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STANDING TO SUE FOR WRONGFUL DEATH IN GEORGIA WHEN A SPOUSE AND CHILDREN SURVIVE THE TORTIOUS DEATH: MACK V. MOORE

INTRODUCTION

Recently in Georgia, an uncertainty has developed regarding who should be allowed standing to sue for the wrongful death of a parent or spouse. The uncertainty is limited to situations in which a spouse and children survive a parent. Three major changes, two judicial and one legislative, have occurred since 1984; these changes altered standing rules which had controlled for over one hundred years.

In 1984 the Georgia Supreme Court invalidated the standing portion of the state’s wrongful death statute because it unconstitutionally violated equal protection rights. Prior to the decision, two separate statutory rules conferred standing based upon the decedent’s gender. A widow could sue for wrongful death without including the children as parties to the suit, but a widower was required to join the decedent’s surviving children. In the 1984 case, the court held the surviving spouse, regardless of gender, and the children must sue jointly.

In 1985 the Georgia General Assembly cured the constitutional infirmity by codifying a different standing rule. The new statute provided that the surviving spouse, alone, could bring the cause of action and surviving children were denied independent standing.

In 1986 the Georgia Supreme Court, in Mack v. Moore, added a gloss to the 1985 legislative amendment. The court held that a surviving spouse has a duty to bring the wrongful death action when the decedent also is survived by children. In so holding, the court

1. See generally BLACK’S LAW DICTIONARY 1260 (5th ed. 1979) (“‘Standing to sue’ means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”).
specifically overruled *Bloodworth v. Jones,* which held the spouse had no such duty. *Bloodworth* had been consistently followed since 1940.

This Comment discusses the effect of *Mack v. Moore* on standing rights and duties in a wrongful death action when a decedent is survived by both a spouse and children. It also reviews the history of spousal standing, discusses issues unresolved by *Mack*, and proposes legislative action to resolve these issues.

I. HISTORICAL DEVELOPMENTS

A. Georgia Statutory Standing Law Before 1984

A wrongful death action to recover the value of a decedent’s life was unknown at common law. The right, first established by the Georgia Legislature in 1850, is currently codified at O.C.G.A. §§ 51-4-1 through 51-4-5. The statute initially granted standing to sue to the authorized representative of a decedent’s estate. In 1856 the statute was amended, transferring standing to the decedent’s widow. In 1887 a surviving widower was allowed the right to

7. Bloodworth v. Jones, 191 Ga. 193, 11 S.E.2d 658 (1940). “At common law there was no right of action to recover damages on account of a homicide. The rule was changed in England in 1846, by Lord Campbell’s act, and in this State by the act of 1850, which for the first time permitted such recovery.” Id. at 194, 11 S.E.2d at 659.
9. O.C.G.A. §§ 51-4-1 to -5 (1982 & Supp. 1987) (section 51-4-1 defines “homicide” and “full value of the life of the decedent”; section 51-4-2(a) accords standing to surviving spouse and, if no spouse, to children; section 51-4-2(b) provides for survival of the action to decedent’s child or children if the spouse dies while the action is pending and if one of the children dies while the action is pending, the action survives in any remaining children; section 51-4-2(c) allows spouse to release the tortfeasor without permission of decedent’s children or court; section 51-4-2(d) provides that spouse shall hold damages recovered subject to law of descent for equal sharing with decedent’s children per capita but, in no case shall spousal share be less than one-fourth; section 51-4-2(e) prohibits application of recovery to decedent’s debts or liabilities; section 51-4-2(f) allows decedent’s children born out of wedlock the same rights as decedent’s children born of a marriage; section 51-4-3, the former widower section, is repealed; section 51-4-4 provides that recovery for wrongful death of child is governed by O.C.G.A. § 19-7-1; section 51-4-5 allows decedent’s personal representative standing to bring the cause of action if no spouse or children survive and to hold recovery for next of kin).
bring an action for the tortious death of his wife.  

From the inception of the widower's right, the Georgia Code distinguished the standing rights of the widow or widower and of surviving children. The "widow or, if no widow, a child or children," had standing to bring the cause of action. The widower could "recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately."  

Although the widow, alone, had standing to bring the action, the statute held her accountable to the decedent's children for a portion of any damages recovered. The children's distributive share of any recovery was determined by the Georgia law of descent and distribution. Thus, children could recover damages indirectly from the tortfeasor for their father's death.

The section of the statute requiring different widow and widower standing rules has been amended numerous times since 1887. None of the changes, however, altered the basic standing distinction between widowers and widows. In 1984 the Georgia Supreme Court invalidated the gender distinction as an impermissible classification in violation of the equal protection provisions of the Georgia and United States Constitutions.

11. 1855-56 Ga. Laws 154 (widow given standing); 1887 Ga. Laws 43 (widower given standing). These Acts only applied to wrongful deaths which resulted from torts committed by railroads.


13. Id. In 1960 the widower section was amended to provide that any one of the children or the husband could commence the wrongful death cause of action and by personally serving the other beneficiaries bind the others to the final judgment of the action. 1960 Ga. Laws 968.

14. 1878-79 Ga. Laws 59 (in addition, clarified measure of damage recovery as "the full value of the life of the deceased as shown by the evidence"). Current codification of children's distributive share right is O.C.G.A. § 51-4-2(d).


