 per year and receiving "sporadic" annual cash bonuses. When Alan worked for

Sears, the company was always in financial straits, and the likelihood of receiving a bonus was very low. He recalls receiving a bonus in 2007.

¶ 26 Alan left Sears in late 2007/early 2008 to go work at Coleman Cable, where his base salary was $175,000. Alan was also eligible to participate in the corporate bonus pool, equal to 25% of his salary. Alan left Coleman in 2014 and stopped receiving paychecks from the company in February 2015, which included his 12-month severance package.

¶ 27 Addressing 2009, Alan referred to an exhibit he had prepared and testified that his base salary was $185,000 and that he did not receive a bonus that year. When asked why his 2009 W-2 reflected Medicare income of $196,831, Alan explained that the $11,831 discrepancy was due to 401(k) plan matching contributions by his employer and "pre[-]tax medical." He also stated that there could have been a timing difference based on when the payroll checks were processed near year-end.

¶ 28 In 2010, Alan continued to work at Coleman Cable, earning a base salary of $185,000. He did not receive an annual bonus that year. His W-2 reflects Medicare wages of $195,100.84 for 2010. The $10,100.84 difference between his Medicare wages and his base salary is due, according to Alan, to 401(k) plan contributions and pre-tax medical. Also, the difference between the Medicare and $200,272.24 in gross wages on the W-2 is attributable to 401(k) plan contributions and cafeteria plan contributions. The $3,834 on line 15B of his 2010 tax return reflects a distribution from an inherited IRA.

¶ 29 The trial court, ultimately, did not order Alan to pay additional child support for 2009 and 2010, finding that the evidence was unclear as to the discrepancy between his W-2 Medicare wages and his base salary. Dawn challenges this finding in her cross-appeal.

¶ 30 Alan's base salary in 2011 was $224,000, and he did not receive a bonus that year. He did receive compensation in the form of vested RSUs, about $87,188 of income, of which he received 1/3 in cash and 2/3 in stock. The RSUs, Alan stated, were not part of the annual bonus program, nor were they related to performance, and he could not sell the stock. Alan's W-2 wages were $342,954.24, which included $224,000 in base salary, $87,188 in the stock vesting, 401(k) plan matching contributions, and pre-tax medical. None of this, in his view, was bonus income. Box 12CV on the W-2, showing $58,125, represents that value of the shares that he can sell. The additional income of $3,251 on his 2011 tax return is the distribution from his deceased father's IRA.

¶ 31 Turning to the LTIP, Alan denied that the LTIP was an annual bonus program. Rather, it "was a restricted stock program given to officers of the company to create a management team that had an ownership interest in an entity which would be viewed favorably from external investor standpoint that management[']s interests were aligned with those investors['] interests." Alan testified that the vesting was not tied to his annual work performance and that the LTIP did not take the place of the bonus structure outlined in his original offer letter. He continued to be eligible to participate in the bonus pool. After the LTIP became part of his compensation package, he received bonuses.

¶ 32 When the RSU's vested, he explained, the shares were put into an account for his benefit; they were not monetized, *i.e.*, sold. At this point, he incurred taxable income. The cash component was designed to partially offset that tax that was due upon receipt of the shares. Alan was not able to sell the shares because it would have been frowned upon. It was important that the management team have ownership in the company. The stock price hit the first trigger point in 2011, and shares were credited to Alan's account. It reached the second and third stock

trigger prices in 2013. By this time, Alan was an officer of Coleman and, by virtue of his inside information, he could not "trade in the market constantly." The vesting events, according to Alan, were not annual bonuses. Alan continued to have annual reviews to determine his eligibility for bonuses. The RSUs were not discussed at his reviews.

¶ 33 Next, Alan addressed the 2010 NQO award he received from Coleman. Alan testified that the NQO agreement was not part of his annual bonus contemplated in his offer letter, and he continued to be eligible to receive annual bonuses. Nor was the NQO an annual incentive program. The first tranche vested in 2012, but Alan was not able to exercise his stock options, because "we held onto them." The second tranche vested in 2013. Alan could not exercise his options because he was an officer of the company at this time (AVP and CFO) and had inside information.

