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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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In re the Matter of:

KARIMY E. BRYSON, *Petitioner/Appellee*,

*v.*

RYAN BRYSON, *Respondent/Appellant*.

No.1 CA-CV 16-0531 FC  
FILED 6-8-2017

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Appeal from the Superior Court in Maricopa County  
No. FC2015-003749  
The Honorable Dewain D. Fox, Judge

**AFFIRMED**

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COUNSEL

Lincoln & Wenk, PLLC, Goodyear  
By Russell F. Wenk, Michael Lincoln  
*Counsel for Petitioner/Appellee*

Warner Angle Hallam Jackson & Formanek PLC, Phoenix  
By Erik C. Bergstrom  
*Counsel for Respondent/Appellant*

**MEMORANDUM DECISION**

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge John C. Gemmill<sup>1</sup> joined.

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**J O N E S**, Judge:

¶1 Ryan Bryson (Husband) appeals the family court’s order awarding Karimy Bryson (Wife) a \$422,500 equalization payment for her one-half share of the community’s interest in High Side Electric, L.L.C. (High Side). Husband also appeals the court’s denial of his motion for a new trial. For the following reasons, we affirm.

**FACTS<sup>2</sup> AND PROCEDURAL HISTORY**

¶2 The parties were married in May 2005. During the marriage, the parties started and operated an electrical contracting business, High Side, with another couple, and each couple held a 50% interest therein. As between the parties, Wife held 26% of the parties’ interest while Husband held 24%. After Husband filed for dissolution of the marriage in April 2015, the parties jointly retained James Anderson to determine both the fair value and the fair market value<sup>3</sup> of the community’s 50% interest in High Side.

¶3 In performing his assessment, Anderson first calculated the “overall value of the company on a controlling interest basis” (Overall Value) by combining the valuation derived from an income or earnings

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<sup>1</sup> The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

<sup>2</sup> We view the facts in the light most favorable to sustaining the family court’s ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 522 n.1, ¶ 1 (App. 2007) (citing *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2 (App. 2005)).

<sup>3</sup> Fair market value is “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction.” Black’s Law Dictionary (10th ed. 2014). “A fair-value assessment is often used when a fair market value is unavailable, usu[ally] because there is no active market for the item.” *Id.*

BRYSON v. BRYSON  
Decision of the Court

approach (Income Approach) with the valuation from a Market Approach. He then applied the “owner’s percentage of that overall controlling value” to conclude that, as of April 30, 2015, the fair value of the community’s 50% interest in High Side was \$863,000. To determine fair market value, Anderson considered various discounts to apply to the fair value figure, resulting in a fair market valuation of \$478,000 for the community’s interest in High Side.

¶4 In calculating the Overall Value of High Side, Anderson explained that he assessed the value under the Income Approach using the capitalized current earnings method, and, under the Market Approach, he used the guideline acquisitions method. Anderson’s valuation report explains the Income Approach’s capitalized current earnings method “is based on the theory that, when current earnings approximate those expected to be realized in the future assuming a normal growth rate, an investment in a business is worth the current earnings divided by a capitalization rate that reflects the risk, or degree of uncertainty, that those earnings will not be realized in the future.” Anderson applied the Income Approach, using High Side’s average earnings for 2013 to 2015, to obtain a value of \$1,685,826. In explaining why he used the higher three-year average value as opposed to the annualized 2015 earnings, Anderson believed the three-year average was more reflective of a typical revenue cycle for both the industry generally and High Side specifically, given:

the unusually high level of revenues and net income in 2014 resulting from its large and non-recurring work at Camp Navajo, the lower level of revenues and net income in 2013 resulting from establishing the Company’s operations, management’s expectation of 2015 annualized operating results to reflect sustainable operations on an ongoing basis, and the cyclicity of operations for construction contractors.

¶5 Regarding the Market Approach, Anderson’s report clarified that the guideline acquisitions method “estimates the value of a business by comparing the subject company to similar companies which have been recently sold.” In the report, however, Anderson also states he has “significant concerns surround[ing] the reliability and usefulness” of the Market Approach because High Side “operates in a relatively narrow niche of the electrical contracting industry.” Moreover, Anderson testified the comparable companies he used in his analysis “do a different type of electrical work” than High Side. For these reasons, Anderson recommended \$1,803,819 as the value of High Side’s equity derived from the Market Approach.

BRYSON v. BRYSON  
Decision of the Court

¶6 Because Anderson believed the Income Approach to be more reliable under the circumstances, he gave “two-thirds weight” to the Income Approach and “one-third weight” to the Market Approach. Accordingly, Anderson assigned High Side an Overall Value of \$1,725,157.

