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2013 IL App (3d) 120546-U

Order filed September 6, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
NARVEEN VIRDI,)	of the 14th Judicial Circuit,
)	Rock Island County, Illinois,
Petitioner-Appellant,)	
)	Appeal No. 3-12-0546
and)	Circuit No. 93-D-41
)	
PREM VIRDI,)	Honorable
)	Frank R. Fuhr,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Wright concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held:* In a postdissolution proceeding, the trial court did not err in reducing respondent's maintenance obligation or in denying petitioner's request for attorney fees but did err in setting an automatic termination date for maintenance. The appellate court, therefore, affirmed the trial court's order as to the reduction of maintenance and the denial of attorney fees, reversed the trial court's order as to the setting of the termination date, and remanded the case for further proceedings.

¶ 2 Petitioner, Narveen Virdi, and respondent, Prem Virdi, filed competing postdissolution petitions regarding maintenance. After an initial evidentiary hearing and a subsequent hearing in

reconsideration, the trial court reduced Prem's maintenance obligation from \$10,000 per month to \$1,500 per month, set an automatic termination date of three years for the payment of maintenance, and denied Narveen's request for attorney fees. Narveen appeals. We affirm the trial court's order as to the reduction of maintenance and denial of attorney fees, reverse as to the setting of the termination date, and remand this case for further proceedings.

¶ 3

FACTS

¶ 4 The parties were married in 1970 and filed for dissolution in 1993. A written judgment of dissolution of marriage was entered in February 1998 which provided, among other things:

"That [Prem] is ordered to pay to [Narveen] as and for maintenance the sum of \$4,000 per month. The Court is mindful of the fact that [Prem] is in a profession that requires not only a keen intellect but also fine motor skills to perform microsurgery. The Court therefore finds that it would only be fair to order that [Prem] continue to pay maintenance until he retires from the practice. To order [Prem] to pay maintenance beyond the period that he is practicing would require him to pay maintenance out of his own property. Thus the Court finds that maintenance is to be permanent and shall terminate upon [Prem's] retirement from the practice of ophthalmology."

¶ 5 In October 2000, the trial court modified the maintenance award and increased the amount to \$10,000 per month based upon a substantial change in circumstances. We affirmed that ruling on appeal. *In re Marriage of Viridi*, No. 3-01-0005 (2001) (unpublished order under Supreme Court Rule 23). In July 2008, based upon another substantial change in circumstances, the trial court modified maintenance again and reduced the monthly maintenance amount to

\$5,000 per month. On appeal, we reversed the trial court's reduction of maintenance and reinstated the \$10,000 monthly maintenance amount. *In re Marriage of Viridi*, No. 3-08-0621 (2009) (unpublished order under Supreme Court Rule 23). Our decision in that appeal was entered in August 2009 and the mandate was issued in October 2009. Despite our mandate, however, Prem continued to pay only \$5,000 per month in maintenance.

¶ 6 In September 2009, Prem notified Narveen that he would retire from the practice of ophthalmology at the end of November 2009 and that his November 2009 maintenance payment would be his final payment. In November 2009, Narveen filed a petition for rule to show cause to have Prem held indirect civil contempt for failing to increase his maintenance payments back to the \$10,000 level after this court's decision in the previous appeal. The following month, in December 2009, Prem filed a petition alleging that he had retired and seeking to terminate his maintenance obligation. Narveen filed a response and opposed termination. In her response, Narveen asserted that the determination of whether maintenance would continue was controlled by sections 504 and 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504, 510 (West 2010)) and not by the above-quoted language from the trial court's initial decree. In January 2011, Narveen filed a petition for continuation of maintenance and for an award of attorney fees, including those that she had incurred for the previous appeal.

