COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 05-CI-00459

COMMONWEALTH OF KENTUCKY, PETITIONER
OFFICE OF THE ATTORNEY GENERAL
Ex rel. Gregory D. Stumbo in his official
Capacity as Attorney General of the
Commonwealth of Kentucky

v. **PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

BOARD OF DIRECTORS FOR THE RESPONDENTS
COMMONWEALTH POSTSECONDARY
EDUCATION PREPAID TUITION
TRUST FUND, et al.

* * * * * * * *

INTRODUCTION

Within his motion for Summary Judgment the Respondent, Robbie Rudolph, in his official capacity as the Secretary of the Finance and Administration Cabinet, admits the Attorney General is correct; the provision within the current biennial budget which prohibit the use of the abandoned property fund to support KAPT contracts purchased prior to the repeal of KRS 393.015 is in violation of Section 19 of the Kentucky Constitution. However, the Secretary asserts the transfer of $13.7 million from the abandoned property fund to the KAPT Fund was "improper" and "wrongful". This assertion is quite surprising since he voted for the transfer as a member of the KAPT Board. Further, his employees approved and carried out the transfer of the funds to Fifth Third bank. The Attorney General did not anticipate the Secretary would criticize his own conduct and that of his employees. Fortunately for him, the Attorney General does not share his beliefs. The decision of the KAPT Board to transfer the money was lawful. The

"improper" and "wrongful" action is the attempt to take money from the KAPT Fund for use by the General Fund.

ARGUMENT

I. The Secretary's admission that the budget bill violated Section 19 of the Kentucky Constitution by prohibiting the use of the abandoned property fund to support existing KAPT contracts compels a finding that the budget bill is unconstitutional in every aspect which would limit the use of the abandoned property fund for that purpose.

It is commendable that the Secretary now recognizes the Commonwealth has a contractual obligation to citizens who purchased KAPT contracts to provide the guarantee of 75% of the abandoned property fund pledged both by statute and under the contractual terms. The Secretary asserts he lacked an understanding of whether the Attorney General claimed the guarantee applied to future contracts; this is odd since the prayer for relief in the Attorney General's petition specifically requested an order to compel the Respondents "to meet the Commonwealth's obligations under KAPT contracts entered into prior to the enactment of HB 267." Therefore, the Secretary has agreed with the position put forth by the Attorney General on this issue.

It is perplexing that the Secretary subsequently asserts other inconsistent theories within his motion for Summary Judgment. By admitting a violation of Section 19, the Secretary admits the guarantee by the abandoned property fund is a material term of the KAPT contract, and that removal of the guarantee would take a "vested right" from the contract owners. *Hopwood v. City of Paducah*, 424 S.W.2d 134, 136 (Ky. 1968). If the purchasers have a vested right to the guarantee, then they also have a vested right to use of the guarantee as is contemplated under the contract and by statute (as the statutes existed at the time of contracting). Included in the terms of contracts are the laws which

subsist at the time and place of the making of the contract as if they were expressly incorporated into the terms. *City of Covington v. Sanitation District No. 1*, Ky., 301 S.W.2d 885 (1957).

The legislation which created the KAPT program, KRS 164A.700-709, also amended the Escheats Act by enacting KRS 393.015 which pledged 75% of the abandoned property funds "for support" of the KAPT Fund, and authorized transfers from the "abandoned property fund" to the KAPT fund to meet any "unfunded liability as determined by the Board." The KAPT Board was also invested with duties which it owed to the purchasers of the KAPT contracts. The most relevant was KRS 164A.704 (7) which stated that the board shall:

> Obtain appropriate actuarial assistance to establish, maintain, and certify a fund sufficient to defray the obligation of the fund, annually evaluate or cause to be evaluated, the actuarial soundness of the fund, and determine prior to each academic year the amount of prepaid tuition for each tuition plan and for each eligible educational institution for specific academic years, the corresponding values.