16. 1924 Ga. Laws 60 (allowed decedent's administrator to sue if no spouse or children survived decedent for benefit of decedent's next of kin if the next of kin was dependent upon decedent's support); 1939 Ga. Laws 233 (consolidated wording clarifying that widower and children have cause of action jointly); 1960 Ga. Laws 968 (granted dependent children born out of wedlock standing to sue and recover for mother's death); 1971 Ga. Laws 359 (deleted dependency requirement for recovery for mother's death; allowed both children born of a marriage and children born out of wedlock the right to recover for mother's death); 1973 Ga. Laws 488 (allowed widow to release alleged tortfeasor without child, child's representative, or court approval).

B. Judicial Construction of Widow's Standing Rights Before 1984

As previously noted, the common law did not recognize an action for wrongful death. Georgia courts deciding cases involving the wrongful death statute, therefore, consistently followed the general canon of statutory construction which requires courts to construe strictly those statutes enacted in derogation of the common law. As a result, Georgia courts determined who had standing to bring the suit by strictly interpreting the statute.

_Bloodworth v. Jones_, decided in 1940, is the landmark case interpreting the widow's standing rights under the wrongful death statute. In _Bloodworth_, the widow gave the decedent's mother custody of the decedent's children and assigned the grandmother the widow's wrongful death right, with the understanding that the proceeds of the action were to be used for the benefit of the children. The grandmother, as guardian of the children, then sued the alleged tortfeasor. The case squarely presented the issue of the transferability of widow standing rights.

The trial court dismissed the action, based on lack of standing, and the Georgia Supreme Court affirmed. "Under our statutes, if there is a surviving widow the right of action is vested in her, and she alone may bring the suit; and this is not altered by the provision that the children shall share in the recovery." The _Bloodworth_ decision was premised on a strict construction of the wrongful death statute because the statute was in derogation of the common law. The court recognized, therefore, that "[t]he statute makes no provision for a case where the widow declines to sue, and gives her no right to transfer or assign the right to sue to another. We would not be authorized to read such provisions into the statute."

In 1949 the holding in _Bloodworth_ was extended by the Georgia Court of Appeals in _Odom v. Atlanta & West Point R.R._ In that

18. See supra note 7.
19. See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 401 (1950) (a complementary canon of construction, that remedial statutes should receive liberal construction, has been ignored by Georgia courts interpreting the wrongful death statute).
21. Id. at 195, 11 S.E.2d at 660.
22. Id. at 196, 11 S.E.2d at 660.
case, decedent's minor children attempted to sue by a next friend for their father's wrongful death. Their mother predeceased their father, who later remarried. The second wife, who had statutory standing under the guidelines discussed in *Bloodworth*, survived the decedent. Attempting to block the step-mother's wrongful death claim, the children filed a petition alleging that the stepmother and the defendant railroad fraudulently conspired to settle the claim for wrongful death and thereby "deprive[d] the children of their legal rights in the value of the life of their father."  

Essentially ignoring the plaintiffs' fraud allegations, the Georgia Court of Appeals held that even if the widow's decision not to sue was fraudulent, the *Bloodworth* rule, limiting who had standing to sue, controlled. Therefore, decedent's children could not circumvent the widow's statutory right to bring a wrongful death suit. Again, the court emphasized strict construction of the wrongful death statute. "The result is a harsh one as we see it but a correction of the injustice, if it is one, lies with the legislature which has either not been informed of the [*Bloodworth*] rulings or has by its inaction approved them."  

A later attempt to change judicially the *Bloodworth* rule occurred in 1978. The issue arose in a case construing Georgia's civil procedure rules. In *Lawrence v. Whittle*, the decedent's former wife attempted to bring a wrongful death action on behalf of a child fathered by the decedent. In this action, the former wife sought to join her ex-husband's widow as an involuntary plaintiff under former Ga. Code Ann. § 81A-119, now O.C.G.A. § 9-11-19.  

Noting that the joinder issue was one of first impression in this jurisdiction, the Georgia Court of Appeals relied on a federal case, *Coast v. Hunt Oil Co.*, for authority. The court in *Coast* interpreted Rule 19(a) of the Federal Rules of Civil Procedure, which was substantially the same as the Georgia Code section at issue in *Lawrence*. In addressing the standing issue in *Coast* the court stated:

24. 78 Ga. App. at 478, 51 S.E.2d at 466.
25. Id. at 478, 51 S.E.2d at 467.
26. Id. See 255 Ga. 138, 139, 345 S.E.2d 338, 339 (1986). Indeed, the legislature did not act, and the rule of *Bloodworth* and *Odom* was followed uniformly until it was expressly overruled in *Mack v. Moore* 256 Ga. 138, 345 S.E.2d 338 (1986).
30. 155 F.2d 870 (5th Cir. 1952).
The difficulty is that the plaintiff himself has no standing, joint or otherwise, to maintain this action. Rule 19(a) . . . makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff.\textsuperscript{31}

Thus, according to \textit{Coast}, a plaintiff who lacks standing to bring an action cannot "create" standing by requiring the statutorily authorized party to join in the suit.