¶ 7 An evidentiary hearing was held on the competing petitions at various times in September 2010, March 2011, and May 2011. Prior to or during the presentation of evidence in March 2011, the trial court and the attorneys discussed the burden of proof and the manner in which the hearing would proceed. The trial court decided that the burden would first fall upon Prem to establish that he had retired and that a substantial change of circumstances had occurred, and that

if Prem was able to satisfy that burden, the burden would then shift to Narveen to show under sections 504 and 510 of the Act that maintenance should continue and in what amount.

¶ 8 During the course of the hearing, the trial court heard extensive testimony and received numerous exhibits as to the financial circumstances of the parties. The evidence established that Prem was 73 years old as of the hearing date and had various chronic medical conditions, including rheumatoid arthritis and coronary artery disease, for which he took medications. Those medical conditions had a negative impact on Prem's ability to practice medicine and had caused him to retire. At the time of dissolution, Prem had received 47% of the net marital assets, which had a value of \$1.5 million.¹ As of the hearing date, Prem's assets had increased to \$2.9 to \$3 million (\$1.8 to \$1.9 million in liquid assets and \$1.1 million in real estate). After Prem retired from the practice of medicine, his income decreased substantially. In 2009, his last full year of practice, Prem's gross annual income, which was derived from wages and rental payments, was \$198,000. Out of that \$198,000, Prem paid Narveen \$120,000 in maintenance (according to the testimony). As of the hearing date, Prem's income, which was derived solely from social security and rent, was \$6,500 per month. Prem's expenses were \$7,400 per month. Prem had been paying maintenance since 1993 and had paid more than \$1.4 million in maintenance to Narveen over the years.

¶ 9 Narveen was 62 years old as of the hearing date. At the time of dissolution, Narveen had received 53% of the net marital assets, which had a value of \$1.7 million. As of the hearing date, Narveen's assets had declined to \$1.4 million. From the date of dissolution forward, Narveen's only income was the maintenance that she had received from Prem. Narveen was a stay-at-home

¹ All of the amounts listed in this order have been rounded and are approximate amounts.

mother during the marriage to the parties' one child, who was now an adult. Narveen had obtained master's degrees in literature and English in India in 1970 but did not continue her education further because she was allegedly not allowed to do so by Prem and his family. From about 1993 forward, Narveen owned an establishment known as the Moline Commercial Club (Moline Club), which had never been profitable and was a constant drain on her income.

Narveen was also active in art and in other endeavors but generally did not receive any income from those endeavors. Narveen had no current source of income and had not received any income since December 2009 when Prem had stopped paying maintenance. Her expenses were \$13,200 per month. Because of her lack of income, Narveen had been taking money out of her retirement account to pay for her expenses and owed \$54,000 in back taxes on the Moline Club, which would have been considerably less if the taxes had been paid when due. Narveen had not tried to obtain employment since the date of dissolution, other than her work as an artist and a business owner.

¶ 10 After all of the evidence had been presented, the trial court took the case under advisement and the parties filed written closing arguments. In their closing arguments on the issue of maintenance, the parties referenced the factors set forth in sections 504(a) and 510(a-5) of the Act. Narveen's argument focused upon the 504(a) factors, and Prem's argument focused upon the 510(a-5) factors. The trial court later issued a written ruling in which it found that: (1) Prem's decision to retire had been made in good faith; (2) from the date of dissolution forward, Narveen had not made reasonable efforts to become self supporting—she had never tried, or even considered, obtaining gainful employment, she lived solely off of the maintenance payments provided by Prem, and her business (the Moline Club) was not profitable and lost money every

