MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE

COURT OF APPEALS OF INDIANA

Andrew Jay West, Executor of the Estate of Patsy V. Gartley,

Appellant-Respondent,

v.

Michael D. Gartley and Peter H. Donahoe, Co-Personal Administrators of the Estate of Richard C. Gartley,

Appellees-Claimants,

March 11, 2022

Court of Appeals Case No. 21A-EU-1687

Appeal from the Marion Superior Court

The Honorable Steven R. Eichholtz, Judge

Trial Court Cause No. 49D08-2101-EU-3391

Robb, Judge.

Case Summary and Issues

[1] Richard and Patsy Gartley were married in 1988. Patsy died on January 4, 2021, and Richard died on January 5, 2021. Patsy's will left her entire probate estate to her son, Andrew West. West was appointed executor of Patsy's unsupervised estate ("Estate").

[2] Peter Donahoe, co-administrator of Richard's estate ("Claimant"), filed a claim with the Estate for the surviving spouse's statutory allowance. The Estate objected, but the trial court entered an order allowing the spousal allowance. The Estate now appeals, raising the following restated issue for our review: whether Richard is a surviving spouse entitled to the spousal allowance. Claimant cross-appeals, arguing the Estate's appeal is untimely. Concluding the appeal is timely and that Richard is a surviving spouse who is entitled to the spousal allowance even though he did not claim it before his death, we affirm.

Facts and Procedural History

[3] When Richard and Patsy married in 1988, each had children from a prior marriage and no children were born of their marriage to each other. Richard and Patsy were both hospitalized with COVID-19. Patsy died on January 4, 2021, and Richard died the next day.

[4] Patsy's 2020 will left her probate estate to her son, West. The Estate was opened on January 29, 2021. On March 10, Claimant filed a claim with the

Estate for the statutory allowance by a surviving spouse.[1] On April 30, the Estate filed an objection to Claimant's claim. And on May 17, the trial court issued the following order:

> Pursuant to IC 29-1-4-1(c), the Court finds an interested party is required to file an objection to the manner in which the allowance is being claimed not later than thirty (30) days after the date the election is filed with the court, meaning an objection should have been filed no later than April 10th. An objection was not filed until April 30th.
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> Thus, the Court allows the Claim for Spousal Allowance as an objection was not filed in compliance with the manner required by statute.

Appellant's Appendix, Volume 2 at 8.

[5] On May 18, the Estate filed a Motion to Reconsider Order Granting Spousal Allowance and Motion to Correct Error, alleging the trial court allowed the spousal allowance claim "on incorrect procedural grounds, without ruling on the merits of this Claim." Appellees' Appendix, Volume 2 at 8. Claimant filed a response and objection to the motion to reconsider/correct error, alleging there are no merits to rule on because the surviving spouse is entitled by statute to the spousal allowance. After a hearing, the trial court entered an order on July 9 denying the Estate's motion to reconsider/correct error. On August 3,

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[1] Claimant also filed an election to take against Patsy's will pursuant to Indiana Code section 29-1-3-4 on March 5, 2021.

the Estate submitted a proposed order which the trial court signed on August 4, stating as follows:

> It is now ordered, adjudged and decreed that the July 9, 2021 decision of this Court's Judicial Officer Denying the Estate's Motion to Correct Errors is Approved and confirmed; and, pursuant to Rule 54(B), Indiana Rules of Trial Procedure, there is no just reason for delay and a Final Judgment as to the Claim for Statutory Allowance filed by [Claimant] is hereby entered.

Appellant's App., Vol. 2 at 10. The Estate filed a Notice of Appeal that same day.[2]

Discussion and Decision

I. Cross-Appeal: Timeliness

[6] Claimant contends that the trial court's order allowing the spousal allowance, entered on May 17, 2021, was an interlocutory order for the payment of money appealable as of right and that the Estate's failure to appeal the order within thirty days makes this appeal untimely.

[7] The May 17 order is clearly an interlocutory order, as it was entered in an estate which is not yet closed and did not dispose of all issues in that cause. *See In re Estate of Botkins*, 970 N.E.2d 164, 166-67 (Ind. Ct. App. 2012) ("Indeed, this

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[2] On August 5, the Claimant filed in the trial court a motion to reconsider and vacate the August 4 order. In short order, the Estate responded in opposition to the motion, and the Claimant replied. The trial court denied the motion to reconsider on August 16.

court has acknowledged that orders issued by a probate court are not final until the estate is closed."). However, it is questionable whether it was an interlocutory order "for the payment of money," Ind. Appellate Rule 14(A)(1), because that requires a direct order for one of the parties to pay a specific sum to another party or to the court by a date certain, *see DuSablon v. Jackson Cnty. Bank*, 132 N.E.3d 69, 76 (Ind. Ct. App. 2019), *trans. denied*. Here, the specific sum of the statutory allowance to a surviving spouse is set by statute, but the trial court did not order that amount paid to Claimant by a date certain. Therefore, it is unlikely that the May 17 interlocutory order was appealable of right. Even if it was an interlocutory order appealable of right, "there is no requirement that an interlocutory appeal be taken. A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal from the final judgment." *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004) (internal citation omitted).