Read together, these two statutes, KRS 393.015 and KRS 164A.704, obligate the KAPT Board to obtain an annual actuarial analysis of the KAPT Fund and further, when that analysis shows the KAPT Fund is insufficient to meet its obligations, take necessary action which is within the KAPT Board's authority to allow the board to "establish, maintain and certify" that the KAPT Fund can "defray" its obligations.

That is exactly what the KAPT Board did during the December, 2004 board meeting. The Board found, based upon the 2004 actuarial analysis, that it was necessary to transfer $13.7 million from the abandoned property fund to the KAPT Fund in order to establish, maintain and certify a fund which could defray its obligations. Once the KAPT Board made this decision, the contract owners had a vested right to have the money

transferred into the KAPT Fund. Subsequently removing that property would impair that contractual right just as surely as refusing to allow the use of the abandoned property fund to support the KAPT Fund in the first place. Therefore, admitting *Ky. Const. §19* compels the availability of the abandoned property fund to support the KAPT Fund but denying it must be used in the manner prescribed by statute is illogical.

Moreover, because the contract owners have a vested contractual interest in the transfer of the abandoned property funds placed in the KAPT Fund, they also have a vested property interest in those funds following the execution of the administrative decision of the KAPT Board. *Ky. Const. §2*, like the 14th amendment to the U.S. Constitution, prohibits arbitrary deprivation of life or liberty or arbitrary spoliation of property. *Minor v. Stephens*, 898 S.W.2d 71 (Ky. 1995). Additionally, Ky. Const. §§2 & 13 prohibit assessments that take private property, but have no benefit to the payor. This rule was recently stated in *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374 (Ky.App. 1996) as follows:

> The validity of special assessments and users fees depends on an analysis of the charge and the benefit received. Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation.

Certainly, the assessment of $13.7 million from the KAPT Fund did not comport with any of the standards of due process. It also provides no benefit to the KAPT program and the citizens who have invested in that program. Short of appropriating money directly from citizens' 401k accounts it is hard to imagine a more egregious violation of Sections 2 & 13 of the Kentucky Constitution.

II. The KAPT Board has discretion to determine when an "unfunded liability" existed.

Secretary Rudolph seems to suffer under the misapprehension that the Attorney General has determined there is, or was, an "unfunded liability" in the KAPT Fund. He has not. The KAPT Board did, and since the Board is the administrative body the legislature has authorized to make that determination, the Attorney General must defer to its authority, as should the Secretary. The crux of the Secretary's argument is that the KAPT Board was wrong when it determined the KAPT Fund had an "unfunded liability" and therefore the transfer from the abandoned property fund to the KAPT Fund was "wrongful." In short, he wants the Court to second guess the administrative board which the General Assembly assigned the discretion to make this decision.

Prior to the current biennial budget which repealed KRS 393.015, it stated as follows:

> Seventy-five percent (75%) of the balance of the abandoned property funds shall be available for the support of the Commonwealth postsecondary education prepaid tuition trust fund. Transfers from the abandoned property fund to the trust fund are authorized in order to meet *any unfunded liability as determined by the board.*
> (Emphasis added)

Any unfunded liability as determined by the board! The Secretary admits the General Assembly did not define "unfunded liability". Further, authorization for the transfer is not contingent upon further review by the General Assembly, or any other body, as the Secretary suggests. When the determination is made by the KAPT Board, the transfer is authorized by law. KRS 393.015.

The Secretary pins his argument on the proposition that the General Assembly intended the term "unfunded liability" to mean "*currently* unfunded liability." The

language in KRS 164A.701 (1) which generally describes the KAPT Fund as consisting of payments for the KAPT contracts and income derived from the payments is cited as legal justification. It is argued this language restricts money from any other source from being deposited into the KAPT Fund. However, the specific statute relating to transfers from the abandoned property fund, KRS 393.015, states: "[T]ransfers from the abandoned property fund to the trust fund are authorized." It is a well settled rule of statutory interpretation that a specific statute has priority over a statute of general application. *Hughes v. Commonwealth*, 875 SW2d 99 (Ky. 1994). Thus, KRS 393.015 as enacted at the time is controlling.