In \textit{Lawrence}, the Georgia Court of Appeals, after adopting the \textit{Coast} rule, cited \textit{Bloodworth} and \textit{Odom} for the proposition that when a widow survives, the child lacks standing to bring the cause of action for the wrongful death of her father. The court, therefore, dismissed the former wife's action and held that "[j]ust as Coast had no standing to bring the action in the first place, neither [decedent's child] nor her mother could bring the suit involved here."\textsuperscript{32}

\section*{C. Judicial Construction of Widower's Standing Rights Before 1984}

During the time the section of the Georgia wrongful death statute authorizing the widow's cause of action was being construed as giving the widow, alone, the right to file suit, the section governing a widower's standing was uniformly construed to require the widower and the children to sue jointly. The landmark case on widower wrongful death standing rights is \textit{Hood v. Southern Ry.},\textsuperscript{33} decided in 1929.

In \textit{Hood}, the mother allegedly had been tortiously killed. Later, the widower father died without joining in a wrongful death suit with the children. Subsequently, the children sought to recover for the value of their mother's life.\textsuperscript{34} Based on a plain reading of the wrongful death act, however, recovery was barred. In reaching this result, the Georgia Supreme Court strictly construed the statute and held that it "expressly requires joint action by the husband

\textsuperscript{31} \textit{Lawrence}, 146 Ga. App. at 688, 247 S.E.2d at 214 (quoting \textit{Coast}, 195 F.2d at 872).

\textsuperscript{32} \textit{Lawrence}, 146 Ga. App. at 688, 247 S.E.2d at 214.

\textsuperscript{33} \textit{Hood v. Southern Ry.}, 169 Ga. 168, 149 S.E. 898 (1929).

\textsuperscript{34} \textit{Id.} at 168, 149 S.E. at 901 (Russell, C.J., concurring) (noting the anomaly that the statute's wording would not preclude suit by the children if their father, rather than their mother, had been tortiously killed, and the widow died prior to bringing a wrongful death cause of action).
and children, and excludes separate actions by them. Therefore, "if a joint action is not commenced by the husband and children while all are in life, the whole cause of action will abate on the death of either the husband or a child."

The Hood rule was changed by the legislature in 1939 with an amendment to the wrongful death statute allowing survival of the action if either the children or the widower died before suit was filed. There was no concomitant change, however, in Georgia courts' strict construction of the joint standing requirement.

Some moderation of the rule's harshness was affected by Georgia courts if one of the potential beneficiaries of recovery, either husband or child, were contributorily negligent in causing the wife's death. This amelioration was the result of a general relaxation of contributory negligence rules, in order to avoid a complete bar to any cause of action. Likewise, contributory negligence did not bar all recovery by cobeneficiaries of the wrongful death action. The contributorily negligent beneficiary, however, was still required to sue jointly as a plaintiff with the other beneficiaries.

II. RECENT DEVELOPMENTS

A. The 1984 Equal Protection Challenge

In 1984 the Georgia wrongful death statute contained two separate Code sections with standing rules that differentiated on the basis of the surviving spouse's sex. The standing rules treated chil-
dren who were similarly situated differently depending solely on the gender of the deceased parent. Because of the distinction based on the sex of the surviving spouse, the rules were ripe for an equal protection challenge alleging discrimination.

An equal protection challenge to the standing rules was raised in *Tolbert v. Murrell*. The *Tolbert* decedent was killed in an automobile accident. His widow sued, but later settled her wrongful death claim. Two of the decedent's children, by a previous marriage, then brought a wrongful death suit against the alleged tortfeasor. Surprisingly, the *Bloodworth* rule, which limited standing to the widow alone, and would have barred the children's claim, was not followed. The Georgia Supreme Court instead was persuaded by the children's argument that they were denied equal protection of the law as a result of the Georgia Code's conflicting standing rules:

Because the rights of children whose mothers have been wrongfully killed are protected by O.C.G.A. § 51-4-3 in ways in which the rights of children whose fathers have been wrongfully killed are not protected, we find that O.C.G.A. § 51-4-2 deprives children of deceased fathers who leave widows equal protection of law in violation of Art. I, Sec. I, Par. II of our Constitution.

The court identified four areas of equal protection disparity which existed between the two Code sections, including the standing provisions. The court held that no rational basis existed for the differing classifications; therefore, one of the sections was necessarily unconstitutional. The court selected O.C.G.A. § 51-4-3, which required joint widower and children standing and provided the most favorable recovery for surviving children, as the preferable rule. "Henceforth, children of deceased fathers who leave widows shall be afforded the rights afforded children under O.C.G.A. § 51-4-3."

*Tolbert* effectively deleted O.C.G.A. § 51-4-2 from the wrongful

42. Id. at 566, 322 S.E.2d at 487.
44. Tolbert, 253 Ga. at 571, 322 S.E.2d at 492.
45. Id. at 570, 322 S.E.2d at 491 (the other three differences were: (1) widower's children, but not widow's children, could reject settlement; (2) widower's children receive recovery directly, but widow's children must rely on widow to distribute the proceeds; (3) widower's children share on a per capita basis with widower, but widow could never receive less than one-fifth of the recovery).
46. Id. at 571, 322 S.E.2d at 492.
death statute and substituted “spouse” for “widower” in O.C.G.A. § 51-4-3. Although the court did not specifically overrule Bloodworth v. Jones⁴⁷ and its progeny, these cases were overruled by implication because of their dependence on O.C.G.A. § 51-4-2.