[8] Regardless of whether the May 17 interlocutory order was appealable of right, however, an interlocutory order may become final by meeting the requirements of Trial Rule 54(B). *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998), *cert. denied*, 525 U.S. 1049 (1998); *see also* App. R. 2(H) (defining a final judgment in part as one directed by the trial court in writing under Trial Rule 54(B)). These requirements are that the trial court, in writing, expressly determine that there is no just reason for delay and, in writing, expressly direct entry of judgment. Ind. Trial Rule 54(B). If the trial court does not make an interlocutory order final of its own accord, a party may request entry of

judgment pursuant to Trial Rule 54(B). *See, e.g.*, *Am. Heritage Banco, Inc. v. McNaughton*, 879 N.E.2d 1110, 1114 (Ind. Ct. App. 2008) (noting the trial court, at the request of defendants, entered an order expressly determining that there is no just reason for delay and directing that final judgment be entered). And there is no time limit in Trial Rule 54(B) for requesting or ordering that final judgment be entered on a previously interlocutory order. *See, e.g.*, *Plan Comm'n for Floyd Cnty. v. Klein*, 765 N.E.2d 632, 638-39 (Ind. Ct. App. 2002) (in which trial court issued an order on December 5, 2000, a request for entry of final judgment was made on March 30, 2001, and trial court entered final judgment pursuant to Trial Rule 54(B) on April 30, 2001). Inclusion of the "magic language" required by Trial Rule 54(B) confers the right to appeal and starts the clock running on the time within which an appeal must be taken. *Forman v. Penn*, 938 N.E.2d 287, 290 (Ind. Ct. App. 2010), *on reh'g*, 945 N.E.2d 717 (Ind. Ct. App. 2011), *trans. denied*.

[9] The Estate requested the trial court make its May 17 interlocutory order final, which the trial court did by its written order of August 4 when it expressly found no just reason for delay and expressly directed entry of judgment. *See* Appellant's App., Vol. 2 at 10. The Estate filed its notice of appeal within thirty days of the August 4 final appealable order, so the appeal is timely.

II. Appeal: Surviving Spouse

[10] Pursuant to Indiana Code section 29-1-4-1(a), the "surviving spouse of a decedent who was domiciled in Indiana at the decedent's death is entitled from

the estate to an allowance of twenty-five thousand dollars ($25,000)." Although it is undisputed that Richard survived Patsy, he had died by the time Claimant asserted the survivor's allowance on his behalf. The primary questions presented by this appeal are whether, under those circumstances, Richard is a surviving spouse, and if so, whether his estate is entitled to claim the surviving spouse allowance on his behalf.

[11] In 1870, when the statutory spousal allowance was a "widow's allowance" of $300, our supreme court noted that the purpose of the statute was to give the widow "a credit for the necessaries of life at once upon the husband's death, and the means of decent burial *should she die before the amount comes to her hands*." *Bratney v. Curry*, 33 Ind. 399, 400 (1870) (emphasis added). To accomplish these purposes, the statute "requires a liberal, instead of narrow, interpretation[.]" *Id.* Accordingly, the court held that the allowance is not purely personal, and even though the widow died before the allowance could be paid, it nonetheless passed to her personal representatives. *Id.* The same considerations remained in play even after the statute was amended to be a "spousal allowance" of $8,500, when, in *Matter of Estate of Gray*, this court allowed the spousal allowance from the wife's estate despite the fact the surviving husband died before the wife's estate was even opened. 505 N.E.2d 806, 810 (Ind. Ct. App. 1987), *trans. denied*. The rights given a spouse "are in the nature of a preferred charge imposed by law upon the estate and constitutes such a right that it is not necessary for the [spouse] to file a claim against the estate to compel payment therefor." *Elkhart Cnty. Dep't of Pub. Welfare v. Kehr*,

124 Ind.App. 325, 329-30, 112 N.E.2d 451, 453 (1953), *trans. denied*. In other words, a surviving spouse is automatically entitled to the spousal allowance upon the other spouse's death, and the entitlement is not extinguished by the surviving spouse's death.[3]

[12] The Estate argues that Richard should not be considered a "surviving spouse" because he only survived Patsy by approximately twenty-four hours. "Surviving spouse" is not specifically defined in the Probate Code nor does section 29-1-4-1 refer us to any other statutory provision to understand or define the term. However, in the common vernacular, a "spouse" is "one's husband or wife" and a "surviving spouse" is a "spouse who outlives the other spouse." Black's Law Dictionary 1621 (10th ed.). Because Richard outlived Patsy, he became entitled to the spousal allowance immediately upon her death, and the fact that he did not survive to actually be paid the allowance is of no consequence.[4]

[13] To the extent we need to further define the term, the parties direct us to the Uniform Simultaneous Death Act ("USDA"). Ind. Code ch. 29-2-14. Section 29-2-14-1 of the USDA states, "Where the title to property or the devolution

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[3] This is in contrast to an election to take against the will, which, by the plain language of the statute, "is personal to the spouse [and] is not transferable and cannot be exercised subsequent to the spouse's death." Ind. Code § 29-1-3-4(a). Our decision here has no bearing on Claimant's election to take against Patsy's will, as that motion is not before us in this appeal.

