

# Tennessee's New Adoption Law

*By Dawn Coppock and  
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## What You Need to Know About the 2018 First in Adoption Act

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On May 3, 2018, Gov. Bill Haslam signed into law a legislative package that brings significant changes to Tennessee's adoption code.<sup>1</sup> This legislation was commonly referred to as the "First in Adoption Act" by its legislative sponsors.<sup>2</sup>

The "First in Adoption Act" (FIAA) was broadly popular, passing Tennessee House and Senate subcommittee, committee and floor votes without dissent.

This article will explore the impetus behind FIAA, as well as the significant changes that it has made to the Tennessee adoption code, effective July 1, 2018.

**Legislative Changes.** The most significant changes brought by FIAA are amendments affecting several termination grounds, a narrowed definition of "putative father," and a new surrender form.

## Changes to Termination Grounds

For an adoption to take place in Tennessee, it is necessary for the parental rights of all legal parents, guardians and putative fathers to be voluntarily relinquished or terminated involuntarily.<sup>3</sup> Involuntary terminations require the petitioner to prove by clear and convincing evidence that at least one ground exists to terminate parental rights and that termination serves the child's best interest.<sup>4</sup>

### 1. Abandonment Ground:

**Willfulness.** “Abandonment” is the most common ground alleged in termination actions.<sup>5</sup> “Abandonment” has several definitions in the definitional section of the adoption code,<sup>6</sup> but generally speaking, proof of abandonment has required the proof of a “willful” failure either to support or visit a child for a period of four consecutive months. Tennessee appellate courts have extended the proof of willfulness to require that a petitioner prove what the parent's income was and what the parent's expenses were during the applicable time period.<sup>7</sup> This is often quite difficult, particularly since it is the parent, not the petitioner, who possesses the evidence.

FIAA makes the absence of willfulness an affirmative defense and removes it as an element of the primary abandonment case. This cures the problem of discovering the intentions, income and life circumstances of a parent who is either entirely absent or uncooperative with discovery. Parents in abandonment cases are rarely present or cooperative with discovery. In contrast, a parent who has arguably failed to support or maintain contact with their child in the applicable four-month period of time retains the ability to defeat a finding of abandonment by explaining that failure with evidence of their intentions, income and

life circumstances. While the petitioners must prove the parent's failure to support or visit by clear and convincing evidence, the parent need only prove the affirmative defense of absence of willfulness by a preponderance of the evidence.

**2. Abandonment Ground: Cases Involving a Total Failure to Support or Visit.** FIAA also addresses abandonment cases involving a parent's total failure to support or visit the child during the applicable four-month period.

While some appellate decisions have excused a parent's complete nonpayment of child support based upon claims of financial pressures or because of incomplete evidence of a parent's financial circumstances,<sup>8</sup> the relevant question here is not whether such a parent could pay significant or guideline child support, but whether the parent could pay anything at all. Likewise, while some parents certainly face challenges in visitation, when no visits at all are made, the appropriate question will be whether even one visit was beyond the capacity of the parent during the applicable four-month period. Certainly, this is a relevant question for the parent who proves resourceful in securing time and transportation for other errands and yet does not visit the child.

Accordingly, FIAA requires that the parent prove no ability to pay to defend against abandonment for failure to support based on four months with absolutely no payments. Likewise, when no visits at all are made in the applicable period, the parent must affirmatively prove an inability to make any visits. It is important to note, however, that these requirements only apply where there have been no payments and/or no visits. If there have been any payments or any visits during the applicable period, then the prior analysis of whether the visits and/or support was

merely “token” would apply.

**3. Abandonment Ground: Amended Pleadings.** FIAA also adjusts the timing of the relevant four-month period for the abandonment ground. Current law looks to the period “immediately preceding the filing of the proceeding or pleading to terminate parental rights.”<sup>9</sup> In a 2017 case, the Tennessee Court of Appeals held that an amended termination petition was not a “pleading” within the meaning of the statute and therefore a new or additional period of abandonment could not occur after the filing of the initial termination petition.<sup>10</sup>

Often when a parent continues to fail to visit or support after an initial petition for termination is filed, an amended petition is filed to allege a post-petition period of abandonment. Amended petitions create consequences for parents who are litigating but otherwise fail to undertake or maintain parental engagement with the child. Certainly, both petitioners and respondents have more information as a result of the filing of an initial termination petition. All parties clearly know the location of the caretaker and the child. Parents know that parental rights are at risk and that visits and support are important. If the petitioners did not have custody of the child for four months immediately prior to the filing of the initial petition, they may not have a cooperating witness to testify about the entire four-month pre-petition period, but if they amend their petition they can certainly testify with authority about all that has been requested or offered during the post-petition period.

