

NO. 09-10145

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In the Matter of VANCE COLE CHESNUT,
Debtor.

**MARK T. BROWN and
TEMPLETON MORTGAGE CORPORATION,**
Appellants,

v.

**VANCE COLE CHESNUT and
JACQUELINE CHESNUT,**
Appellees.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANTS

APRIL 13, 2009

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Mark T. Brown, Appellant;
2. Templeton Mortgage Corporation, Appellant;
3. Robert Nicoud, Jr., Dennis Olson, and Olson Nicoud & Gueck, L.L.P.,
Attorneys for Appellants;
4. James M. Morrison, Attorney for Vance Cole Chesnut, Appellee;
5. Vance Cole Chesnut, Debtor, Appellee;
6. Tim Truman, Chapter 13 Trustee for Appellee, Vance Cole Chesnut.
7. Jacqueline Chesnut, Appellee, non-debtor spouse of Vance Cole Chesnut; and
8. Pamela A. Bassel, Attorney for Jacqueline Chesnut, Appellee.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument is necessary in this case, based on the standards contained in Fed. R. App. P. 34(a)(2).

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NO. 04-10919
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Appeal from the United States District Court
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BRIEF OF APPELLANTS, MARK T. BROWN AND
TEMPLETON MORTGAGE CORPORATION

TO THE HONORABLE JUDGES OF THE COURT
OF APPEALS FOR THE FIFTH CIRCUIT:

COME NOW Mark T. Brown and Templeton Mortgage Corporation,
Appellants (collectively referred to herein as “Templeton”), and file this Brief of
Appellants and would respectfully show the Court the following:

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Northern District of Texas dated January 6, 2009 that disposed of all of the parties' claims.

Appellants' Notice of Appeal was filed February 5, 2009.

The district court had jurisdiction based on an appeal from the Bankruptcy Court for the Northern District of Texas pursuant to 28 U.S.C § 158. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the bankruptcy court lacks jurisdiction to order the release of a lien on property which is not property of the bankruptcy estate.
2. Whether the Debtor's Chapter 13 Plan gave Appellants adequate notice that the Debtor intended by his Plan to require Appellants to release their lien on property that was not property of the bankruptcy estate.
3. Whether the doctrine of res judicata bars Appellants from arguing that their lien should not be released because the property was not property of the bankruptcy estate.
4. Whether the bankruptcy judge erred in ordering the release of a lien on property that was never found to be property of the bankruptcy estate.
5. Whether the bankruptcy judge erred in failing to conduct a trial of the

still pending adversary proceeding, post-remand from the Fifth Circuit Court of Appeals, in which the Appellants' asserted defense is that the property in issue is not property of the bankruptcy estate.

STANDARD OF REVIEW

Issues of law are subject to *de novo* review on appeal. *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, at 209 (5th Cir. 1983). To the extent that Appellants' issues involve mixed issues of fact and law, the issues are subject to the clearly erroneous standard with respect to factual premises and *de novo* review with respect to legal conclusions. *Clark Pipe and Supply Co., Inc.*, 893 F.2d 693, at 697-698 (5th Cir. 1990).

STATEMENT OF THE CASE

This is an appeal from a final ruling of the United States District Court for the Northern District of Texas affirming a bankruptcy court order that would compel Templeton to release a lien on certain real property located in Eastland County, Texas. The bankruptcy court had ruled that a chapter 13 plan confirmation order in the bankruptcy case of Vance Cole Chesnut ("Chesnut") had a *res judicata* effect which precluded Templeton from arguing that the Eastland property was not property of the bankruptcy estate of Chesnut.

STATEMENT OF FACTS

This is now the second time this case has been brought before this Court. Previously, this Court had issued an opinion in *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298 (5th Cir. 2005) (“*Chesnut I*”). Many of the facts recounted here were already stated in *Chesnut I*. However they are repeated as they are relevant to this proceeding. References to the Record on Appeal are made by citing (R___), with the page number of the Record inserted in the blank, followed by a reference to the Record Excerpt by citing (E___), with the excerpt tab number in the blank.