A year later the court was asked to apply Tolbert’s holding retroactively in General Motors Corp. v. Rasmussen.⁴⁸ In that case, the husband was killed in an automobile accident, but his wife settled the wrongful death claim prior to the decision in Tolbert. One of decedent’s daughters sought to intervene in the suit and set aside the court approved settlement.⁴⁹ The supreme court declined the request, opting for a prospective application of Tolbert.

The court concluded that the usual wrongful death suit would not, as was the situation in Tolbert and Rasmussen, involve a surviving spouse and surviving children with conflicting interests. Because cases such as Tolbert and Rasmussen were a minority, the court believed “the interest in furthering the purpose underlying the ruling [of Tolbert] would not be greatly fostered by retroactive application.”⁵⁰ Tolbert was therefore made applicable to causes of action accruing after November 27, 1984, the date the motion for rehearing in Tolbert was denied.

In discussing the equal protection issue the supreme court in Rasmussen stated that “the constitutional infirmity in O.C.G.A. § 51-4-2 lay not in a failure to treat children on equal footing with their parents, but in the failure of the legislature to put all children on equal footing with other children.”⁵¹ The rationale used to limit Tolbert became an important aspect of the 1986 holding in Mack v. Moore,⁵² although Tolbert was made moot by 1985 legislative action.

B. The 1985 Legislative Amendment

In 1985 the Georgia Legislature acted to cure the constitutional infirmity identified in Tolbert, thus making the Tolbert rule short-lived. The Georgia General Assembly repealed O.C.G.A. § 51-4-3 and made the wording of O.C.G.A. § 51-4-2 gender neutral. This legislative action effectively reinstated Bloodworth v. Jones.⁵³

⁴⁹. Id. at 545, 340 S.E.2d at 588.
⁵⁰. Id. at 546, 340 S.E.2d at 589-89.
⁵¹. Id. at 546, 340 S.E.2d at 589.
making its rule applicable to all spouses, not just widows. As a result, from April 10, 1985, the date the new law was effective, the surviving spouse had the sole standing right to bring the cause of action when there also were surviving children.

No record of the legislative history, findings, or hearings exists pertaining to this amendment. It is therefore difficult to surmise the motive behind the change. Perhaps the legislature believed the spouse more capable of prudent control of the wrongful death suit and the resultant proceeds. Additionally, because the children are entitled to share in the wrongful death action proceeds under O.C.G.A. § 51-4-2, as determined by the Georgia law of intestate succession, their rights are safeguarded. The legislature presumably believes this provision of the statute adequately protects the children’s rights.

The 1985 legislative session also accomplished changes in Georgia’s law of descent and distribution, the statute which determines beneficiary shares under O.C.G.A. § 51-4-2. Previously, the law of descent differentiated by gender as to a spouse’s portion of recovery of the intestate estate. The former Code section governing the minimum widow share of the estate was increased from one-fifth to one-fourth, and the section’s wording was made gender neutral. At the same time, the former section governing widower intestate recovery was repealed. This reform parallels the reform made in the wrongful death statute. The 1985 change in the intestate succession law and the reinstatement of O.C.G.A. § 51-4-2 combined to give the surviving spouse sole standing to bring the wrongful death cause of action and made the spouse accountable to the decedent’s children for up to three-fourths of any damages recovered.

C. Mack v. Moore

In 1986, the Georgia Supreme Court added a gloss to the 1985 legislative amendment by creating a duty for the spouse to bring a wrongful death action as a representative of the decedent’s chil-

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55. The legislature may have been aware that any gender-based statute was unlikely to be sustained by the Georgia Supreme Court if challenged on equal protection grounds. E.g., Insurance Co. of North America v. Russell, 246 Ga. 269, 271 S.E.2d 178 (1980) (gender-based benefit distinction in workers’ compensation statute unconstitutional); accord Tolbert v. Murrell, 253 Ga. 565, 322 S.E.2d 487 (1984).

56. See supra text accompanying note 14.
dren. Thus, after Mack v. Moore, the surviving spouse not only is accountable to the decedent's children for recovered wrongful death damages, but also has a duty to initiate the suit.\textsuperscript{57}

This duty was imposed as a result of a suit arising out of a motorcycle accident. On August 1, 1985, Eric Harris was operating his motorcycle northbound on Church Street in Decatur, Georgia. Sidney Moore was operating his automobile southbound on Church Street. A collision between the two vehicles occurred, causing Harris' death.

Carolyn Mack cohabited with Eric Harris from 1980 until his death. Their child, Nickola Livetta Mack, was born on November 6, 1982. Carolyn Mack brought suit, as next friend of Nickola, to recover from Sidney Moore for the alleged wrongful death of Eric Harris.\textsuperscript{58}

Although living with Carolyn Mack, Eric Harris was still legally married to Zenovia Harris when he died. One child, Durrell Jabbar Harris, was born of this marriage. Eric and Zenovia Harris had voluntarily separated in 1979, but were never divorced or legally separated. Based on her petition to the probate court, Zenovia Harris was appointed administratrix of the estate of Eric Harris. Subsequently, Zenovia Harris moved to intervene in the DeKalb County Superior Court suit by Carolyn Mack against Sidney Moore and also to dismiss Carolyn Mack's claim.\textsuperscript{59} The trial court granted both of Mrs. Harris' motions, basing its decision on the 1985 reinstatement and amendment of O.C.G.A. § 51-4-2.\textsuperscript{60} Ms. Mack was allowed to appeal directly to the Georgia Supreme Court.\textsuperscript{61}

Apparently mindful of the success of the equal protection challenge in Tolbert v. Murrell,\textsuperscript{62} Mack's counsel attempted to establish that an equal protection infirmity still existed in O.C.G.A. § 51-4-2, as amended in 1985. Mack argued that the statute unreasonably differentiated between similarly situated classes of potential beneficiaries of the wrongful death proceeds by affording standing to spouses, but not to children. Further, Mack contended that the distinction between children and spouses in O.C.G.A. §

\textsuperscript{57} 256 Ga. 138, 345 S.E.2d 338 (1986).