Further, all statutes are presumed to be enacted in furtherance of a legislative purpose and should be read to accomplish that end rather than to render the statute a nullity. *Woods v. Commonwealth,* 142 S.W.3d 24 (Ky. 2004). The Secretary's interpretation of the language in KRS 164A.701 (1) as excluding transfers from the abandoned property fund would render KRS 393.015 a nullity. This is because the mechanism KRS 393.015 specifically authorizes for the abandoned property fund to support the KAPT Fund is the transfer of assets from the abandoned property fund <u>to</u> the KAPT Fund. If money from the abandoned property fund could not be transferred into the KAPT Fund by operation of KRS 164A.701 (1), it could never go toward the obligations under the KAPT contracts because those contracts "only obligate the funds in the KAPT Fund" as the Secretary accurately states at the bottom of page 3 of his Motion for Summary Judgment. The Secretary's argument is circular. He claims transfers can only be made when the KAPT Fund is in default, but he interprets the statutes and the contract in such a way that even under those dire circumstances the guarantee of the

unclaimed property fund could not be used to prevent the KAPT Fund from defaulting on the obligations in the contracts.

The Secretary also argues that the *post hoc* enactment of HB 267 reveals legislative intent that "unfunded liability" always meant "*currently* unfunded liability". First, the relevant legislative intent is drawn from the plain language of the statute. The Secretary is not at liberty to add or subtract words to suit his interpretation. The Kentucky Supreme Court recently reminded the Cabinet of this rule of construction in *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 818 (Ky. 2005), noting the Court assumes the Legislature "meant exactly what it said, and said exactly what it meant." In this case the statute in question states "unfunded liability as determined by the board", not "*currently* unfunded liability". KRS 393.015.

Second, only when a statute is ambiguous, which is not the case here, is the legislative **history** relevant. Hence, the pertinent legislative history is that which reveals the intent of the General Assembly which unanimously passed the KAPT legislation in 2000. *Dalton v. Fortner*, 125 S.W.3d 316 (Ky.App. 2003). Otherwise, a law could not have an accepted meaning according to its own language, but instead would have to be interpreted based on changing opinions of the General Assembly. It should also be pointed out that the provision in the budget to take $13.7 million from the KAPT Fund was not in either the House or Senate budget bills and was inserted in the conference committee's report on the final day of negotiation. Whether this provision would have passed on an up or down vote with any more than the minimal deliberation associated with passing a budget on the last day of a legislative session is questionable. The

proposition that a court must interpret a law based upon what a subsequent General Assembly might think of the law is absurd and unworkable.

Finally, the Respondent reaches for the argument that transferring money into the KAPT fund when a deficit develops is a "dangerous" management practice. He does not state how this would relate to interpretation of KRS 393.015 or KRS 164A.010 *et. seq.* Nevertheless, in the world the Secretary would create deficits are good, and surpluses are bad. He looks at the KAPT program as having a finite existence, and posits that if there is a surplus then some day there will be money left over. Oh the horror! If that occurred, the Commonwealth simply would have to wait three years for the money to go unclaimed and then it would be presumed abandoned, and would escheat right back into the abandoned property fund. KRS 393.010 *et. seq.* The money would not remain in limbo, as suggested, and ultimately the Commonwealth would recoup the remainder.

Additionally, the KAPT program was not intended to exist within a finite period of time. Instead, the statutes provide for annual enrollments to continue indefinitely. During each enrollment period the cost of the KAPT contracts are calculated based upon a number of assumptions. The two most important are the projected income on the money invested and the projected increase in college tuition. These projections are based upon long term averages. But there is volatility from year to year. So both deficits and surpluses are anticipated. The goal is to sell contracts over a number of years to diversify the risk, and the good years are hedged against the bad. (Crompton statement, pps. 18-21.) A surplus from one year benefits the next class, and the Commonwealth is able to charge the lowest prudent price year after year. In turn, this allows the KAPT program to

meet its dual purposes of providing affordable access to college, and protecting parents from rising tuition costs. KRS 164A.701 (2).