FIAA adds the specific language “petition or any amended petition” to revive and clarify the original statutory language and affirm that parental responsibilities are not stayed while a termination petition is pending.

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**4. Abandonment Ground: Suitable Home.** A second definition of “abandonment” under the Tennessee adoption code is limited to children in agency custody who have been found to be dependent and neglected. In such a situation, abandonment can be found when a parent has failed to make reasonable efforts to “maintain a suitable home.” This is the case where a child has been removed from a parent’s home on a finding that a child is dependent and neglected and for a period of four months following removal, the Department of Children’s Services or the applicable agency has made reasonable efforts to reunite parent and child, but the parent has failed to make reciprocal efforts to establish a suitable home for the child.

Despite recognizing in other cases that a home is not just four walls of physical structure but is an environment that nurtures or supports a child, the appellate courts have held that this ground may only be used against a parent in whose physical home the child lived at the time of removal.<sup>11</sup> This interpretation holds the parent attempting to care for the child to greater account for removal than the one who left the child entirely. Arguably, the court’s current interpretation blames the removal entirely on the better of two bad parents. This interpretation also relieves both parents of the responsibility for providing a suitable home when they both left their child in the home of an unfit non-parent.

In addition, appellate decisions have required that the dependency finding be final, meaning that it has gone through all phases of juvenile court and appeal proceedings.<sup>12</sup> In contrast, most practitioners believe that the very first removal should trigger the relevant period, to recognize the child’s pressing need to be promptly reunified with the parent in a safe home or to find permanence quickly elsewhere.

FIAA amends this ground to apply to both unfit parents, rather than

protecting one over the other, and it will be applicable at the first removal order, as most believe the legislature originally intended.<sup>13</sup>

**5. Persistent Conditions Ground.** *Tenn. Code Ann.* §36-1-113(g)(3) provides a separate ground for termination when a child has been removed by court order from the home for six months and the conditions that led to the removal, or other conditions that prevent reunification, still persist. Case law has interpreted this ground to be available only after the child has been

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adjudicated to be dependent and neglected, which may be a year or more after the child’s actual judicial removal from the home on an initial or preliminary order. As in the “suitable home” abandonment ground discussed above, this ground has been applied only to the parent for whom the child is removed, again exempting possibly the more reprehensible of two bad parents.<sup>14</sup> As stated above, this is a judicial gloss on the statutory language, and again it is reversed by FIAA. Likewise, the judicial requirement that the removal must no longer be subject to appeal is eliminated. Permanency for children will no longer have to wait until all juvenile and appellate proceedings produce a final dependency and neglect finding, a process that can take years, not six months.

In addition, this ground may be pled before the six months have completely transpired, so long as the six months have elapsed before the first trial setting of the termination of parental rights. The legislative intent here is to shorten the time a child must wait when the

prospects of a parent’s remediation are poor. However, a previously unmotivated parent could find motivation, possibly prompted by the termination filing, and cure the alleged persistent conditions during the remainder of the six-month period.

**6. Severe Child Abuse Ground.** *Tenn. Code Ann.* §36-1-113(g)(4) provides a termination ground when a parent or guardian has committed severe child abuse “against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of a parent or guardian.” FIAA broadens the scope of this termination ground so that it now applies to a parent or guardian who has been found to have severely abused *any* child.

Certainly if the abuse is so remote in time or circumstance or if the parent’s relationship with the subject child is so positive that the trial court decides that the risk of such continued relationship is outweighed by the quality of the relationship, the trial court can decline to terminate parental rights, not for a lack of grounds, but because termination of parental rights is not in the best interest of the child.