\textsuperscript{58} See Supplemental Brief in Support of Denial of Intervenor's Motion to Dismiss and Motion to Intervene at 1-2, Mack v. Moore, 256 Ga. 138, 345 S.E.2d 338 (1986).

\textsuperscript{59} Id.

\textsuperscript{60} Mack, 256 Ga. at 138, 345 S.E.2d at 338.

\textsuperscript{61} O.C.G.A. § 5-6-34(b) (Supp. 1987) (authorizes trial judge to certify to supreme court that immediate review is required because of the importance of the issue decided).

51-4-2 lacked a rational basis and was therefore unconstitutional. "Those who are married to the decedent have a cause of action; those who are children of the decedent have none. This kind of arbitrary and unreasonable classification violates the principle of equal protection of the law." 83

The Georgia Supreme Court disagreed, holding:

There is no denial of equal protection in the statute's giving greater rights to surviving spouses than to children to sue for wrongful death. There is a rational basis for the differentiation in the need to designate a representative of the beneficiaries of any recovery which the statute provides shall be distributed between the surviving spouse and the children. 84

This result was foreshadowed in General Motors Corp. v. Rasmussen, when the supreme court refused to make the Tolbert holding retroactive based on the court's conclusion that the equal protection clause required only that similarly situated children be treated the same, but that spouses and children need not be treated the same. 85

Mack also argued that although children were entitled to a distributive share of the wrongful death recovery under O.C.G.A. § 51-4-2, the remedy was illusory because the children's recovery was totally dependent upon the spouse's willingness to proceed with the claim. In other words, Mack asserted that because of the Bloodworth v. Jones 86 line of cases, equal protection was effectively denied to children of the decedent when a spouse survived. The court was more receptive to this argument, holding:

Although the statute confers exclusive standing upon the surviving spouse, it does not vest in the spouse all of the rights to the claim. . . . A duty is owed to the children and part of that duty is to act prudently in asserting, prosecuting and settling the claim. The failure to do this could subject the spouse to liability for breach of duty as a representative. We disapprove the holding in the line of cases represented by Bloodworth v. Jones, to the extent they conflict with this holding. 87

64. Mack, 256 Ga. at 138, 345 S.E.2d at 339.
65. 255 Ga. 544, 340 S.E.2d 585 (1986); see also supra notes 48-52 and accompanying text (equal protection does not require similar standing rules for spouses and children).
67. Mack, 256 Ga. at 138-39, 345 S.E.2d at 339 (citation omitted). Justice Gregory disagreed, stating that Bloodworth should not be overruled and that the statute vested in the surviving spouse all rights to decide whether to bring a wrongful death action.
D. Present Georgia Wrongful Death Standing Rules

As a result of Mack and other recent developments, Georgia law presently has four different rules defining who has standing to bring the wrongful death action when both a spouse and children survive a decedent's tortious death. The application of these differing rules depends on when the cause of action arose.

1) Before November 17, 1984, a widow may sue alone, but a widower must sue jointly with the children.68
2) Between November 17, 1984, and April 9, 1985, the surviving spouse and the children must sue jointly.69
3) Between April 10, 1985, and July 2, 1986, the spouse alone may sue, with no duty owed to the surviving children to bring the cause of action.70
4) After July 2, 1986, the spouse alone may sue but the standing right imposes a duty as representative to bring the cause of action on behalf of all the decedent's children.71

Arguably, Mack could be applied retroactively to April 10, 1985, the effective date of the 1985 amendment, thus eliminating the third category. The representative duty announced in Mack was read into the statute and may be viewed judicially as if written in by the legislature in 1985. No suit has yet raised the issue of the retroactive application of Mack.

An attorney representing a client whose spouse was tortiously killed after April 10, 1985, should advise the client of the spousal duty to bring the action to avoid any possible malpractice allegation. Likewise, an attorney representing the children of a parent killed after April 10, 1985, but before July 2, 1986, may be able to persuade a recalcitrant spouse to initiate a wrongful death suit by arguing Mack should be applied retroactively. In any event, an attorney representing any of the decedent's possible wrongful death beneficiaries should be aware of each of the above mentioned rules, because the requirements vary widely. Additionally, to effectively assure final settlement the attorney representing the tortfeasor should require release of the wrongful death claim from the decedent's spouse and all decedent's children.

Id. at 139 (Gregory, J., concurring specially).
68. O.C.G.A. §§ 51-4-2 to -3 (1982).
70. O.C.G.A. § 51-4-2 (Supp. 1987).
III. REMAINING PROBLEMS WITH STANDING RULES

A. Possible Equal Protection Argument

The Mack court strongly emphasized the conclusion that there was no equal protection denial between the classes of spouses and children because it was reasonable to designate only one representative for recovery of damages. In General Motors Corp. v. Rasimusen the supreme court stated that the equal protection inequity of former O.C.G.A. §§ 51-4-2 and 51-4-3 lay in the sections' unequal treatment of similarly situated classes of children, not in its treatment of spouses and children as separate classes.