Unfortunately, during the first 4 years that KAPT was in existence, the benchmark tuition at the University of Kentucky rose at an unprecedented pace. This phenomenon has continued into the present school year creating a new deficit for 2005 of $7 million above and beyond the $13.7 million deficit identified in 2004. (Crompton statement, pps. 21-25.) In December of 2004 when the transfer was made, the KAPT Board had a duty to "maintain and certify" the KAPT Fund was sufficient to defray the obligations of the fund based upon an annual evaluation of the "actuarial soundness of the fund." KRS 164A.704 (7). They were advised by their actuary the odds for recovery from this deficit were low, roughly 1 in 4, and that a transfer from the reserve fund was necessary. The Board met, considered this advice and voted to follow it.

Despite voting for the transfer, the Secretary now claims the KAPT Board should have waited until the deficit of $13.7 million grew to $54 million, as the actuary projects, before it acted. He deems the probable loss of $41 million preferable to the off chance that future purchasers of KAPT contracts may get better terms than they otherwise would have. But this "windfall", as the Secretary describes it, furthers the statutory purpose of the program. Moreover, it will primarily go to the State's colleges and universities; which are already funded predominantly by tax dollars.

Far from a "dangerous proposition", the decision by the General Assembly to render to the KAPT Board discretion to ascertain when an "unfunded liability" exists displays exceptional foresight. The KAPT Board must make complex decisions in order to carry out its statutory duties. The board members must develop expertise to exercise

their discretion wisely. It is appropriate for them to make the determination. Not the Attorney General or the Secretary of the Finance and Administration Cabinet. Further, as long as the decision was reasonable it deserves deference from the Court as well. See pages 23-24 of the Petitioners Memorandum in Support of Motion for Summary Judgment for thorough legal discussion and citation regarding this issue.

III. The KAPT Fund is distinct from the General Fund.

The Secretary serves the Court a red herring with the argument the liquid assets of the abandoned property fund are in the General Fund. It is the position of the Attorney General that the assets of the abandoned property fund are public funds and, therefore, it is irrelevant whether they are in the General Fund or not. The dispositive issue is whether the public funds in the abandoned property fund became private funds once the KAPT Board found an unfunded liability existed and transferred those public funds into the KAPT Fund.

However, to respond to the arguments put forth by the Secretary it is necessary to define the various funds and their relationship to one another. "Public funds" are all moneys from which the Generally Assembly could appropriate, and includes trust and agency funds which themselves contain public funds. *Armstrong v. Collins,* 709 S.W.2d 437 (Ky. 1986). The "General fund" is that subset of "public funds" which the General Assembly has actually appropriated for the operation of the executive branch in the budget bill. See KRS 48.315(2) "transfer of money *from* the agency funds, special funds or other funds *to* the general fund… shall be for the period of time specified in the budget bill." The "abandoned property fund" means the "fund in which monies are placed that are paid to the [Treasury] department pursuant to this chapter." KRS 393.010 (i).

The relationship between these legally defined funds was in disarray in December of 2004 due to the fact the Governor instituted a spending plan when the General Assembly failed to pass a budget during the 2004 legislative session. In *Fletcher v. Commonwealth, ex. rel. Stumbo,* 163 S.W.3d 852 (Ky. 2005) the Supreme Court addressed the legality of the Governor's spending plan which expended public funds for the operation of state government without an appropriation by the General Assembly. Citing favorably to *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291, 13 L.Ed. 693 (1850) the Supreme Court found: "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned." In the same opinion the Supreme Court expressly overruled *Miller v. Quertermous*. 304 Ky. 733, 202 S.W.2d 389 (Ky. 1947) which had accepted the premise there can exist an "unappropriated surplus in the General Fund."