¶7 As between the two valuation standards of fair value and fair market value, Anderson offered no opinion as to which valuation standard the family court should apply. Anderson described fair value as the “ownership percentage multiplied by that [Overall] value of the entity so that [the squeezed-out stockholder is] not being penalized for . . . not being in a controlling position.” After applying the community’s 50% interest in High Side to the Overall Value, Anderson determined the fair value was approximately \$863,000.

¶8 Anderson elaborated that, on the other hand, a fair market valuation applies certain discounts to the fair value figure. In his analysis of the community’s interest in High Side, Anderson applied a 12% discount for lack of control, which corresponds to a minority interest’s “lack of control over [] enterprise cash flows and the ability to receive those cash flows.” Anderson opined that Husband is “the most critical member [of High Side] due to being the qualifying party on both the contractor licenses, his overall management role, and his relationship with the company’s customers and referral sources.” Anderson also applied a 37% discount for High Side’s lack of marketability and resultant illiquidity. Husband himself testified he did not intend to sell High Side. After applying these discounts, Anderson concluded the fair market value of High Side was \$478,000.

¶9 After taking the matter under advisement, the family court found Anderson’s valuations appropriate and adopted them. The court then applied the analysis found in *Schickner v. Chickner*, 237 Ariz. 194 (App. 2015), to determine a minority discount would be inappropriate.<sup>4</sup> The court therefore accepted the fair value calculation in concluding the community’s

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<sup>4</sup> A minority discount and a marketability discount are distinct concepts. A minority discount takes into account the degree of control the minority interest holder does or does not have within the business, whereas “a marketability discount addresses the *degree of liquidity* of the interest.” See *In re Marriage of Tofte*, 895 P.2d 1387, 1391 n.3 (Or. Ct. App. 1995), cited favorably by *Schickner*, 237 Ariz. at 198, ¶ 17.

BRYSON v. BRYSON  
Decision of the Court

50% interest in High Side was worth \$863,000, and Wife was entitled to an equalization payment of \$422,500.<sup>5</sup>

¶10 Husband thereafter filed a motion for new trial, arguing the family court erred in its assessment of the value of the community's interest in High Side because it failed to: (1) use the fair market value standard rather than the fair value standard; (2) adjust Anderson's capitalized current earnings calculation by using the annualized 2015 figures rather than the three-year averaged figures; and (3) base the valuation solely on the Income Approach and disregard the Market Approach. The court denied Husband's motion. Husband timely appealed, and this Court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1),<sup>6</sup> -2101(A)(1), and (5)(a).

DISCUSSION

¶11 Husband reasserts the same arguments on appeal as those previously articulated in his motion for new trial. We review both the family court's determination of the value of a business in a divorce proceeding and its denial of a motion for new trial for an abuse of discretion. *Schickner*, 237 Ariz. at 197, ¶ 13 (value of a business) (citing *Roden v. Roden*, 190 Ariz. 407, 411 (App. 1997)); *First Fin. Bank, N.A. v. Claassen*, 238 Ariz. 160, 162, ¶ 8 (App. 2015) (denial of a motion for new trial) (citing *Suciu v. Amfac Distrib. Corp.*, 138 Ariz. 514, 520 (App. 1983)). "A trial court abuses its discretion when it commits an error of law or 'reaches a conclusion without considering the evidence or the record fails to provide substantial evidence to support the trial court's finding.'" *Schickner*, 237 Ariz. at 197, ¶ 13 (quoting *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007)). Moreover, "[o]ur duty on review does not include re-weighing conflicting evidence." *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16 (App. 2009) (citing *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13 (1999)). Therefore, "[e]ven though conflicting evidence may exist, we affirm the trial court's ruling if substantial evidence supports it." *Id.* (citations omitted).

¶12 We first address Husband's argument that the family court erred in relying upon Anderson's Market Approach when there were no

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<sup>5</sup> Although Wife's interest in High Side was valued at \$431,500, she was responsible for reimbursing Husband for half of Anderson's fee, or \$9,000, which the family court offset from the equalization payment.

<sup>6</sup> Absent material changes from the relevant date, we cite a statute's current version.