It remains arguable that amended O.C.G.A. § 51-4-2, as interpreted in Mack, denies equal protection to similarly situated children. Under the present rule, when the parent who was tortiously killed was the only living parent and has no surviving spouse, surviving children have standing to sue for wrongful death. On the other hand, children whose deceased parent leaves a surviving spouse lack standing. The courts, therefore, may be receptive to an equal protection argument which stresses that similarly situated children are not treated the same under present Georgia law.

B. The Spousal Duty and Due Process

The supreme court denied a due process challenge to O.C.G.A. § 51-4-2, as amended in 1985, in O'Kelley v. Hospital Authority of Gwinnett County. In that case, children of the decedent's first two marriages brought an action against the alleged tortfeasors to recover the value of their father's life. Decedent's third wife had not initiated a wrongful death action. Defendants' motion for summary judgment was granted based on the children's lack of standing. The trial court held that O.C.G.A. § 51-4-2 vested the cause of action in decedent's third wife, not his children.

On appeal, the supreme court affirmed and disagreed with the children's argument that the distributive share of wrongful death recovery, afforded children by amended O.C.G.A. § 51-4-2, gave

73. But cf. Tolbert v. Murrell, 253 Ga. 566, 322 S.E.2d 487 (1984) (court emphasized that the constitutional infirmity of the widow recovery section versus the widower recovery section was gender based). When recovery differs for children depending on whether a spouse survives the parent's tortious death, no gender-based classification exists.
74. 256 Ga. 373, 349 S.E.2d 382 (1986).
75. Id.
them a property right which could not be vindicated under the statute’s present standing provisions. The children alleged that the standing limitation denied them due process of law. In effect, they argued the statute afforded a right without a remedy because the standing rules barred them from initiating the wrongful death action.

The court, however, concluded that Mack v. Moore was controlling. Furthermore, the court found that the duty imposed in Mack “adequately protects any property interest that children might have in an action for a parent’s wrongful death.” The representative duty announced in Mack was the means by which the court believed the children could effectuate their vested property right. However, the court offered no further elaboration of the parameters of the spouse’s representative duty.

C. Adverse Interests and Judicial Economy

The Mack holding is laudable because it recognizes that a provision in the wrongful death statute giving children a portion of recovery is useless if the children cannot be assured of a means to effect recovery. The Bloodworth v. Jones and Odom v. Atlanta and West Point R.R. line of cases worked undue hardship when the decedent had been married more than once and had children from a previous marriage or out of wedlock. The supreme court addressed that hardship by reading into the wrongful death statute a spousal duty to bring the cause of action.

76. Id. at 373-74, 349 S.E.2d at 382.
78. O’Kelley, 256 Ga. at 374, 349 S.E.2d at 383. See also id. (Weitner, J., concurring specially) (in a proper case, for example, when the statute of limitations is about to run against the tortfeasor, a superior court’s equitable powers permit action, upon application, to “fairly protect the substantive and procedural rights of any party at interest”).
80. 78 Ga. App. 477, 51 S.E.2d 466 (1949), aff’d on other grounds, 208 Ga. 45, 64 S.E.2d 889 (1951).
81. Nowhere in the Mack opinion does the court refer to strict construction of a statute in derogation of the common law. Earlier Georgia case law interpreting the wrongful death statute stressed the necessity of strict construction of the statute’s wording. See supra text accompanying notes 18-26 & 35-36. Indeed, to have stressed strict construction would have been contradictory since a duty was announced in Mack that was plainly not present in the statute’s actual wording. This shift in emphasis may be attributed to the fact that the statute had been established for over one hundred thirty-six years before the Mack holding. Equally important is the relevance of the equal protection argument in the latter half of twentieth century American jurisprudence, not only in Georgia, but in federal courts as well. See, e.g., Insurance Co. of
The major problem with the Mack holding is it assumes that a duty to bring the wrongful death cause of action sufficiently addresses the childrens' interests, but it fails to recognize that adverse interests may exist between the surviving spouse and the decedent's children. The incidence of divorce, remarriage, adoption, children born out of wedlock, and advances in reproductive technology affect many Georgia families. In some situations, these factors would leave a surviving spouse with interests directly in conflict with those of the decedent's children. The conflict is especially apparent if the deceased had never revealed the existence of other children to the spouse. The surviving spouse in such a case would rarely be the best representative of such children when he or she may not be aware, or may resent, that the child exists. With the surviving spouse representing the child, the same difficulty could occur in situations of artificial reproduction, in which the child conceived may have many different legal parents depending on the circumstances surrounding conception. 82

Recent Georgia case law has afforded children born out of wedlock the same rights as children born of a marriage. 83 In Edenfield v. Jackson 84 the supreme court held that O.C.G.A. § 51-4-2 accords children born out of wedlock the right to a distributive share of the wrongful death recovery. It seems anomalous to assign a surviving spouse, who may have disputed the child's paternity or maternity and the right to a distributive share, a duty to represent that same child in a wrongful death suit.