¶ 34 Alan's compensation from 2012 to 2014 was as follows:

	2012	2013	2014
Regular Earnings	$224,039	$311,539	$456,750
(Gross) Bonus	$50,000	$39,832	$315,001
Stock (underlying value of awarded shares)	$0	$258,335	$621,530
Misc. (cash portion of vested share award)	$0	$129,168	$0
Stock Dividend	$0	$2,163	$0
TFB (taxable fringe benefit: auto allowance)	$0	$8,408	$1,401
Vacation Credit	$0	$0	$20,972
Wellness Credit	$585	$520	$260
W-2 Medicare Wages:	**$224,039**	**$749,963**	**$1,415,914**

¶ 35 In 2012, Alan earned a base salary of $224,039 and he received a $50,000 bonus. Alan conceded that he did not pay Dawn a portion of his $50,000 2012 bonus because Dawn "has a

habit of spending money on things other than the kids consistently." Now, however, he is prepared to tender that payment. The stock component of his compensation was not an annual bonus for work performed, nor was the stock dividend or the TFB. One-third of his stock options vested in 2012, but he was not able to exercise them.

¶ 36 In 2013, Alan earned a $311,539 base salary and received a $39,832 bonus. Alan conceded that he owed Dawn 28% of the net of the $39,832 bonus. His $129,168 miscellaneous income that year is the 1/3 portion of the two stock-award transfers that vested. The $258,335 amount shown on his last pay stub is the underlying value of the stock awarded; he could not sell the shares in 2013 because he was an officer with inside information. The $2,163 represents dividends on the underlying shares. The TFB income is a taxable fringe benefit for an auto allowance; it was not a bonus. Nor were the stock shares or dividend a bonus for work performed.

¶ 37 In late 2013 and early 2014, Coleman merged with Southwire Corporation. Alan received an annual bonus in 2014 of about $141,700. His 2014 base salary was $315,000, but his regular earnings for that year were $456,750. The $141,750 difference is due to a restrictive covenant agreement with Coleman under which, upon a change in control and the companies de-listing from the stock market, Alan was paid at 1.5 times his annual base salary of $315,000. This agreement was not part of any bonus pool, nor was it tied to any annual review of Alan's performance or changeable based upon his annual performance. It was an incentive for Coleman to "close the deal." Addressing the $621,530 listed as 2014 stock income, Alan testified that this figure constituted the proceeds from the exercise and sale of stock of the 29,000 options. It was not part of any bonus pool or tied to his annual work performed for the company. Nor was the TFB or the vacation pay. The 2014 bonus that Alan received from Coleman was, in his view, a

bargained for term of the merger and was only available to persons who were officers like himself. Because he bargained for the money, he believes that it does not qualify as a bonus for purposes of the dissolution judgment. He has not paid any of it as additional child support.

¶ 38 Next, Alan addressed exhibit LL, the agreement and plan of merger between Coleman and Southwire. Alan testified that the bonus plans to which the provision refers are the "one[s] under which I was paid the $141,7[5]0" in 2014. (This was the extra money above his base salary of $315,000 that he received that year to support the merger.) According to Alan, as a result of the merger, he received a bonus of $315,000, but otherwise would have received a bonus of $141,700. He agreed that he owes child support on $141,750 of the 2014 bonus income, but not on the remaining $173,250 that was related to the merger but unrelated to his work performed.

¶ 39 Next, addressing Schedule 14D-9 (exhibit MM) that was filed with the SEC at the time of the merger, Alan testified that page A-16 of the document reflects that his 2013 bonus opportunity was capped at $173,250. Pages A-17 and A-18 refer to the long-term incentives that are part of the LTIP program. In Alan's view, the stock options, NQO, RSU's, are all separate and apart from the annual bonus described on page A-16. Furthermore, he believes that the retirement benefits and perquisites are separate and apart from the annual bonus.