## Putative Father Changes

Putative parentage presents a morass of competing interests in the adoption context. When the mother is cooperative, the biological father can work with her to have parentage established by genetic testing and together they can legally establish the biological father as the legal father by one of several methods. When the mother is uncooperative but her whereabouts are known, the biological father can file a parentage action and obtain the same result with the assistance of the court.

A practical problem for biological fathers arises when parentage is undetermined and the mother’s location is unknown to the father so he cannot pursue the mother’s cooperation or the court’s assistance. Tennessee maintains a

putative father registry,<sup>15</sup> so possible biological fathers who want to assert parentage can be found by adoption petitioners without the assistance of a child's mother and even in the face of overt deception by the mother. To find such men, petitioners in adoption and termination actions must check the Tennessee putative father registry for men who have made a filing to indicate their intention to claim paternity of a child. The results must be promptly reported to the court.<sup>16</sup> In Tennessee, potential fathers can place themselves on the registry while a child is expected and until a child is 30 days old.<sup>17</sup> Tennessee has had a putative father registry since 1996.

Many other states maintain similar putative father registries. However, prior to FIAA Tennessee petitioners were only obligated to check the Tennessee putative father registry. FIAA requires that petitioners also check the putative father registries of other states "if the petitioner knows or has reason to believe that the mother was living or present in another state at the time of the child's conception." This change is intended to expand protection for unwed fathers who may not know the mother or child is in Tennessee but who actively seek parental rights, and it also increases the likelihood that the children of these men will know their fathers.

FIAA also makes a significant change as to who qualifies as a putative father. The issue is important, because under *Tenn. Code Ann.* §36-1-117(a) legal parents, guardians and putative fathers are the only parties whose rights must be surrendered or terminated before an adoption can take place.

FIAA narrows the definition of putative father to exclude men whose only connection to the child is being named as biological father by the mother.

A putative father continues to include any man who:

- Has filed a petition to establish paternity of the child;
- Has filed a notice with the putative father registry;
- Has claimed that he believes that

he is the child's biological father;

- Is openly living with the child, holding himself out to be the child's father; or
- Has entered into a permanency plan or plan of care for the child.<sup>18</sup>

The men who are removed from putative father status are those who are identified by the mother, but who have themselves taken none of the enumerated actions. The previous definition often elevated the status of men beyond their level of interest and created a disincentive for mothers to name potential fathers. Adopted children benefit from the social and medical history that the mother may be able to provide about the child's father, so a disincentive to identify the father does not serve the child.

The U.S. Supreme Court has held that for a man to merit parental protections he must "grasp the opportunity" to assert parental rights and responsibilities.<sup>19</sup> The mother remembering his

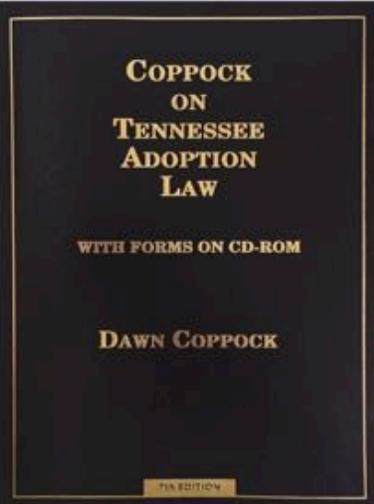
name absent any listed action or claim of paternity on his part is not an action by the father. The remaining ways to become a putative father all require some action on his part.

Much time is lost trying to find and serve process upon men who are only elevated to status of putative father because the mother was willing and able to name them. FIAA eliminates the disincentive to identify the father, thus securing better historical information for the child. It also does not elevate the rights of men who do not grasp the opportunity to act as a parent, and thereby eliminates considerable complication, expense and delay.

**New Surrender Form.** The surrender form is the document that a parent or guardian signs before a judge or other authorized officiant to voluntarily transfer parental rights from themselves to a prospective adoptive family

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or to an agency. Until FIAA, the surrender form was created administratively by the Tennessee Department of Children's Services. The new form is now included in the statute.<sup>20</sup> The prefatory language permits any form that "contains statements comparable" to the statutory form to be used as well.