Instead the Supreme Court found there can be no expenditure of funds by the executive branch without a lawful appropriation by the General Assembly except as pursuant to statutory, constitutional and federal mandates. It further held that any attempt to notwithstand or suspend existing statutes through the "Executive Spending Plan" was void *ab initio*. There was no budget which appropriated money for the general operation of the executive branch in December of 2004 when the transfer from the unclaimed property fund to the KAPT Fund occurred. Hence, it is simply not possible for the transfer to have come from the General Fund. The General Assembly had not suspended KRS 393.010(i) to allow the Finance and Administration Cabinet to take money from the abandoned property fund to pay for general operating expenses and even if such transactions were shown on the Cabinet's books at the time they were void from the

beginning, and as if they had never occurred. See definition of *ab initio*, *Black's Law Dictionary,* Forth Edition, 1951, at p. 8.

Moreover, even were this not the case, the abandoned property fund is distinct from the General Fund under the plain language of its originating statute. KRS 393.010 (i). The Secretary's confusion stems from the fact the abandoned property fund is unlike any other trust or agency fund found in state government. It takes in private property under the Commonwealth's sovereign authority to claim ownership to property where there appears to be no legal owner, not under a statutorily enacted tax or fee. The court in *Commonwealth v. Thomas' Adm'r*, 140 Ky. 789, 131 S.W. 797, 800 described the breadth of this sovereign authority as follows:

> The state may in its generosity, or sense of fairness, say that it will not in such case hold the proceeds against the original claimant, if he subsequently appears, and may provide for his reimbursement. It may do less, as by shortening the time in which it will make reimbursement, or it may exact conditions. In the instance here the state has declared that, for escheated property which it dedicates to purposes of education, it will not make reimbursement. Rather, it fails to make provisions for it in such instances. It was in the competency of the state to so provide, or fail to provide as it saw fit. The policy is one of legislative discretion, and is not a condition precedent to the state's exercise of power.

Hence, the General Assembly can handle the abandoned property as it chooses. It could have the abandoned property placed directly in the General Fund and never provided for an abandoned property fund. The creation of the abandoned property fund and the decision to allow for the return of abandoned property to the owner once it has escheated was discretionary.

Within KRS Chapter 393 the right of an owner to return of his property is retained so long as the Commonwealth has not instituted an action for the property to be adjudged actually abandoned. *Commonwealth by Geary v. Johnson*, 668 S.W.2d 569 (Ky.App.

1984). Nevertheless, the General Assembly still retains the authority to legislate how abandoned property can be used so long as the statutory obligation to the owners who seek return of their property is met. Therefore, the General Assembly can legally take the money in the abandoned property fund for use by the General Fund through the mechanism of a budget bill which suspends KRS 393.010(i), and guarantee payment to the owners without violating Sections 50 and 177 of the Kentucky Constitution. See *McGuffey v. Hall*, 557 S.W.2d 401, 411 (Ky. 1977).

However, the fact the General Assembly can use the abandoned property fund in such a manner does not mean that the abandoned property fund is not legally distinct from the General Fund. KRS 393.010(i) makes it patiently clear the abandoned property fund is a fund which consists of that subset of property received by the Treasury pursuant to KRS Chapter 393, even thought the General Assembly did not have to create such a fund and could have required abandoned property to be placed directly in the General Fund. Indeed, Controller Ed Ross admits the abandoned property fund is distinct from the General Fund in his Affidavit attached to the Secretary's motion for Summary Judgment as Exhibit D. At paragraph 6 he states that for non-liquid assets "the agency fund is not part of what is known as the General Fund…" Where Mr. Ross is mistaken is when he states: "[L]iquid assets that escheat to the Commonwealth are placed directly in the General Fund…" This may be how the Finance and Administration Cabinet accounts for the liquid assets but it is not what the law contemplates.

By law, the liquid assets must be placed in the abandoned property fund just like stocks and bonds, or any other abandoned property. KRS 393.010(i) makes no distinction between types of property. Whether the liquid assets are accounted for as general funds

under the system used by the Finance and Administration Cabinet is not relevant to the legal status of the property. Pursuant to KRS 393.010(i) abandoned property is placed in the abandoned property fund.