¶ 40 Alan stopped receiving paychecks from Coleman in about February 15, 2015, which included his 12-month severance package.

¶ 41 Alan testified that, in 2014, his stock options were exercised (and sold) at $26.25, a price set by the merger and unrelated to his work performance. The sale is reflected in exhibit JJ (a 2014 filing with the SEC reflecting a change in beneficial ownership) that ties to the $621,000 figure on his pay stub concerning stock. This amount does not reflect any taxes due.

¶ 42 On April 24, 2015, Alan started working as CFO for Convergint Technologies. His starting and current annual salary is $250,000. He has a management incentive plan with the company that outlines goals for a bonus based on annual work performed. For 2015, Alan received a bonus that was paid out in March 2016.

¶ 43 Alan paid child support on a $103,125 bonus for 2015, but made an error by calculating on 20% of the net bonus, whereas he should have based support on 28% of the net amount because one of his children was not yet emancipated (she had attained age 18, but had not yet graduated high school, the emancipating event). Exhibit O is Alan's 2015 year-end pay stub. He has not filed his tax returns for 2015. He did not receive a bonus for 2015.

¶ 44 Alan has consistently paid $3,931 in monthly child support since 2008. He also pays for medical, dental, and vision insurance.

¶ 45 Alan testified that he seeks a cap on his child-support obligation at $2,760.58, which would be a deviation from statutory guidelines, because he does not believe the money benefits the children directly when it is paid to Dawn. The lower amount would cover all of his daughter's expenses. For the 2016-2017 school year, Alan will have two children in college; another child has completed college. Dawn did not make any contributions to college expenses, and, prior to Dawn filing the current petition against Alan, he had not asked her for any contribution toward college expenses. One child, Ryan, will be a college senior this year. To date, Alan has paid $121,000 for tuition, room, and board. He also made additional payments of $20,142.82 to the university. He paid for these expenses from the RSUs. The second child will be starting college in Michigan at a school agreed to by Alan and Dawn. Tuition, room, and board will be about $25,000 per year; none has been paid to date. Alan's oldest child, Dylan, graduated from Truman State in 2014. Alan and Dawn equally split the costs of his college.

¶ 46 As to his NQOs from Coleman, they have all vested and were exercised and distributed. Alan spent some of the proceeds on his son's college expenses, and the rest are in three accounts. Similarly, all of the RSUs have vested and been distributed. The proceeds were used to pay for college and a portion has been deposited in the three accounts.

¶ 47 3. Dawn

¶ 48 Dawn testified that she is employed as a landscape designer, earning $27.50 per hour. She is remarried and has a three-year-old daughter, but her husband does not work full time. She has not been able to provide the children with the lifestyle they had during the parties' marriage. Dawn believes that, had she received greater child support, she would have been able to provide the parties' children with more things and experiences.

¶ 49 B. Trial Court's Ruling and Subsequent Proceedings

¶ 50 On August 31, 2016, the trial court issued its decision. In a letter opinion, the court addressed Alan's argument that the only income to be included for bonus child support was his annual bonus paid in 2012, not the other monies paid to him. The court found Alan's argument "specious." Further, the court determined that the stock Alan was awarded resulted from his work and effort. The trial court disagreed that the term "annual bonus" in the MSA means only a payment labeled as a bonus. The court noted that, at the time of dissolution, Alan's only sources of income were his salary and annual bonus. In the 2008 agreed order that increased his support, "he knew he was eligible to participate in the company bonus and stock option plan and he made no effort to exclude those incomes from any bonus child support." The parties, the court noted, did not attempt to exclude any income from child support, and it would be against public policy to do so. Accordingly, the court found "Alan's arguments not persuasive." In its calculations, the court included the stock, stock dividend, miscellaneous, and bonus components of Alan's

income to bonus child support, finding that all were the result of Alan's work and effort through his employment.