year; (3) Prem's present and future earning capacity was impaired due to his age, health, and retirement; (4) Narveen's earning capacity had not changed since the date of dissolution—she was employable but had failed to seek gainful employment; (5) it appeared from the initial decree that the trial court was anticipating that maintenance would terminate upon Prem's retirement and was providing Narveen with sufficient maintenance to allow her to save for the future reality that maintenance would eventually terminate; (6) Prem's income had decreased substantially since the prior judgment because of his retirement; (7) Narveen's income had not changed because she had failed to seek any gainful employment; (8) a substantial change in circumstances had occurred that would justify a modification of the maintenance provision of the original decree, which called for termination of maintenance upon Prem's retirement, in that Narveen's net worth had decreased from the time of dissolution while Prem's net worth had almost doubled; (9) the substantial change in circumstances justified a continuation of maintenance; (10) neither party had sufficient income from which to pay his or her own attorney fees and that both parties would be required to liquidate some of their assets to do so; and (11) Narveen had \$1.4 in net marital assets and would not be economically destabilized by having to pay her own attorney fees. Based upon those findings, the trial court: (1) reduced the amount of monthly maintenance paid by Prem to Narveen from \$10,000 per month to \$1,500 per month retroactive to a date certain; (2) ruled that maintenance would automatically terminate in three years, unless either party filed a request to review maintenance prior to that time; and (3) denied Narveen's entire request for attorney fees. In its written ruling, the trial court discussed the section 510(a-5) factors at length but did not specifically mention or discuss the section 504(a) factors.

¶ 11 Narveen filed a motion to reconsider, which the trial court granted in part and denied in

part. Of relevance to this appeal, the trial court awarded Narveen attorney fees for her prosecution of the contempt petition against Prem but again denied Narveen's request for attorney fees for the previous appeal. This appeal followed.

¶ 12

ANALYSIS

¶ 13 As her first contention on appeal, Narveen argues that the trial court erred in reducing the amount of maintenance paid by Prem from \$10,000 per month to \$1,500 per month. Narveen asserts that: (1) in making its decision, the trial court failed to consider the section 504(a) factors (750 ILCS 5/504(a) (West 2010)) and based its decision solely upon the section 510(a-5) factors (750 ILCS 5/510(a-5) (West 2010)); (2) contrary to established Illinois law, the trial court's ruling would force her to liquidate her assets to pay for her living expenses; (3) the trial court's ruling failed to strike the proper balance between providing maintenance as an incentive for her to become self-supporting and a realistic appraisal of whether self-support was even possible for her under the circumstances; (4) the trial court erroneously treated the maintenance award in this case as rehabilitative rather than permanent; and (5) the trial court committed an abuse of discretion when it set maintenance at an arbitrary amount of \$1,500 per month, without any explanation as to why that amount was appropriate, when Narveen's demonstrated need was more than \$10,000 per month. Prem disagrees with all of Narveen's assertions and argues that the trial court's reduction of maintenance was proper and should be affirmed.

¶ 14 A trial court's ruling on the modification of maintenance will not be reversed on appeal absent an abuse of discretion. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (modification upon general review of maintenance); *In re Marriage of Logston*, 103 Ill. 2d 266, 287 (1984) (modification upon the filing of a petition for modification). The threshold for finding an abuse

of discretion is high and will not be overcome unless it can be said that no reasonable person would have taken the view adopted by the trial court. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 15 In general, a party seeking to modify or terminate maintenance is required to show that a substantial change in circumstances has occurred. 750 ILCS 5/510(a-5) (West 2010); *Blum*, 235 Ill. 2d at 35-36; *Logston*, 103 Ill. 2d at 287. In determining whether a modification is appropriate, the trial court must consider the factors set forth in sections 504(a) and 510(a-5) of the Act. *Blum*, 235 Ill. 2d at 41. The statutory factors listed in section 504(a) are as follows:

“(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;

(2) the needs of each party;

(3) the present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

- (8) the age and the physical and emotional condition of both parties;
- (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
- (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (11) any valid agreement of the parties; and
- (12) any other factor that the court expressly finds to be just and equitable.” 750 ILCS 5/504(a) (West 2010).

The statutory factors listed in section 510(a-5) are as follows:

- "(1) any change in the employment status of either party and whether the change has been made in good faith;
- (2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;
- (3) any impairment of the present and future earning capacity of either party;
- (4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;
- (5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;
- (6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage *** and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage ***; and

(9) any other factor that the court expressly finds to be just and equitable.”