Nor is it relevant that the General Fund regularly takes that money and replaces it with what amounts to an I.O.U. The accounting entry reflecting the General Fund's liability to the abandoned property fund becomes, in itself, an asset of the abandoned property fund. It is these assets of the abandoned property fund, the debt of the Commonwealth plus the non-liquid assets in the abandoned property fund, which guarantee the KAPT Fund. This legal subtlety may be lost on the Secretary, but it is relevant and significant to a critical analysis of the Secretary's argument.

The Secretary argues the General Assembly simply seeks a return of what is rightfully the General Fund's money. But this money was never appropriated for the general use of state government. First, Mr. Ross admits the non-liquid assets which were liquidated to cover the cost of the transfer were not in the General Fund. Further, the Finance and Administration Cabinet placed money to be transferred in the General Fund on its own accord and not pursuant to an order of the KAPT Board. The KAPT Board only had authority to order the transfer of the money from the abandoned property fund to the KAPT fund. KRS 393.015. It could not order the transfer of the money from the abandoned property fund to the General Fund and neither could the Cabinet since there was no lawful suspension of statute or lawful appropriation at the time.

Therefore, even if one were to assume that accounting for the money in question in a General Fund account for approximately 24 hours solely for the purpose of facilitating the transfer to the KAPT fund could ever meet the definition of an

appropriation for the general operation of state government, which it does not, the appropriation into the General Fund was void *ab initio*, since neither the Secretary or the Governor had the authority to notwithstand KRS 393.010(i). *Fletcher v. Commonwealth, ex. rel. Stumbo, supra.* At p.872. The only legally authorized transaction was the transfer from the abandoned property fund to the KAPT Fund, and for all practical purposes that is exactly what occurred.

IV. The taking of $13.7 million from the KAPT Fund is a taking of private property in violation of sections 2, 13 and 51 of the Kentucky constitution.

This argument is covered within the Attorney General's Memorandum in Support of his Motion for Summary Judgment. See pages 25-30. This issue is again addressed herein at page 4 with specific reference to *Ky. Const. §§ 2 & 13*. Therefore, those arguments are reiterated, but will not be repeated a third time within this argument. Instead this argument will address only the Secretary's argument that the budget bill provisions in question do not violate *Ky. Const. §51*.

The Secretary is correct in stating that existing case law does interpret Section 51 as allowing the General Assembly to amend or repeal statutes through the budget bill, so long as the action is related to an appropriation for the operation of state government. Further, the Secretary is correct when he states "that is exactly what happened here" to the extent he is addressing the repeal of KRS 393.015. The statute has been lawfully repealed to the extent it does not impair a contract lawfully entered into by the Commonwealth. Also, as previously discussed, both the Attorney General and the Secretary agree the repeal of KRS 393.015 may not be applied to remove the guarantee the statute provided for existing KAPT contracts without violating *Ky. Const. §19*.

The lingering issue is whether Section 51 prohibits the transfer of the $13.7 million. The holding in *Armstrong v. Collins, supra* plainly states that the budget bill may not appropriate private funds, nor may it attempt to appropriate formerly public funds where they have been commingled with private funds. The unrebutted statement of Clint Long, submitted as Exhibit 6 to the Attorney General's Memorandum, conclusively establishes the money transferred from the abandoned property fund to the KAPT Fund has been commingled with the KAPT Fund's assets. The Secretary's arguments to the contrary, unsupported by any evidence whatsoever, are completely without merit.