¶ 51 Next, the court addressed whether a deviation from statutory guidelines would be appropriate. It found that, over the relevant period, Alan earned more money each year and that, had Dawn petitioned to modify child support, she would have been entitled to receive additional monies. However, she did not do so. Therefore, the court determined it would not remedy Dawn's failure to seek the court's assistance by awarding her child support from Alan's base income, but it would only apply the bonus income. The trial court also noted that it would not reward Alan by finding a downward deviation is required simply because he never petitioned for such. "He simply cannot have it both ways." It found that Alan owed $268,891.16 in back due child support through August 31, 2016.

¶ 52 Finally, as to college expenses, the court found that, if Dawn had received the bonus child support due her, coupled with her income for three years (2012 through 2014), she and Alan would have had about a 35/65 split of net incomes.[1] Under this scenario, based upon what Alan paid for Ryan's education, Dawn would have paid about $35,350 towards three years of school and $8,750 for the current year for Erin. The court, accordingly, found that of the $268,891 due Dawn for back due child support, it would credit Alan with $35,350 for Ryan's college expenses, $14,000 for Ryan's final year, and $35,000 for Erin's four years, resulting in a net balance due Dawn of $184,541.

¶ 53 In an order entered the same date, the court incorporated its accompanying letter opinion, finding Alan in indirect civil contempt for his failure to pay any bonus child support from his

[1] The court found that from 2012 through 2014 Alan's net income (after taxes plus child support) was over $1.25 million. Dawn's income, even with child support, was $156,604.

2012, 2013, and 2014 bonuses and that the issue of failure to pay the 2008 bonus child support was reserved by agreement of the parties. The court set the purge amount at $184,541 payable to Dawn. It also granted Alan's petition concerning contribution to college expenses, and, based on credits given, deemed Dawn to have no further responsibility for Erin and Ryan's undergraduate education.

¶ 54 In September 2016, the parties moved to reconsider and Alan further petitioned to deviate from statutory guidelines for child support. On November 3, 2016, the court entered an order directing Alan to pay $2,760 per month for the parties' minor child. The trial court, on November 4, 2016, denied the parties' motions as they related to child support, but reconsidered and modified its prior ruling as to college contribution. Specifically, it denied Alan's motion to reconsider; denied Dawn's motion to reconsider as to Alan's 2009, 2010, and 2011 bonus income, finding that the evidence was unclear/inconsistent (a ruling that is the subject of Dawn's cross-appeal); granted Dawn's motion to reconsider prepayment of college (ordering Dawn, beginning for the 2017-2018 school year, to pay $4,375 per semester for Erin's college and holding $26,250 in escrow for her total obligation for Erin's college; ordering Alan to pay Ryan and Erin's spring 2017 college expenses without further contribution from Dawn; and ordering Alan to pay Dawn $26,250 and ordering Dawn to place funds in an escrow account); granted Dawn's motion to reconsider retroactivity for payment of college expenses (ordering Alan to deliver to Dawn's counsel $29,458.33 for her escrow account, pending appeal); finding no just cause to delay enforcement or appeal of the court's order; and finding that Alan's overpayment of child support from June 2016 to October 2016 be applied to Dawn's attorney fees and finding that Alan's attorney-fee obligations are satisfied. Alan appeals, and Dawn cross-appeals.

¶ 55 II. ANALYSIS

¶ 56 A. Alan's Appeal

¶ 57 In his appeal, Alan challenges the trial court's ruling concerning bonus child support for the years 2013 and 2014, arguing that the trial court erred in failing to give effect to the terms of the parties' MSA that define and limit the "bonus" on which Alan is required to pay such support. He disagrees with the trial court's determination that he was bound to pay extra child support for stock and cash awarded to him under Coleman's incentive program and its merger with Southwire. For the following reasons, we reject Alan's claim.