Attorneys familiar with the previous form will notice the following changes: Rather than have several places for signature for a judge, the parent/custodian and the accepting party, now each just signs one time, and the form previously 16 pages long is now just two pages long.

Other information, including post-placement contact and contact veto, Native American heritage, counseling, expenses and parentage, is now collected on a Pre-Surrender Information Form and a Pre-Acceptance Information Form, both of which are included in the statute.

The social and medical information form promulgated by DCS will still be used. All three of these forms, however, are completed prior to the surrender hearing and simply attached for the

*The law now requires the agency to get court permission to keep documents secret from the adoptive parents, rather than requiring that the petitioners' attorney get permission to review the filing.*

court's review. No questions are asked more than once, and the language is clear. The three-day revocation period remains unchanged.

**Other Interesting Changes.** In addition to some housekeeping changes not discussed in this article, the following FIAA modifications to Tennessee's adoption code will be of interest to practitioners:

1. *Venue.* FIAA expands venue where termination and adoption cases may be filed to include (a) where a respondent resides, (b) where the child was placed in the care of an agency, and (c) where the court that gave partial or complete guardianship over the child to the petitioners.

This change expands choice of forum, while maintaining a connection between where the case is heard and the parties or the history of the case.

2. *Residency.* FIAA also expands the jurisdiction of Tennessee courts to hear adoptions. In non-relative cases, previous law required that a petitioner live in Tennessee for at least six months before filing a petition for adoption.<sup>21</sup> This left adoptive families new to the state with no court or agency supervision for up to six

months before they could begin the legal process of adoption. FIAA maintains the requirement of actual Tennessee residency in most cases but removes the requirement that a six-month period of residency be established before a filing may occur.

In addition, Tennessee law already allows active duty service personnel to file adoptions in Tennessee when they reside elsewhere, if the service member lived in Tennessee for six months before entering military service. FIAA adds service members who identify Tennessee as their state of residence to the U.S. military to the list of non-resident service members who may adopt in Tennessee.

3. *First cousins once removed.* A petitioner being "related" to a subject child allows a judge to waive certain formalities, most particularly, the home study.<sup>22</sup> The definition of "relative" in the adoption code was written in an attempt to include an adoption between cousins. Cousins are often similar in age, so the most common adoption fact pattern involving cousins is not to adopt one's cousin but to adopt the child of one's cousin. However, because the relative definition focuses on the relationship between the child and the adoption petitioners, the current inclusion of "first cousin" does not include the child of one's cousin. In order to include the child of one's cousin as a "related" child, FIAA adds "first cousin once removed" to the relative definition.

4. *Initials and Pseudonyms.* Under previous law, an adoption petition had to state the full names of the petitioner and the child.<sup>23</sup> This is almost always appropriate, but occasionally a parent may present a serious danger to the child, the adoptive family or both (for example, a parent who has previously abused the child or engaged in sex trafficking or — in a step-parent adoption — had previously abused the

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child's other parent). FIAA permits the use of initials or pseudonyms in a petition, provided that the court's permission is obtained. This change does not create a right to anonymity throughout contested litigation. If a dangerous parent participates in litigation in the case, then the court can make decisions on discoverable information using other applicable law. This change is most useful in cases where a terminated parent or guardian does not respond to process or actively participate.

5. *Access to file.* In most court cases the attorney for a party can see all the filings submitted to the court unless there is some type of protective order in place. In contrast, in adoptions the adoptive parent's attorney cannot look at the filings of agencies unless the court enters an order permitting review. These filings usually contain the legal documents that prove the agency has properly freed the child for an adoption. An adoption based upon a flawed termination is a flawed adoption. The prospective adoptive parents' counsel cannot determine the integrity of the termination of parental rights without reviewing the agency's court filings. FIAA now requires the agency to get court permission to keep documents secret from the adoptive parents, rather than requiring that the petitioners' attorney get permission to review the filing. In times largely past, limited review protected the identity of the birth parents. It is now rare for the adoptive parents to not know the identity of the birth parents. More eyes reviewing the legal basis for adoptions will result in more careful work and more errors found and cured in a timely manner. This will protect birth parents, adoptive parents and children.