Therefore, the only remaining question is whether the KAPT fund contains private funds. In *Thompson v. Kentucky Reinsurance Association*, 710 S.W.2d 854 (Ky. 1986) the Court laid out a straightforward three part analysis: 1) What is the nature of the KAPT Fund? 2) What is the purpose of the KAPT Fund? 3) What is the source of the funding of the KAPT Fund? The nature and purpose is that of a private savings plan for the education of private citizens whether in a public or private post secondary education. The funding is private, with public funds to be provided in support only when required by the terms of the contract entered into between the Commonwealth and those citizens who have chosen KAPT as the investment vehicle best suited to their families' educational needs. This analysis compels a finding that the KAPT Funds are private funds. Therefore, any public funds commingled in the KAPT Fund are private. Consequently, they cannot be appropriated, and this attempt to do so in an appropriations bill has violated Section 51 of the Kentucky Constitution. *Armstrong v. Collins, supra.*

CONCLUSION

Neither the evidence nor the arguments put forth by the Secretary support summary judgment in his favor. First, it should be noted the Secretary's admission the abandoned property fund must be provided as a guarantee for all KAPT contracts sold prior to the enactment of HB 267 leaves all parties in agreement that the Attorney General is entitled to at least a partial summary judgment which finds that the provision in HB 267 at p. 305 which states that no "abandoned property funds shall be available for the support of the Commonwealth postsecondary education tuition trust fund" is in violation of Ky. Const. §19. Second, this admission by the Secretary carries with it the admission that the purchasers of KAPT Contracts have a vested right to the abandoned property guarantee. As such, they also have a vested right to have that guarantee exercised as provided by statute. In this case the KAPT Board did precisely that. For the General assembly to undo the Board's action impairs the KAPT contracts just as certainly as prohibiting the availability of the abandoned property funds to begin with.

The KAPT board was granted discretion by the General assembly to determine when an unfunded liability existed and when a transfer from the abandoned property fund was necessary for the board to uphold its statutory duties. The Board's decision to transfer the abandoned property into the KAPT Fund was supported by the annual actuarial analysis the board must obtain and further is based upon a reasonable interpretation of its statutory authority. That the Secretary has changed his position after voting for the transfer is of no consequence. The decision was reasonable, and therefore, it is entitled to deference from the court.

Finally, the Secretary's argument both that this is simply a "return" of general fund moneys and there is still plenty of money in the abandoned property fund to cover future deficits in the KAPT Fund are particularly unpersuasive. Neither bears any relation to the legal issues in this case. Additionally, the assets sold to cover the transfer were never in the General Fund. The Controller states this in his affidavit. The weak claim that they became General Funds because the Secretary chose to account for these assets in a General Fund account for roughly 24 hours while they awaited transfer to the KAPT fund is particularly disingenuous since they were never legally appropriated for the operation of state government. Had the Governor's spending plan attempted to do so, it would have been void.

Concerning the security of the abandoned property fund, the fund has roughly $37 million in hard assets (Ross statement paragraph 13.) Its remaining assets consist of the debt obligation recognized by the Commonwealth. If the unfunded liability of the KAPT Fund, as determined by the KAPT Board, ever exceeds the hard assets of the abandoned property fund, the Board will no longer have the authority to independently carry out its statutory duty since it will require an appropriation by the General Assembly to service that debt before the money could be transferred to the KAPT fund. Therefore, aside from the fact that the security of the abandoned property fund has nothing to do with Board's statutory authority to transfer the funds, it is dangerously misleading to give this assurance. This is beyond the authority of the Secretary or even the General Assembly since each General Assembly is "a free and independent body and cannot control the conduct of its successor except by acts in the form of binding contracts." *Fletcher v. Commonwealth, supra.* citing *Bd. of Trustees v. Attorney Gen.,* 132 S.W.3d at 789; *City*

of Mt. Sterling v. King, 126 Ky. 526, 104 S.W. 322, 322 (1907); *Swift & Co. v. City of Newport*, 70 Ky. (7 Bush) 37, 41 (1870).

In sum, the material facts are not in dispute and all of the foregoing reasons compel Summary Judgment in favor of the Attorney General, not the Secretary.

Respectfully submitted,

By: _____

Gregory D. Stumbo
ATTORNEY GENERAL
Office of the Attorney General
Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, KY 40601-3449
(502) 696-5300
(502) 564-8310 Fax

Robert S. Jones
ASSISTANT ATTORNEY GENERAL

Ryan M. Halloran
ASSISTANT ATTORNEY GENERAL