On March 25, 1999, Jacqueline Chesnut (“Ms. Chesnut”) acquired approximately 2.52 acres of land in Eastland County, Texas. This property will hereafter be referred to as the “Eastland Property”. The Warranty Deed for the Eastland Property recited that it was being acquired by Ms. Chesnut as her “sole and separate property”. (Trial Exhibit 1, fax page 16 of 18), (E 14). The remaining documents associated with this property recited only Ms. Chesnut’s name. (E 15) and (E 16). *Chesnut I*, 422 F.3d at 300. At the time of the acquisition of the Eastland Property, Ms. Chesnut was married to Chesnut. The seller of the Eastland Property, Brooksie Nell Hodges, financed the sale. After Ms. Hodges had difficulty in getting payments on the promissory note signed by Ms. Chesnut, Ms. Hodges assigned the note and the related lien to Templeton. *Chesnut I*, 422 F. 3d at 300.

Templeton then began enforcing the payments due on the note from Ms.

Chesnut and posted the Eastland Property for foreclosure sale for February 4, 2003. On January 31, 2003, Chesnut filed an individual Chapter 13 bankruptcy petition in the Northern District of Texas, Fort Worth Division. Ms. Chesnut did not join in Chesnut's bankruptcy filing. *Chesnut I*, 422 F. 3d at 300.

Templeton took the position that the Eastland Property was legally Ms. Chesnut's separate property and, therefore, was not included in Chesnut's filing. Accordingly, Templeton believed that the automatic stay of 11 U.S.C. § 362 did not apply to the Eastland Property. Templeton then proceeded with the foreclosure sale on February 4, 2003, resulting in Templeton's purchase of the Eastland Property. Subsequently, Chesnut filed an adversary proceeding in the bankruptcy court seeking to recover the Eastland Property as being acquired by Templeton in violation of the automatic stay and seeking also to impose sanctions for violation of the automatic stay. Templeton defended, in part, by arguing that the Eastland Property was Ms. Chesnut's separate property and not affected by the automatic stay. The Bankruptcy Court ruled that the automatic stay did apply to the Eastland Property, ordered it returned to Ms. Chesnut and imposed sanctions.¹ On appeal, the District Court reversed the Bankruptcy Court.² Ultimately, this Court ruled that

¹ *Chesnut v. Brown*, 300 B.R. 880 (Bankr. N.D. Tex. 2003).

² *Brown v. Chesnut*, 311 B.R. 446 (N.D. Tex. 2004).

the Eastland Property was “arguable” property of the Chesnut bankruptcy estate and, therefore, the automatic stay would apply to the Eastland Property. *Chesnut I*, 422 F. 3d at 306. Initially, this Court remanded for a determination of whether the Eastland Property was property of the Chesnut bankruptcy estate. However, the ruling was later modified to delete the requirement of subsequent proceedings to determine the character of the property. (R 121- 122), (E 10). Meanwhile, while *Chesnut I* was on appeal, Chesnut’s attorney filed a proof of claim in the Chapter 13 case on behalf of Templeton (R 72), (E 13), filed a Chapter 13 Plan which provided for payment of the Templeton claim (R 62), (E 11), and proceeded to have the Chapter 13 Plan confirmed by an order dated December 8, 2004. (R 66), (E 12). Templeton did not object to the claim or the Chapter 13 Plan. One provision of the Chapter 13 Plan provided as follows:

“Each secured creditor’s lien (including tax liens) will be released after payment through the plan of the creditor’s allowed secured claim, with allowed interest, to the extent of the lesser of the amount listed in the claim column or the amount listed in the value column, as shown in Section I, part E above. Creditor will deliver title with lien released to the Debtor(s) after receiving payment of the amount specified in this paragraph.” (R 62), (E 11).