¶ 58 When interpreting a marital settlement agreement, courts seek to give effect to the parties' intent. *Allton v. Hintzsche*, 373 Ill. App. 3d 708, 711 (2007). Ordinarily, the language the parties use is the best indication of their intent. *In re Marriage of Frain*, 258 Ill. App. 3d 475, 478 (1994); see also *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (Illinois follows the "four corners rule for contract interpretation in that, " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.' ") (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)).

¶ 59 When contract terms are unambiguous, they must be given their plain and ordinary meaning. *Id.* A contract term is not ambiguous merely because the parties disagree as to its interpretation; rather, a term is ambiguous when it may reasonably be interpreted in more than one way. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety, Inc.*, 185 Ill. 2d at 462. We review *de novo* an interpretation of a marital settlement agreement and a determination of

whether the agreement's terms are ambiguous. *In re Marriage of Dundas*, 355 Ill. App. 3d 423, 425-26 (2005).

¶ 60 If a contract is ambiguous, *i.e.*, the agreement contains language that is susceptible to more than one reasonable interpretation, a court may consider extrinsic or parol evidence to ascertain the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007); *Allton v. Hintzsche*, 373 Ill. App. 3d 708, 711 (2007). The interpretation of the contract language then becomes a question of fact, and the trial court's determination of the intent of the parties will not be overturned, unless it is contrary to the manifest weight of the evidence. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783 (2002). A finding is against the manifest weight of the evidence if the finding is unreasonable, arbitrary, and without a basis in the evidence. *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 773 (2007).

¶ 61 Here, the parties' 2004 MSA contains a provision addressing bonus child support. It states as follows:

> "In the event that [Alan] shall receive *an annual bonus for work and effort performed in his employment*, [Alan] shall pay to [Dawn] within seven (7) days of his receipt thereof, forty percent (40%) or the statutory guideline amount applicable of the net amount received as bonus child support. The net amount shall be determined as provided by law in Section 505 of the Illinois Marriage and Dissolution of Marriage Act." (Emphasis added.)

¶ 62 Alan contends that the MSA is not ambiguous and necessarily means that much of the compensation that he received in addition to his base salary was *not* "an annual bonus for work and effort performed in his employment" and, therefore, he was not obligated to pay additional child support on it. He notes that, if the term "bonus" was not defined in the MSA, then its

meaning would be uncertain and ambiguous. However, in his view, the MSA effectively narrows the type of compensation to which is applies by modifying the word "bonus" with "annual" and with "for work and effort performed in his employment." Thus, Alan proposes that the two modifiers render the term "bonus" clear and plain because the words "annual," "work and effort," and "performed" have plain meanings that can only be understood in one way. See Black's Law Dictionary (10th ed. 2014) (defining "annual" to mean "[o]ccurring once every year; yearly" and "[o]f, relating to, or involving a period of one year"); Webster's Ninth New Collegiate Dictionary (1988) (defining "work" to mean "something produced or accomplished by effort, exertion, or exercise of skill," "effort" as "conscious exertion of power," and "perform" to mean "CARRY OUT; DO"). Specifically, Alan contends, the last three words—work, effort, and perform—imply "aggressive action that the MSA requires to be performed in employment." Taking the dictionary definitions as a whole, Alan contends that the bonus child support provision must be interpreted to apply only to income that regularly results in annual compensation resulting from Alan's actual work and effort in his employment.

¶ 63 In addition to the foregoing, Alan also relies on two rules of construction to support his reading of the MSA: (1) that a contract may not be interpreted so as to nullify or render meaningless terms that are contained within the document; and (2) the presumption against reading provisions into a contract that could have been easily included, but were not. See *Thompson v. Gordon*, 241 Ill. 2d 428, 442, 449 (2011). As to the first rule, Alan maintains that, to give effect to the word "annual," the MSA cannot be interpreted to extend to income that arises in ways other than recurring yearly increments. As to the word "bonus," he argues that it cannot include multiple types of compensation. Finally, as to "work and effort performed in his employment," he asserts that the MSA cannot mean income that is not related to the actual

performance by Alan in the course of his employment. As to the second rule, Alan argues that the parties could easily have provided that Alan was required to pay extra child support on any income or compensation in addition to his base salary that he received through his employment or other broad language similar to this, but they did not do so. Rather, the parties, he emphasizes, specifically limited his duty to pay extra child support to the annual bonus related to Alan's own, not his company's, performance.