It has long been a stated legislative

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## How This Law Came About

In 2016, Rep. Mike Carter, a Chattanooga attorney and chairman of the House Civil Justice Subcommittee, attended an out-of-state conference where he was introduced to a data-driven computer application designed to promote placement stability and permanency for children in foster care by matching children and families based on markers of compatibility. This application was designed to bring the same compatibility matching that has been widely successful in the United States through programs such as eHarmony, to the foster care system [The application, named Family Match, has been developed by Adoption-Share Inc., a Georgia 501(c)(3) corporation.]

It is an established fact that approximately two-thirds of children in foster care for more than one year will experience three or more failed placements [Noonan et al., 2009], and that each disruption dramatically increases the risk of that child achieving poor outcomes such as incarceration, dropping out of high school, homelessness and sex trafficking. Rep. Carter was intrigued by the idea of bringing to the Tennessee Department of Children's Services a computer application that uses data and predictive models to increase the likelihood of success for a child in family pairings. Successful matches not only would provide better outcomes for children as they experience placement stability but should further encourage more families to adopt children in care.

Simultaneously, a group of Tennessee adoption attorneys met in Nashville in August 2017 to initiate discussions about changes to Tennessee's adoption code that would help children find permanency faster, without compromising birth parents' constitutionally protected rights or viable opportunities for family reunification. The people in that group were Meredith Brasfield, Elizabeth Carroll, Lisa Collins, Dawn Coppock, Stewart Crane, Mike Jennings, Ted Kern, Jason Long, Sharon Massey, Andy Roskind, Wende Jane Rutherford, Julia Tate, Bob Tuke, Will Vetterick, Kevin Weaver, Jennifer Williams and Julia Spannaus.

That group of attorneys subsequently petitioned the Tennessee Bar Association to create an Adoption Law Section, and in that capacity offered a proposed bill to Rep. Carter to sponsor in the House as a companion piece to the Family Match program now being implemented by the Tennessee Department of Children's Services. Sen. Ferrell Haile, having sponsored adoption legislation in the past, readily agreed to carry FIAA in the Senate.

The First in Adoption Act was signed into law May 3, 2018, and is effective July 1.

For more information on the TBA's Adoption Law Section, go to [www.tba.org/section/adoption-law-section](http://www.tba.org/section/adoption-law-section). 

nobody ever has a need for it. <sup>41A</sup>



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## Notes

1. Tennessee Department of Health news release issued Sept. 18, 2017: "Increasing Number of Tennesseans Dying from Drug Overdoses." <http://www.tn.gov/health/news/53332>.
2. *Tenn. Code Ann.* §§ 38-7-106(a); 38-7-108; 38-7-109 and 68-3-502(c)(1). *Tenn. Comp. R. & Regs.* 1200-36-01-.03.
3. *Tenn. Comp. R. & Regs.* 1200-07-01-.10(3)(b).
4. *Tenn. Comp. R. & Regs.* 1200-07-01-.10(3)(b).
5. Public Chapter 493, Acts of 2017.
6. <http://publications.tnsosfiles.com/acts/110/pub/pc0493.pdf>.
7. *Tenn. Code Ann.* § 68-3-502(i)(2)(B).
8. <http://www.tn.gov/health/article/OSCMEResources>.
9. *Tenn. Code Ann.* § 68-3-502(i)(2)(B).
10. <https://apps.health.tn.gov/licensure/>.
11. <https://www.tn.gov/health/article/OCME-regional>.
12. *Tenn. Code Ann.* § 68-3-502(i)(3).
13. *Tenn. Code Ann.* § 68-3-502(i)(4).
14. *Tenn. Code Ann.* § 68-3-502(i)(5)(A).
15. <https://www.tn.gov/health/article/OCME-regional>.
16. *Tenn. Code Ann.* § 68-3-502(i)(5)(B).
17. *Tenn. Code Ann.* § 68-3-502(i)(6)(A).
18. <https://www.tncourts.gov/programs/mediation/find-mediator> or call 615-741-2687 or toll free 800-448- 7970.
19. *Tenn. Code Ann.* § 68-3-502(i)(6)(B).
20. Beth Harwell Campaign Update email, Jan. 29, 2018.
21. SB 1949 by Crowe / HB 1961 by Ramsey.