Additionally, litigation to determine the extent of spousal duty potentially encourages familial discord. Mack illustrates that intra-

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familial dispute may arise as the result of pursuing adverse interests. For example, at the same time that Zenovia Harris was required by law to act as Nickola Mack's representative in the wrongful death action, Zenovia Harris as administratrix of the estate of Eric Harris, sued Carolyn Mack, Nickola's mother, alleging bad faith removal of probate assets from the shared apartment of Carolyn Mack and Eric Harris.\textsuperscript{85} The \textit{Mack} duty requires the spouse to act "prudently in asserting, prosecuting and settling the claim."\textsuperscript{86} If Carolyn Mack felt Zenovia Harris did not properly settle the wrongful death claim, a \textit{Mack} suit could possibly ensue. Additionally, O.C.G.A. § 51-4-2 authorizes Carolyn Mack, on behalf of Nickola, to bring a suit if Zenovia Harris refused to turn over Nickola Mack's derivative share of any wrongful death recovery. Stubborn litigiousness is fostered by the availability of the separate suits.

Recently, in \textit{Yost v. Torok},\textsuperscript{87} the Georgia Supreme Court expressed a desire to conclude related actions involving malicious abuse of process in the same forum as the original suit. In discussing the former requirement that malicious abuse of process claims must be brought in a separate suit, the court noted that this "results in substantial delay and additional expense to all parties, as the factual matters must be litigated, all over again, before another tribunal. This is a burden for bona fide litigants—wronged plaintiffs and wronged defendants—because they must bear the costs and delays of additional litigation."\textsuperscript{88} This rationale applies equally to the necessity of bringing a subsequent action for breach of spousal duty and to the necessity of bringing a subsequent derivative share of recovery suit.

When the \textit{Mack} spousal duty is breached, or when the spouse refuses to account for a derivative share of recovery, the wronged child often will be a minor. Since the Georgia statute of limitations for torts does not begin to run until the minor reaches majority,\textsuperscript{89} protracted litigation may result, undermining the goal of timely resolution of disputes. If a child had standing to join in the original

\textsuperscript{86} Mack v. Moore, 256 Ga. at 139, 345 S.E.2d at 399.
\textsuperscript{87} 256 Ga. 92, 344 S.E.2d 414 (1986).
\textsuperscript{88} Id. at 93, 344 S.E.2d at 416.
\textsuperscript{89} O.C.G.A. § 9-3-90 (Supp. 1987); but see O.C.G.A. § 9-3-73 (Supp. 1987) (limiting minor's ability to bring medical malpractice action to within two years after reaching age five and imposing repose and abrogation in other circumstances well before the previous applicable time limit).
wrongful death suit, the problem could be avoided by the appointment of a guardian ad litem to represent the child’s interest.\textsuperscript{90}

In \textit{General Motors Corp. v. Rasmussen},\textsuperscript{91} the supreme court decided that \textit{Tolbert v. Murrell}\textsuperscript{92} did not apply retroactively, reasoning, “[w]e cannot conclude that most children involved in actions for the wrongful death of a father have interests antagonistic to the interest of the father’s widow.”\textsuperscript{93} Although this reasoning may be correct in most circumstances, the cases most likely to be litigated are those involving adverse beneficiary interests. To allow a subsequent spousal duty suit permits the minority of cases to consume a disproportionate share of scarce judicial resources. In the majority of adverse beneficiary interest cases, joinder could be accomplished with minimum effort.

Most likely, the duty of the surviving spouse announced in \textit{Mack} will be held to be a duty to act reasonably to present the claim. Inevitably, suits will be brought alleging breach of that duty. These suits will waste court resources because they require litigation of issues which could have been easily adjudicated in the original wrongful death suit.

Presumably, the wrongful death tortfeasor and the tort liability insurance company would not be liable for breach of the spousal duty, absent their own fraud or misrepresentation. The errant spouse is unlikely to carry insurance to cover this type of tort. The result may often be a valid claim and an indigent defendant, leaving the wronged children without compensation; this is the same result accomplished by the rule of \textit{Bloodworth v. Jones}.\textsuperscript{94} It would be preferable, in the interest of economic efficiency, to assure the children a direct action against the tortfeasor, who is much more likely to be insured for wrongful death liability than is the surviving spouse for breach of representative duty.

\textbf{IV. Suggestion for Legislative Action}

A possible solution to rectify problems remaining after \textit{Mack} would be legislation requiring all potential beneficiaries of the wrongful death recovery to be joined as plaintiffs in the wrongful

\textsuperscript{90} O.C.G.A. § 29-4-4 (1986) (authorizes appointment of guardian of the person or property of minor by judge of probate court where minor is domiciled).
\textsuperscript{91} 255 Ga. 544, 340 S.E.2d 588 (1986).
\textsuperscript{93} \textit{Rasmussen}, 255 Ga. at 546, 340 S.E.2d at 589.
\textsuperscript{94} 191 Ga. 193, 11 S.E.2d 658 (1940).
death action. The one interest all such beneficiaries have in common is to recover from the tortfeasor. With all beneficiaries present in the same action, a more just evaluation of the value of the decedent's life would be assured. Any adverse beneficiary interests would be adjudicated promptly, rather than continuing into another suit alleging breach of a duty to represent the children's interest in the wrongful death lawsuit.

Georgia has a tradition of joint standing for widowers and chil-

95. Following is a proposed statute creating joint children and surviving spouse standing:

O.C.G.A. § 51-4-2. Persons entitled to bring action for wrongful death of spouse or parent; survival of action; disposition of recovery; joinder of cobeneficiaries; effect of final judgment; exemption of recovery from liability for decedent's debts.