¶ 64 Alan contends that his extra income for 2013 and 2014 were beyond the MSA's terms, specifically, his benefits related to the LTIP and to his company's merger in 2014. Rather than being related to his "work and effort performed in his employment," Alan argues that these payments were related to matters of corporate incentive, investment, and merger and, further, were not annual.

¶ 65 We conclude that the MSA's bonus provision is ambiguous. The MSA does not define the "bonus," and it has, generally, on its own, a broad plain and ordinary meaning. See Webster's Ninth New Collegiate Dictionary (1988) (defining "bonus" to mean "something in addition to what is expected or strictly due" and "money or an equivalent given in addition to an employee's annual compensation"); Black's Law Dictionary (10th ed. 2014) (defining the term as "[a] premium paid in addition to what is due or expected; esp., a payment by way of division of a business's profits, given over and above normal compensation" and "In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given"). The addition of the modifier "annual," in our view, does not render unambiguous the ambiguous term "bonus," because "bonus," with or without the preceding modifier "annual," is commonly utilized to mean the same thing, much as the terms "salary" and "annual salary" are commonly used

interchangeably. It can, in certain circumstances have the narrower meaning that Alan advances, *i.e.*, that it constitutes income that regularly results in annual compensation, but it remains that the term is ambiguous. See *In re Marriage of Minkin*, 218 Cal. Rptr. 3d 407, 416 (Cal. Ct. App. 2017) (one plain and ordinary meaning of annual bonus is any compensation in addition to one's base salary, and another such meaning is "a discretionary payment based on performance").

¶ 66 Similarly, the phrase "for work and effort performed in his employment," which modifies "annual bonus," is also, we conclude, ambiguous because it has several reasonable plain and ordinary meanings. When the phrase is combined with "annual bonus," one plain and ordinary meaning is a broad and, frankly, superfluous reference to anything received while employed, and another such meaning is the narrower one Alan advances: that it is compensation resulting from Alan's actual work and effort in his employment, *i.e.*, any individual-performance-based bonus award. In our view, the phrase does *not* necessarily limit the annual bonus to income that is directly tied to Alan's individual performance at work or specifically attributable to him. The phrase is ambiguous.

¶ 67 Having determined that the "annual bonus" provision is ambiguous, we next examine the parol evidence to adduce its meaning and determine if the trial court's findings were against the manifest weight of the evidence. *Gallagher*, 226 Ill. 2d at 233; *Installco Inc.*, 336 Ill. App. 3d at 783. The trial court did not specifically address the documentary exhibits, but rejected as "specious" Alan's narrow interpretation of the MSA provision and noted that, at the time of the 2008 agreed order, Alan could have sought to exclude the incentive compensation from the bonus child support provision, but did not do so. For the following reasons, we conclude that the trial court could have reasonably determined that the evidence supported a finding that all of Alan's compensation, including not only that explicitly labeled as a bonus, but also awards that

were not labeled as such (*i.e.*, the incentive awards under the LTIP and the compensation he received pursuant to the change in control), fell under the MSA's bonus child support provision. We reject Alan's claim that his testimony at the hearing was not impeached and that Dawn offered no contrary evidence on the issues in this appeal. The documentary evidence, which Alan claims is corroborative of his testimony, actually rebuts his assertions concerning the nature of the LTIP and other arrangements. A reasonable interpretation of the evidence is that the bonus child support provision was intended to include all compensation that Alan received. When it was drafted, Alan received from Sears a base salary and occasional bonuses. Thus, the provision was written to include all forms of compensation that he received at the time of dissolution. Alan never returned to court seeking to exclude specific forms of compensation.