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goal of the Tennessee adoption code to enable children to achieve permanency in an expeditious manner.<sup>24</sup> FIAA is a legislative enactment that focuses on this goal, while maintaining a meaningful opportunity for birth parents to step up, claim children, and — in the foster care system — to cure shortcomings. This is delicate work in a field with many competing interests. However, the First in Adoption Act gives all the adults their due, while keeping the primary focus on children. <sup>41A</sup>



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Jennings is currently serving as vice-chair of the Tennessee Bar Association's new Adoption Law Section.

## Notes

1. Tennessee's adoption code is found at *Tenn. Code Ann.* §36-1-101, et seq.
2. HB1856 (Carter, R Ooltewah), SB1851
22. *Ray v. Leader Federal Savings & Loan Association*, 40 *Tenn.App.* 625, 644, 292 S.W.2d 458, 60 A.L.R.2d 564 (*Tenn.Ct.App.* 1953).
23. *Mutual Benefit Health & Accident Association v. Denton*, 22 *Tenn. App.* 495, 124 S.W.2d

(Haile, R Gallatin).

3. *Tenn. Code Ann.* §36-1-117(a).
4. Termination grounds are enumerated in *Tenn. Code Ann.* §36-1-113(g).
5. *Tenn. Code Ann.* §36-1-113(g)(1).
6. *Tenn. Code Ann.* § 36-1-102(1).
7. See *In re Alivia E.*, No. M2016-02328-COA-R3-PT (*Tenn. Ct. App.* Jan. 30, 2018); *In re Matthew T.*, No. M2015-00486-COA-R3-PT (*Tenn. Ct. App.* April 20, 2016).
8. See *In re Josephine E.M.C.*, No. E2013-02040-COA-R3-PT (*Tenn. Ct. App.* April 17, 2014).
9. *Tenn. Code Ann.* §36-1-102(1)(A)(i).
10. *In re: Douglas H.*, No. M2016-02400-COA-R3-PT (*Tenn. Ct. App.* Sept. 29, 2017).
11. See *Isabella G.*, No. M2016-02105-COA-R3-PT (*Tenn. Ct. App.* Oct. 3, 2017).
12. *In re Quintin S.* No. E2016-02150-COA-R3-PT (*Tenn. Ct. App.* July 13, 2017).
13. More specifically, the revised ground expressly applies to parents who have "lost physical or legal custody ... by a court order at any stage of proceedings" (new *Tenn. Code Ann.* §36-1-102(1)(A)(ii)(a) (emphasis added).
14. *In re: K.M.K.*, E2014-00471-COA-R3-PT (*Tenn. Ct. App.* Feb 27, 2015); *In re: B. P. C.* No. M2006-02184-COA-R3-PT (*Tenn. Ct. App.* April 18, 2007).
15. *Tenn. Code Ann.* §36-2-318.
16. *Tenn. Code Ann.* §§36-1-113(d)(3)(A); 36-1-117(c)(1).
17. *Tenn. Code Ann.* §§ 36-2-318 (e)(3).
18. *Tenn. Code Ann.* §§36-1-102(43) and 36-1-117(c).
19. *Lehr v. Robertson*, 463 U.S. 248, at 248 (1983) see also *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Quilloin v. Walcott*, 434 U.S. 246 (1978).
20. *New Tenn. Code Ann.* §36-1-111(b).
21. *Tenn. Code Ann.* §36-1-115(d).
22. *Tenn. Code Ann.* §§ 36-1-116(e)(1) and 36-1-119(b).
23. *Tenn. Code Ann.* §36-1-116(b)(1).
24. *Tenn. Code Ann.* 36-1-101(a)(5).
- 278, 282 (*Tenn.Ct. App.* 1938).
24. *Provident Life and Accident Insurance Company v. Prieto*, 169 *Tenn.* 124, 83 S.W.2d 251, 267 (*Tenn.* 1935).
25. *Brown v. Sun Life Insurance Co.*, 57 S.W. 415 (*Ct. Chancery App.* 1899).