Templeton did receive of all the payments provided for by the Chapter 13 Plan. However, Templeton refused to release its lien on the Eastland Property because the payments received under the Chapter 13 Plan were not sufficient to pay

the amount due under the original note assigned from Brooksie Nell Hodges. (R 94), (E 8). When Templeton refused to release the lien, Chesnut filed a Motion to Enforce Confirmed Plan (R 68), (E 6), seeking an order of the bankruptcy court compelling Templeton to release its lien on the Eastland Property. This motion was later joined by Ms. Chesnut. (R 88), (E 7).

Templeton responded, again contending the Eastland Property was not property of the Chesnut bankruptcy estate and that none of the proceedings relating to the confirmation of the Chapter 13 Plan had ever resolved this issue.

Following a hearing (R 107), (E 10), the bankruptcy court issued an opinion (R 15), (E 5), concluding that the confirmation proceeding was *res judicata* as to all issues which could have been raised in those proceedings. These issues included the issue of the characterization of the ownership of the Eastland Property. According to the bankruptcy court, Templeton had never raised the issue, and it was now precluded under *res judicata* principles from doing so.

On appeal, the District Court appeared to struggle with the decision of the bankruptcy court and this Court in *Chesnut I*. Ultimately, the District Court concluded that the decision in *Chesnut I* was a conclusion that “the Debtor had a sufficient claim of right to the Eastland County property to cause Templeton and the property to be subject to the Bankruptcy Court processes in the Debtor’s Chapter 13

case.” (R USCA5 128), (E 4). Based on that conclusion, the District Court further concluded that the Bankruptcy Court had the power to deal with the Eastland Property and that it was up to Templeton to either object to any proposed treatment or appeal from any such rulings. Finally, the District Court concluded that, since Templeton had neither objected to the confirmation process nor appealed from the confirmation order, *res judicata* principles apply to make the bankruptcy court’s ruling concerning the lien on the Eastland Property final.

SUMMARY OF ARGUMENT

Templeton holds a note payable by Ms. Chesnut and secured by the Eastland Property held solely in the name of Ms. Chesnut. Since the Eastland Property is held solely by Ms. Chesnut it is presumed to be her sole management community property under Texas law and, therefore, not property of the estate in Chesnut’s bankruptcy. The bankruptcy court does not have subject matter jurisdiction over the Eastland Property and cannot order Templeton to release its lien on the Eastland Property without first determining that the Eastland Property is property of Chesnut’s bankruptcy estate.

The proceedings leading to confirmation of Chesnut’s Chapter 13 plan were not sufficient to rebut the presumption and bring the Eastland Property under the bankruptcy court’s jurisdiction, nor was Templeton given sufficient notice that

Chesnut intended to obtain such a result without an evidentiary hearing on whether the Eastland Property is property of the Chesnut bankruptcy estate. Templeton is entitled to retain a lien on the Eastland Property unless, after notice and hearing on the merits of his defenses, there is a judicial determination that the Eastland Property is property of Chesnut's bankruptcy estate.

ARGUMENT

A. The decision in *Chesnut I* only ruled that the Eastland Property was protected by the automatic stay, not that it was property of the estate.

Throughout the litigation resulting in *Chesnut I* and this case, Templeton has argued that there needed to be a determination of the characterization of the Eastland Property. This is necessary because Templeton has consistently argued that the Eastland Property is not property of the estate in Chesnut's bankruptcy. However, when it was argued in a prior adversary proceeding concerning whether the automatic stay had been violated, the Bankruptcy Court specifically stated that it was not making that determination.

“It is not at this time the chore of the court to determine whether the Property was a community asset or separately owned by Mrs. Chesnut. The court need only decide whether Debtor had an interest in the Property which was protected by the automatic stay.” (Emphasis added).

In re Chesnut, 300 B.R. 880, 886 (Bankr. N.D. Tex. 2003).