¶ 68 The parties entered into the MSA in 2004. At that time, Alan worked for Sears, earning about $130,000 per year and receiving "sporadic" (according to Alan's testimony) annual cash bonuses. Alan recalled receiving a bonus from Sears only in 2007 and stated that the likelihood of receiving one from the company was very low. As Dawn notes, Alan's argument on appeal that the term "annual" implies repetition and cannot include situations that occur only once, randomly, or without a repeating pattern or without a plan that applies to successive years is not consistent with the fact that, at the time he entered into the MSA, his bonuses from Sears were only "sporadic." In other words, the parties' intent, at the time they entered the MSA, cannot have been that the term "annual" means payments that actually occur regularly every year, because such a position is belied by Alan's testimony concerning the receipt of bonuses from Sears and his position that those bonuses are annual bonuses under the MSA.

¶ 69 We also conclude that the various awards Alan received that were tied to his company's stock price were for work and effort he performed in his employment. First, the LTIP, which

was the umbrella program under which the disputed compensation awards were made, was introduced, according to Coleman's filing with the SEC (exhibit MM), "to provide incentives to our executives to increase our long-term performance" and "motivate our officers to return value to stockholders through future appreciation of our stock" and encourage them "to focus energies on long-term corporate performance. The vesting requirements are designed to encourage retention of our officers." This language clearly reflects that awards under the LTIP (*i.e.*, cash incentive awards, stock options, and RSUs) were tied to motivating key employees to perform at their highest level in order to benefit the company over the long term. Thus, they were awarded for work and effort Alan performed in his employment.

¶ 70 Additional documentary evidence reasonably supports our conclusion that the provision does not apply only to compensation actually labeled as a bonus and that was actually awarded annually. In the March 8, 2010, letter from Coleman that notified Alan of his recent grant of RSUs stated that the award was in addition to any other awards he may earn "under *annual* incentive program(s)" (emphasis added) that "are designed to reward and retain" certain employees and to "ensure the company is managed for the long-term benefit of our shareholders." The agreement itself is entitled "Performance-Based Restricted Stock Unit Award Agreement." (Emphasis omitted.) Based on this language, any argument, including Alan's self-serving interpretation of these documents, that the RSUs or other long-term incentive awards that Coleman awarded Alan were not, or could not have been, tied to his performance and awarded annually defies logic.

¶ 71 Similarly, the plan of merger filed with the SEC, at section 6.9(c), collectively refers to Coleman's " 'Bonus Plans' " and, although it references an exhibit that explicitly sets forth the included plans but that is not contained in the record, the provision does reference "performance

targets," "long-term cash bonus," "performance award measures," etc., which, we believe, reasonably include LTIP awards. This conclusion is bolstered by the company's schedule 14D-9 filing with the SEC, wherein it refers to the RSUs as "*performance-based* restricted stock units" (emphasis added) and noted that they were "introduced *** as part of our *annual* equity award grants in 2010 to ensure that [Coleman] is managed for the long-term benefit of stockholders and *to reward executives* for maximizing long-term performance." (Emphases added.) As to the stock-option awards, the schedule 14D-9 filing states that Coleman awarded "options to align the interests of our executives with the interests of our stockholders" and to "*motivate* our officers to return value to stockholders through future appreciation of our stock price." (Emphasis added.)

¶ 72 Alan's argument that the long-term vesting schedule for various LTIP awards reflects that the programs were not annual programs is not well-taken. The fact that the vesting period covered a period of several years reasonably reflects the fact that Coleman wanted to provide a long-term incentive to its executives, including an incentive for their long-term employment with the company. Nevertheless, we note, for example, Coleman's schedule 14D-9 states that stock options were awarded to all named executive officers in 2009 *and* 2010. (Alan received options in 2010; he was not a named executive officer in 2009.) Further, the document states that RSUs that were awarded in 2010 were "part of our *annual* equity award grants." No new equity awards were made in 2013, but Coleman did grant certain LTIP other awards.