750 ILCS 5/510(a-5) (West 2010).

¶ 16 A trial court's decision as to maintenance rests upon the unique facts and circumstances of each individual case. See *In re Marriage of Bates*, 212 Ill. 2d 489, 524 (2004). No single factor listed above is dispositive in the trial court's determination. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157 (1993) (discussing previous version of the Act). In making its ruling, the trial court is not required to give equal weight to each factor, as long as the balance that is struck is reasonable under the circumstances. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 772 (1998). Nor is the trial court required to make explicit findings as to each statutory factor—it is sufficient if the basis for the trial court's determination is established in the record. See *Blum*, 235 Ill. 2d at 38.

¶ 17 After having reviewed the record in the present case, we find that the trial court did not commit an abuse of discretion by reducing the amount of monthly maintenance paid by Prem to Narveen from \$10,000 per month to \$1,500 per month. In making its determination, the trial court had before it extensive evidence as to the parties' health, income, assets, expenses, efforts, earning capacity, and any changes that had occurred thereto. There is no dispute at this point that Prem's retirement was made in good faith and that it caused a substantial reduction in his monthly income. Such a reduction, under the law, may be sufficient to justify a corresponding

reduction in maintenance. See *In re Marriage of Horn*, 272 Ill. App. 3d 472, 476 (1995) (a reduction in maintenance may be justified based upon a good-faith voluntary change in employment that results in diminished financial ability). There is also no dispute in this case, however, that Prem's assets had almost doubled from the date of dissolution; that Narveen's assets had substantially decreased; and that a continuation of maintenance was proper (since Prem did not file a cross-appeal to challenge the continuation of maintenance), despite the language in the initial decree to the contrary. In determining the appropriate amount of maintenance, the trial court was required to balance those two competing concerns—Prem's reduced ability to pay maintenance versus Narveen's reduction in assets and need for maintenance to continue—and to do so while keeping in mind the language of the initial decree, which mandated that maintenance, although permanent, would terminate upon Prem's retirement. The balance struck by the trial court in this case was reasonable under the circumstances and did not constitute an abuse of discretion. See *Dunlap*, 294 Ill. App. 3d at 772; *Leona W.*, 228 Ill. 2d at 460.

¶ 18 Although we recognize that a reduction in maintenance from \$10,000 per month to \$1,500 per month is very drastic, we cannot say that it was inappropriate, especially in light of the trial court's specific finding in this case that Narveen had not made reasonable efforts to become self-supporting. Despite Narveen's assertion to the contrary, it is well established in Illinois law that a party receiving maintenance may have an obligation to make reasonable and good-faith efforts to seek appropriate training and skills to become more financially secure in the future, even when the maintenance award is for a long or indefinite duration. See, e.g., *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833 (1994); *In re Marriage of Samardzija*, 365 Ill.

App. 3d 702, 708 (2006); *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 176-80 (1992). As the trial court noted, the initial decree in this case seems to impose such an obligation upon Narveen.

¶ 19 In upholding the trial court's reduction of maintenance, we note that we do not agree with Narveen's assertion that the trial court failed to consider the section 504(a) factors. It is clear from the record in the case that the trial court was aware that it had to consider both sets of statutory factors in making its determination. The factors were referenced by the trial court and the attorneys when they discussed the manner in which the hearing would proceed and were also referenced by the parties in their pleadings and in their closing arguments. That the trial court only specifically referenced the section 510(a-5) factors in its written decision does not establish, in and of itself, that the trial court failed to consider the section 504(a) factors, since the trial court was not required make explicit findings as to the factors. See *Dunlap*, 294 Ill. App. 3d at 772. Nor as we persuaded by Narveen's remaining assertions, which essentially call upon this court to reweigh the statutory factors. It was the trial court's role to determine the amount of weight to be given to each factor, including those factors that evaluated Narveen's efforts at becoming self-supporting, and absent an abuse of discretion, we will not substitute our judgment for that of the trial court. See *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1064 (2005) (rejecting a party's request to reweigh statutory maintenance factors on appeal); *In re Marriage of Sheber*, 121 Ill. App. 3d 328, 337-38 (1984) (applying the same rule but in the context of a trial court's decision on the division of marital assets and debts). For all of the reasons listed herein, we uphold the trial court's reduction of maintenance.