The district court reversed the bankruptcy court because there was no finding that the Eastland Property was property of the estate. *Brown v. Chesnut (In re Chesnut)*, 311 B.R. 446, 450 (N.D. Tex. 2004). This Court reversed the district court, again specifically not making any final determinations concerning the characterization of the Eastland Property. At one point, it appeared that the bankruptcy judge agreed to hear the issue (R 105), (E 9); however, the bankruptcy judge changed his mind (R 128, 129), (E 10).

The District Court has now concluded that *Chesnut I* was a determination by this Court that the Eastland Property was “subject to the bankruptcy court processes in [Chesnut’s] chapter 13 case.” (R USCA5 128), (E 4). Although not stated, the District Court implicitly concluded that this determination gave the bankruptcy court jurisdiction to make rulings affecting Templeton’s lien on the Eastland Property.

However, a review of *Chesnut I* reveals that the ruling did not go that far. *Chesnut I* was essentially a policy decision that property which is “arguable” property of the estate is subject to the automatic stay of §362. This is so even though the property in question may be ultimately determined not to be property of the estate. In applying that ruling to the Eastland Property this Court said that “this is one such instance” where such arguable property would be subject to the automatic stay and the procedures for seeking relief from the stay. *Id.*, 422 F.3d at

306.

This Court did not determine that the Eastland Property was property of the estate or that it was subject to all bankruptcy processes. It only determined that the Eastland Property fell within the “arguable” sphere of the automatic stay.

B. The Eastland Property is presumed to be Ms. Chesnut’s sole management community property under Texas law.

The Warranty Deed to the Eastland Property was issued to “Jacqueline Chesnut, as her sole and separate property and estate.”³ The promissory note and deed of trust for the purchase of the Eastland Property were in the sole name of “Jacqueline Chesnut.”⁴ When property is held in the name of just one spouse Texas Family Code § 3.104 specifically provides that such property is presumed to be the sole management community property of that spouse⁵. Family Code § 3.104

³ See Trial Exhibit 1, Excerpt 14.

⁴ See Trial Exhibits 7 and 9, Excerpts 15 and 16.

⁵ Texas Family Code § 3.104 states:

PROTECTION OF THIRD PERSONS. (a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in that spouse's possession and is not subject to such evidence of ownership.

(b) A third person dealing with a spouse is entitled to rely, as against the other spouse or anyone claiming from that spouse, on that spouse's authority to deal with the property if:

(1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and

(2) the person dealing with the spouse:

(A) is not a party to a fraud on the other spouse or another person; and

(B) does not have actual or constructive notice of the spouse's lack of authority.

“trumps” the presumption of community property found in Family Code § 3.102. *Jean v. Tyson-Jean*, 118 S.W.3d 1, 8 (Tex. App. - Houston [14th Dist.] 2003 pet. den.).

The validity of this presumption in bankruptcy proceedings has been recognized by this Court in *McCloy v. Silverthorne*, 296 F.3d 370 (5th Cir. 2002). In *McCloy* certain real property (Section 20) was acquired in the name of Willard McCloy (“Willard”) alone while he was married to Beatrice McCloy (“Beatrice”). Willard borrowed money from Silverthorne and pledged a portion of Section 20 to secure payment⁶. Soon after this transaction, Beatrice filed a Chapter 12 bankruptcy and listed Section 20 as an asset. Two years later and while Beatrice’s Chapter 12 case was pending, Willard refinanced the Silverthorne debt and executed a new deed of trust on the Section 20 property. When Willard failed to make payments on the refinanced debt Silverthorne foreclosed on the Section 20 property.

Willard filed suit against Silverthorne to set aside the foreclosure sale and Beatrice sought to intervene to argue that *her* interest in Section 20 was never foreclosed on. Before any ruling on that suit Willard was placed into involuntary bankruptcy proceedings. Willard’s bankruptcy trustee removed that lawsuit to bankruptcy court and sought to compromise with Silverthorne by conveying all of

⁶ Some of these facts are taken from the District Court opinion at *McCloy v. Silverthorne (In re McCloy)*, 2001 U.S. Dist. LEXIS 16805 (N.D. Tex. Oct. 16, 2001)

the Section 20 property (including Beatrice's interest) to him in exchange for \$10,000.00.