¶ 73 Turning to the compensation Alan received upon the change-in-control, we conclude that the evidence reasonably reflected that this compensation came within the purview of the MSA's bonus child support provision. Schedule 14D-9 states, at page A-19, that, upon a change in control (*i.e.*, a merger), the terms of Alan's severance agreement and restrictive covenant provided that he was entitled to severance payments, accelerated vesting of his time-based

options and RSUs, and continued benefits upon certain terminations of employment. As we determined above, the provision, on its own, is ambiguous. The documentary evidence, as we have also determined, supports a finding that the additional compensation should be factored into bonus child support. The final question of whether the change-in-control payments are to be included in the calculation is answered in the same way. Alan received the change-in-control payments as reward for his continued employment with Coleman at the time of the merger. They reasonably constitute bonus compensation for his work and effort in his employment. The fact that the change in control was not a recurring (*e.g.*, annual) event is of no import, where, as we have determined, the MSA's bonus child support provision essentially refers to any compensation Alan received over his base salary.

¶ 74 In summary, the trial court did not err in assessing Alan's bonus child support obligation for the years 2013 and 2014.

¶ 75 B. Dawn's Cross-Appeal

¶ 76 In her cross-appeal, Dawn argues that the trial court erred in failing to: (1) view the cash Alan received in 2011, representing the cash portion for the first vesting of the RSUs, as part of his bonus subject to the bonus child support provision, where it had found otherwise with respect to the 2013 vesting; and (2) address and find that Alan's additional income in 2009 and 2010, specifically, the difference between his base salary and his W-2 gross pay, which Alan attributed to 401(k) plan contributions and pre-tax medical, was bonus income subject to the MSA's bonus child support provision. Dawn requests that we reverse and remand for findings concerning additional income for the years 2009 through 2011.

¶ 77 With respect to 2009 and 2010, the trial court, in announcing its ruling on Dawn's motion to reconsider, noted that the evidence concerning those years was not clear and that it could not

reconcile Alan's testimony concerning his base salary with his reported Medicare wages. Specifically, the court mentioned that Alan had testified as to three different amounts for his earnings, he did not know how much money he contributed to his 401(k) plan, and he did not know his Medicare wages for those years. For 2010, Alan testified his base salary was $185,000, but his W-2 showed $200,272.24 in gross wages and Medicare wages of $195,100.84. He attributed the difference to 401(k) plan contributions and pre-tax medical and denied receiving a bonus that year. For 2009, his base salary was also $185,000, but his gross wages were $201,730.79 and his Medicare wages were $196,831. Thus, again, there was a discrepancy. In calculating Alan's bonus child support obligation, the trial court did not include the additional amount. We cannot conclude that the trial court's findings were unreasonable. The evidence failed to elicit what accounted for the discrepancy. Further, we agree with Alan that, to the extent Dawn seeks a remand for the re-opening of proofs, this request is forfeited for failure to raise it before the trial court. *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 610 (2009).

¶ 78 For 2011, Dawn seeks inclusion into the bonus child support calculation of the cash Alan received upon the vesting of the first tranche of RSUs that year. She notes that Alan received shares and cash, but did not sell the shares. The receipt of shares was, however, a taxable event, and Alan received the cash portion to offset the taxable event. His gross pay that year was $342,954. According to Dawn, the trial court's treatment of this cash in 2011 was inconsistent with its treatment of the subsequent vesting events in 2013, where it included the cash portion as part of Alan's bonus calculation. We agree that this was error, and we remand for the trial court to incorporate the 2011 amount into its calculation of Alan's obligation.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed in part and reversed in part and the cause is remanded for proceedings consistent with this decision.

¶ 81 Affirmed in part and reversed in part.

¶ 82 Cause remanded.