¶ 20 As her next point of contention on appeal, Narveen argues that the trial court erred in setting an automatic termination date of three years for maintenance. Narveen asserts that the

selection of the three-year date was arbitrary, that it was inappropriate under the circumstances, and that it was contrary to the initial decree, which provided for permanent maintenance. In making those assertions, Narveen notes that there was no finding in the initial decree that she had the ability to become self-supporting or that she was required to do so. Prem argues that the trial court's selection of an automatic termination date was proper and should be affirmed. Prem agrees that a three-year termination date is contrary to the initial decree, which called for maintenance to terminate when he retired, but asserts, nevertheless, that the ruling was within the trial court's discretion.

¶ 21 A trial court's ruling on the termination of maintenance will not be reversed on appeal absent an abuse of discretion. *Blum*, 235 Ill. 2d at 36; *In re Marriage of Kocher*, 282 Ill. App. 3d 655, 660 (1996). In determining the appropriate duration of a maintenance award, the trial court must base its decision on the circumstances disclosed by the evidence at the time of the hearing and should not speculate as to the future condition of the parties. *In re Marriage of Sisul*, 234 Ill. App. 3d 1038, 1040 (1992).

¶ 22 In the instant case, without any explanation or evidentiary support, the trial court arbitrarily set an automatic termination date of three years for the payment of maintenance. That decision was based solely upon speculation as to the future circumstances of the parties and was, therefore, improper. See *Sisul*, 234 Ill. App. 3d at 1040. Accordingly, that portion of the trial court's order is reversed and the case is remanded for the trial court to set an appropriate review date, if the trial court determines that one is necessary. If the trial court determines that a review date is not necessary, the maintenance payments will continue to run for an indefinite duration, subject to the right of the parties to petition for modification or termination of maintenance based

upon a substantial change in circumstances.

¶ 23 As her final contention on appeal, Narveen argues that the trial court erred in denying her request for attorney fees for the previous appeal in this case. Narveen asserts that: (1) she is entitled to fees as a matter of law under section 508(a)(3.1) of the Act (750 ILCS 5/508(a)(3.1) (West 2010)), which provides for an award of the attorney fees incurred in the prosecution of an appeal in which the prosecuting party substantially prevailed; and (2) an award of fees was proper under the circumstances of the present case because she has no income or liquid assets from which to pay her attorney fees, Prem has sufficient income and liquid assets to do so, and requiring Prem to do so will not undermine his financial stability. Prem argues that the trial court's ruling was proper and should be affirmed. Prem disputes Narveen's claim of financial inability to pay and points to specific assets and expenses of Narveen in support of his assertion. Prem asserts further that Narveen's request was properly denied because Narveen failed to establish that the amount of the attorney fees was reasonable since the fees were double the amount that Prem paid his attorney for the same appeal, there were questions over whether the fees included the attorney's representation of Narveen in other matters, and Narveen's failure to comply with discovery and with the trial court's orders increased the amount of the fees.