[4] We do note that this is not the reasoning the trial court gave for ordering the spousal allowance to be paid to Claimant. Nonetheless, the *result* of the trial court's order is that Claimant be paid the spousal allowance, and we also reach that result, albeit by different means.

thereof depends upon priority of death *and there is no sufficient evidence that the persons have died otherwise than simultaneously*, the property of each person shall be disposed of as if he had survived[.]" (Emphasis added.) The Estate concedes Richard and Patsy were married at the time of Patsy's death and that Richard survived Patsy. *See* Brief of Appellant at 8. As there *is* sufficient evidence that Richard and Patsy died *other than* simultaneously, the USDA is not applicable and Richard, as the surviving spouse, is entitled to the spousal allowance under this definition, as well.

[14] The Estate devotes the majority of its brief, however, to the notion that section 29-2-14-7 of the USDA compels a different result. Section 29-2-14-7 of the Act states, "This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it." The original USDA was promulgated in 1940 by the National Conference of Commissioners on Uniform State Laws. *Glover v. Davis*, 360 S.W.2d 924, 927 (Tex. Civ. App. 1962). This version of the USDA was eventually adopted in the District of Columbia, the U.S. Virgin Islands, and all but three states. 56 Am.Jur.3d *Proof of Facts* § 2 (2022). Indiana adopted this version of the USDA as early as 1941. *See Stanley v. Gieseking*, 230 Ind. 690, 693 n.1, 105 N.E.2d 171, 172 n.1 (1952) (quoting Section 6-2356, Burns' (Supplement), Acts 1941, ch. 49, § 1, which reads exactly as section 29-2-14-1 now does). This original version of the USDA remains in effect in Indiana today.

[15] In 1991, the USDA was significantly revised by the National Conference of Commissioners on Uniform Laws and, among other changes, a 120-hour survival requirement was added:

> [I]f the title to property [or] the devolution of property . . . depends upon an individual's survivorship of the death of another individual, *an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual.*

Uniform Simultaneous Death Act § 2 (1993) (emphasis added), https://web.archive.org/web/20140531213111/http://www.uniformlaws.org/shared/docs/simultaneous%20death/usda_final_93.pdf (last visited Feb. 25, 2022). According to the Estate, twenty-five states and the District of Columbia have adopted this revised version of the USDA. *See* Br. of Appellant at 19-20. The Estate calls this a "clear majority" of states that have adopted the revised USDA, *id.* at 20,[5] and argues that section 29-2-14-7 "clearly intends that Indiana's Simultaneous Death Act will accept and adopt the revisions in the Uniform Act[,]" as have the majority of states, *id.* at 12. We cannot agree.

[16] In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature. *U.S. Steel Corp. v. N. Ind. Pub. Serv. Co.*, 951 N.E.2d 542, 552 (Ind. Ct. App. 2011), *trans. denied*. The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain

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[5] The Estate fails to acknowledge that if half the states have adopted the revised USDA, half the states have not.

and ordinary meaning unless otherwise indicated by the statute. *Id*. Moreover, "[w]e may not add new words to a statute which are not the expressed intent of the legislature." *City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017). "[W]hen engaging in statutory interpretation, we 'avoid an interpretation that renders any part of the statute meaningless or superfluous.'" *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199 (Ind. 2016).

[17] We cannot presume that the legislature intended by section 29-14-2-7 to allow the National Conference of Commissioners on Uniform State Laws, twenty-five other states, or this court to adopt an entirely different statute than the legislature itself put into effect. We may not interpret section 29-14-2-7 to require adding words which give the USDA an entirely new and different meaning than expressed by the existing language in the Indiana statute. And we may not interpret section 29-14-2-7 to make existing parts of the statute as a whole meaningless and obsolete. If the legislature intended to incorporate the 120-hour survival requirement, it has had thirty years to do so. Instead, the 1940 version of the USDA remains in effect and the plain and ordinary meaning of section 29-14-2-7 is that we should construe and interpret Indiana's existing USDA in uniformity with other states which also continue to use the 1940 USDA, of which many remain. We decline the Estate's request to rewrite the USDA by judicial decree and impose a 120-hour survival requirement.

Conclusion

[18] Richard survived Patsy. He was entitled to claim the spousal allowance under Indiana Code section 29-1-4-1(a) and having failed to live long enough to claim it for himself, his estate was entitled to claim it for him. The trial court's order allowing the spousal allowance to be paid to Richard's estate is affirmed.

[19] Affirmed.

Riley, J., and Molter, J., concur.