BRYSON v. BRYSON  
Decision of the Court

comparable companies to High Side. Anderson identified eleven companies “reasonably similar” to High Side. In his analysis, Anderson admitted having concerns with the usefulness of the comparables he examined relative to High Side. Because of those concerns, however, his ultimate assessment weighted the Market Approach as only one-third compared to the two-thirds weight assigned to the Income Approach, even though the Market Approach ordinarily “provides the most direct, objectively determined evidence of the value of a company’s overall equity.” The court was well within its discretion to consider Anderson’s reasoned devaluation of the Market Approach to be an appropriately ascribed countermeasure to the deficiencies in High Side’s marketability, and we find no abuse of discretion.

¶13 Husband next argues the family court erroneously accepted Anderson’s Income Approach because the figures derived from High Side’s three-year average earnings are less accurate than the annualized figures from the most recent year. Husband relies on the fact that High Side’s management told Anderson the 2015 annualized figures were reflective of sustainable future operations. Anderson, however, explained he believed the three-year average more accurately replicated the cyclical nature of High Side’s industry. As with the Market Approach, the court was entitled to consider competing evidence and resolve conflicts therein. Substantial evidence supports the court’s adoption of Anderson’s Income Approach.

¶14 Finally, Husband argues the family court should have chosen the fair market value of \$478,000 instead of the fair value of \$863,000 in determining the community’s interest in High Side. The situation presented here is remarkably similar to that in *Schickner*; there, through divorce proceedings, the husband sought to buy out his wife’s half of the community’s 50% interest in the husband’s medical practice. See 237 Ariz. at 195-96, ¶¶ 2-7. The trial court adopted a fair market valuation because the community’s 50% interest was not a controlling interest. *Id.* at 197, ¶ 10.

¶15 This Court held that whether a minority discount is appropriate must be determined on a case-by-case basis. *Id.* at 198, ¶ 17 (citations omitted). “Because a minority share discount is an attempt to take into account the difficulty of actually turning an asset into money,” courts should consider “the minority shareholder’s degree of control, lack of marketability, and the likelihood of a sale of the minority interest in the foreseeable future.” *Id.* (internal quotation and citations omitted). In *Schickner*, the record indicated the husband’s 50% membership interest was equal to that of the only other member of the practice, and this Court found the husband “h[eld] significant power regarding financial decisions,” there

BRYSON v. BRYSON  
Decision of the Court

were not “any substantial limitations on his joint control” of the practice, and he “presented no evidence he ha[d] any plans to sell his interest in the business.” *Id.* at 198-99, ¶ 18. Thus, the *Schickner* Court determined “the underlying assumptions justifying the application of a minority share discount [we]re not supported by the record,” and, therefore, the trial court abused its discretion by applying the minority discount. *Id.* at 199, ¶¶ 18-19.

¶16 Husband argues the present case is distinguishable from *Schickner* because Anderson testified as to High Side’s closely held nature and concomitant lack of marketability and relative illiquidity. Furthermore, Husband asserts his minority interest results in the inability to control any voting decisions requiring a majority. Husband further argues his intention to retain ownership of High Side is irrelevant because, contrary to the highly marketable medical practice in *Schickner*, High Side is a “niche electrical company for which there is no ready market.”

¶17 As to Husband’s degree of control over High Side, we conclude he draws distinctions in regard to *Schickner* where there are no differences. Husband retains a 50% interest in High Side, and, although he may not have total voting control, his veto power affords him substantial influence over High Side’s management. Additionally, Anderson testified Husband was the most critical member of High Side because of his day-to-day management role, his business contacts, and his qualifying licenses. Under these circumstances, the family court did not abuse its discretion in declining to apply a minority discount.

¶18 Although we are more persuaded by Husband’s arguments regarding application of a marketability discount, the record bears no evidence that Husband’s decision not to sell his interest in High Side in the foreseeable future was influenced by High Side’s lack of marketability. Rather, Husband’s desire to remain involved with High Side appears to stem from personal fulfillment in operating the small business and its apparent success. Because Husband’s intention not to sell was not demonstrably linked to High Side’s lack of marketability, a marketability discount would serve no purpose but to provide Husband a financial windfall and would, therefore, constitute an inequitable division of the marital community’s interest. *See* A.R.S. § 25-318(A) (directing the court to divide community property equitably). We cannot say the family court abused its discretion in denying a marketability discount where marketability is not a material consideration.

BRYSON v. BRYSON  
Decision of the Court

**CONCLUSION**

¶19 For the foregoing reasons, the family court's orders are affirmed.

¶20 Both parties request attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. In our discretion, we deny both requests. However, as the prevailing party, Wife is awarded her costs on appeal upon compliance with ARCAP 21(b).



AMY M. WOOD • Clerk of the Court  
FILED: AA