(a) The surviving spouse and decedent's child or children, whether minor or sui juris, born of a marriage or born out of wedlock, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence.

(b)(1) The surviving spouse and decedent's child or children, whether minor or sui juris, born of a marriage or born out of wedlock who are alive at the time the action is brought shall bring an action jointly and not separately, with the right of survivorship of the action if any of the parties dies pending the action. The interest of any deceased beneficiary in recovery under subsection (a) shall lapse upon death.

(2) Notwithstanding paragraph (3) of this subsection, a surviving spouse shall receive no less than one-fourth of such recovery as a spousal share.

(3) Any recovery under subsection (a) shall be distributed subject to the law of descents, as if it were personal property descending from the decedent to the surviving spouse and the children, if any, provided that any recovery shall be equally divided, share and share alike, between the surviving spouse and the children per capita.

(4) If any one or more of the surviving spouse and children desire to bring an action under subsection (a) of this Code section, he or she or they may file the action and join the remaining individuals comprising the surviving spouse and children as provided in Code Section 9-11-19(a) and (c). If any of the remaining individuals comprising the surviving spouse and children may not be so joined in the action, those present shall hold any recovery subject to the right of the absent party or parties to a proportionate part of the recovery as provided in paragraphs (2) and (3) of this subsection. After final judgment, any person not a party plaintiff shall have no further right of action against the alleged tortfeasor.

(5) If any one or more of the individuals comprising the surviving spouse and children is a minor, he or she or they may sue or be joined as provided in paragraph (4) of this subsection through a guardian of the minor and a guardian ad litem appointed as provided by law.

(c) A recovery under subsection (a) of this Code section shall not be subject to any debt or liability of the decedent.

96. O.C.G.A. § 51-4-2(a) (Supp. 1987) (authorizing recovery of "the full value of the life of the decedent, as shown by the evidence"). If all beneficiaries are present in the same action a more proximate estimate of support obligations is possible because evidence from all beneficiaries will be available for consideration.
dren under former O.C.G.A. § 51-4-3 which would ease any transitional problems if the above suggested joinder change were enacted. Indeed, the joint action was the remedy fashioned by the Georgia Supreme Court in Tolbert v. Murrell. The standing rules should be modified legislatively to allow the spouse at least one-fourth of any recovery. Also, there should be clear wording regarding the disposition of the share of a beneficiary who dies pending the action. Either the deceased beneficiary's estate could succeed to the interest or the interest could be held to lapse upon death with the other beneficiaries' share thereby increased proportionately.

The means to accomplish forced joinder exists in O.C.G.A. § 9-11-19. In Lawrence v. Whittle the court disapproved of joinder when the party seeking joinder lacked standing to bring the wrongful death action. Legislative creation of joint standing would eliminate many of these concerns and by implication overrule Lawrence. Also, the provisions of O.C.G.A. § 9-11-19 are available to the defendant and would further assure final adjudication in one forum.

CONCLUSION

When a tortious death has occurred and the decedent is survived by a spouse and children, the attorney bringing a wrongful death action in Georgia should be aware of the differing standing rules now extant. These rules depend on the date the cause of action arose. The attorney should be especially cautious when the decedent parented children either during a previous marriage or out of wedlock.

Until the extent of the Mack spousal duty is more clearly defined by the supreme court or the legislature, care should be taken when representing the spouse to ascertain all the decedent's children. Therefore, an investigation, independent of information supplied by the spouse, may be warranted. In any event, the attorney

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98. E.g., Davis v. Sanders, 123 Ga. 177, 51 S.E. 288 (1905) (if class gift involved the interests of those beneficiaries who predecease testator lapses upon their death with the other members of the class increasing proportionately their share of the remainder). The proposed statute, supra note 95, expresses a preference for lapse.
100. Stapleton v. Palmore, 250 Ga. 259, 261, 297 S.E.2d 270, 272 (1982) (joinder provisions are available to a defendant who would risk "incurring multiple or inconsistent obligations" if other parties were not present to adjudicate their interests).
101. See supra text accompanying notes 68-71.
should advise the spouse of his or her obligation to take appropriate steps to satisfy the representative duty imposed by Mack.

The legislature should act to afford standing to the spouse and children jointly to bring the wrongful death cause of action. The principal interest all beneficiaries have in common is recovery from the tortfeasor. When beneficiary interests are adverse, joint standing accomplishes a timely and efficient resolution of the adversity.

The cause of action for wrongful death has existed in Georgia for over one hundred and thirty-six years. This longevity has legitimized the action to the extent that it should no longer be construed strictly, merely because it derogates the common law. The Georgia Supreme Court in Mack apparently recognized that a literal interpretation of the statute's wording is no longer required.

The judicial flexibility recognized in Mack, however, cannot solve all the problems of spousal standing. The legislature has an opportunity to remedy this situation. The Georgia rules on standing to bring the wrongful death cause of action have changed three times since 1984. Therefore, it cannot be said that it would disrupt legal continuity to accord legislatively joint spouse and children standing. In fact, legislative action could end the ongoing uncertainties regarding who has standing to sue for the wrongful death of a parent or spouse. A carefully drafted statute would establish a rule that could last indefinitely.

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