The McCloy's objected to the settlement, arguing that the Section 20 property was community property and that at least Beatrice's interest was subject to her pending bankruptcy automatic stay at the time of the refinancing with Silverthorne. Therefore, they argued, the automatic stay prevented Willard from encumbering Beatrice's interest in Section 20. The bankruptcy court rejected this argument and found that since Section 20 was Willard's sole management community property it was never part of Beatrice's Chapter 12 case and the automatic stay of that case never applied. In a *de novo* review the district court affirmed. This Court affirmed the district court and stated that the listing of Section 20 by Beatrice in her bankruptcy did "not affect the fact that Section 20 was under Willard McCloy's sole management and control" and found that he had full authority to encumber the entire property ⁷.

Therefore, under Texas law the Eastland Property is presumed to be the sole management community property of Ms. Chesnut.

C. The sole management community property of Ms. Chesnut was not property of the estate in Chesnut's

⁷

To some degree the rulings in McCloy and Chesnut I are inconsistent. The McCloy court appeared to be saying that because Section 20 was not part of Beatrice's bankruptcy estate the automatic stay never applied.

chapter 13 bankruptcy.

Bankruptcy Code § 541(a)(2) defines property of the estate when only one married spouse files for bankruptcy. That section states that property of the estate includes “All interests of the debtor and the debtor’s spouse in community property ... that is under the sole, equal or joint management and control of the debtor.” By clear implication property that is under the sole management of the non-filing spouse is not property of the estate. *In re Reiter*, 126 B.R. 961, 965 (Bankr. W.D. Tex. 1991). Therefore, in this case any separate property or sole management community property of Jacqueline Chesnut is not property of the estate in Chesnut’s bankruptcy.

D. The burden is on Chesnut to rebut the presumption that the Eastland Property is the sole management community property or the separate property of Jacqueline Chesnut.

Given the fact that the Eastland Property is presumed to be the sole management community property (if not the separate property) of Ms. Chesnut, the burden is on Chesnut to obtain a ruling of the Bankruptcy Court to rebut this presumption. *Jean v. Tyson-Jean*, 118 S.W. 3d at 9.⁸ See also Fed. R. Evid. 301-302 which recognizes the State law presumption in a federal proceeding (Rule 302)

⁸ *Jean v. Tyson-Jean* involved an attempt by a spouse not named in a deed to contest the authority of the named spouse to deal with property. In this case, neither of the Chesnuts have argued that Ms. Chesnut did not have authority to deal with the Eastland Property, and Templeton has the benefit of the presumption in Tex. Fam. C. § 3.104(a).

and that the burden of rebutting the presumption is on Chesnut (Rule 301).

E. Chesnut failed to obtain a ruling that rebutted the presumption that the Eastland Property was the sole management community property of Ms. Chesnut.

The District Court ruled that the confirmation “proceedings”⁹ and the confirmation order were *res judicata* that the Bankruptcy Court had jurisdiction over the Eastland Property and Templeton Mortgage and the ruling that the lien on the Eastland Property should be released upon completion of the Chapter 13 Plan. (R. 129.) However, there was never a specific ruling rebutting the presumption that the Eastland Property was the sole management community property of Ms. Chesnut and therefore not property of the estate. Since there was no formal confirmation hearing there was no evidence received on this issue.

A proceeding to obtain a declaration that the Eastland Property is property of Chesnut’s bankruptcy estate requires the filing and prosecution of an adversary proceeding under Bankr. R. 7001(2). No such pleading was ever filed by Chesnut. The one adversary proceeding that was filed resulted in all courts at all levels saying, in response to Templeton’s pleading, that no such determination was being made, because it was not necessary to do so in the context of resolving of the alleged

⁹ “Proceedings” is an appropriate term since there was no formal confirmation hearing. The confirmation proceeding was a routine signing of a confirmation order only.

automatic stay violation.