¶ 24 A trial court's ruling on a party's request for attorney fees in a dissolution or postdissolution proceeding will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005); *In re Marriage of Reimer*, 387 Ill. App. 3d 1066, 1076 (2009). As a general rule, each party is responsible for paying his or her own attorney fees. See *In re Marriage of Kennedy*, 214 Ill. App. 3d 849, 861 (1991). Section 508 of the Act, however, creates an exception to the general rule and allows for an award of reasonable

attorney fees in proceedings brought under the Act where one party lacks the financial resources to pay and the other party has the ability to do so. 750 ILCS 5/508 (West 2010); *Schneider*, 214 Ill. 2d at 174. The burden of proof is on the party seeking the award. See *Schneider*, 214 Ill. 2d at 174. To establish an inability to pay, the requesting party does not have to show that he or she is destitute and does not have to divest himself or herself of capital assets. *Kennedy*, 214 Ill. App. 3d at 861-62. Rather, financial inability exists when requiring the requesting party to pay attorney fees would strip that party of his or her means of support or would undermine that party's financial stability. *Id.* at 862.

¶ 25 In the present case, the trial court specifically found that neither party had sufficient income from which to pay his or her own attorney fees and that both parties would be required to liquidate some of their assets to do so. The trial court also found that Narveen would not be economically destabilized by having to pay her own attorney fees. With those findings in place, we cannot conclude that the trial court erred in denying Narveen's request for attorney fees for the previous appeal. *Schneider*, 214 Ill. 2d at 174; *Reimer*, 387 Ill. App. 3d at 1076. In reaching that conclusion, we are mindful that attorney fees were awarded to Narveen for her prosecution of the contempt petition. In addition, to the extent that Narveen is asserting that an award of attorney fees is mandatory under section 508(a)(3.1) of the Act, we reject that conclusion. Section 508(a)(3.1) does not require that an award of attorney fees be made for the prosecution of an appeal but, rather, provides the trial court with discretion to do so. See *In re Marriage of Davis*, 292 Ill. App. 3d 802, 811 (1997) (an award of attorney fees is mandatory under section 508(b) of the Act but is discretionary under section 508(a)).

¶ 26

CONCLUSION

¶ 27 For the foregoing reasons, we affirm the trial court's reduction of maintenance to be paid by Prem to Narveen from \$10,000 per month to \$1,500 per month and its denial of Narveen's request for attorney fees for the previous appeal. We reverse the trial court's setting of a three-year automatic termination date for maintenance and remand this case for further proceedings so that the trial court may determine an appropriate review date, if necessary.

¶ 28 Affirmed in part and reversed in part; cause remanded.

¶ 29 JUSTICE O'BRIEN, dissenting.

¶ 30 I dissent from the majority because the trial judge used the wrong time frame to determine that a substantial change of circumstances had occurred which necessitates a reduction and modification in the permanent maintenance award to the petitioner, Narveen Viridi.

¶ 31 The petitioner appeals from the entry of an order reducing her maintenance from \$10,000.00 per month to \$1,500.00 per month. In so reducing petitioner's maintenance award, the trial judge stated as follows:

"Thus, the court finds that his retirement was in good faith and the burden shifts to the Petitioner to show by a preponderance of the evidence, that there has been a substantial change in circumstances since the entry of the original decree which would warrant continuation of maintenance at this time."

¶ 32 The judge erred in looking back to the entry of the original decree to determine whether there had been a substantial change in circumstances. As set forth in the Illinois Marriage and Dissolution of Marriage Act, the proper time frame to be employed by the court and the parties is from the entry of the last order modifying the maintenance provision of the original judgment for dissolution of marriage. 750 ILCS 5/510 (a)(a-5) (2009). In this case, the maintenance provision was last modified on August 17, 2009 by this appellate court. That order continued the

maintenance award to the petitioner at the monthly rate of \$10,000.00, but more importantly, perhaps, it clarified that all of the respondent's income was to be used to determine his ability to pay maintenance, not just his income from his medical practice. Since the trial court did not use the correct period of time to consider whether there had been a change in circumstances and further did not follow the previous directive of this court to consider all of the respondent's income when determining his ability to continue to pay maintenance, I would reverse the decision of the trial court and remand for further proceedings.