This Court has repeatedly held that a chapter 13 confirmation process (whether with or without evidence and a hearing) cannot override a provision of the Bankruptcy Code or Rules which requires a specific proceeding.

In *In re Simmons*, 765 F.2d 547, 557 (5th Cir. 1985) a creditor, Savell, filed a proof of claim asserting a mechanics lien on the debtor's homestead. The Debtor filed a Chapter 13 plan which treated the Savell's claim as unsecured and proposed a 10% payment. Savell filed a document indicating acceptance of the plan but objected to being listed as unsecured. The Chapter 13 plan was confirmed with a recitation that no objections to confirmation were considered. Approximately thirty days later the Chapter 13 trustee filed a motion to allow claims, including Savell's, as unsecured. Savell did not object to this motion. The trustee made payments on Savell's unsecured claim although Savell claimed the checks had not been cashed.

Approximately one year after confirmation the debtor filed a motion to sell his homestead. The Bankruptcy Court allowed the sale by agreement of all parties with a sufficient amount held in escrow to pay Savell's secured claim. Several months later the debtor filed an adversary proceeding seeking a declaration that Savell's lien was waived as a result of the confirmation order. This Court affirmed the Bankruptcy Court's order that Savell's lien survived the confirmation process

holding that since 11 U.S.C. § 506(d) provided a means to adjudicate the validity of a lien, the debtor could not substitute the confirmation process in its place. *Id.*, 765 F.2d at 559.

In *In re Howard*, 972 F.2d 639 (5th Cir. 1992) the Chapter 13 plan arbitrarily reduced the amount of a creditor's secured claim in exchange for a release of counterclaims asserted by the debtors against the creditor. The creditor did not object and the plan was confirmed. When the creditor later filed a motion for relief from the bankruptcy stay, to enforce its lien, the debtor defended by arguing that the confirmation order was *res judicata* concerning the treatment of the claim. This Court reversed the bankruptcy and district courts and ruled that since the Bankruptcy Code provided a specific means for contesting the secured claim the debtors should follow that procedure instead of substituting the confirmation process. *Id.*, 972 F.2d at 642.

Similarly, this Court has visited the issue in a Chapter 11 case. See *IRS v. Taylor (In re Taylor)*, 132 F.3d 256 (5th Cir. 1998). Mr. Taylor perceived a possibility that he could be assessed "responsible person" liability for unpaid employee withholding taxes collected by his employer, Marshall Mill. Taylor's Chapter 11 plan and disclosure statement described the IRS claim as "0" and that the claim would be discharged upon confirmation without receiving any payment. The

IRS did not object and the plan was confirmed. When the IRS began enforcement of the personal liability claim Taylor initiated a proceeding in Bankruptcy Court seeking a declaration that plan confirmation was *res judicata* on the issue of his personal liability to the IRS. Following the reasoning of *Simmons* and *Howard* this Court ruled again that the confirmation process again cannot substitute for a claim objection proceeding.

A similar technique was also rejected by a district court in *In re Kleibrink*, 2007 U.S. Dist. LEXIS 63974 (N.D. Tex. 2007). Mr. Kleibrink filed a form objection to a secured claim of Wilmington Trust Co. alleging that the claim should be allowed as an unsecured claim only with a value of "0". The objection was sustained as part of the confirmation process. After the bankruptcy was completed Wilmington's successor proceeded to enforce its lien. Kleibrink filed a new bankruptcy case and argued that the claim objection proceeding in the prior case had extinguished the lien. The district court affirmed the bankruptcy court's opinion¹⁰ that there was no extinguishment of the lien because the claim objection proceeding did not provide clear notice that removal of the lien was being sought and no adversary proceeding to litigate the issue had been filed. Since there had never been a clear order extinguishing the lien there was no *res judicata* or collateral estoppel

¹⁰ *In re Kleibrink*, 346 B.R. 734 (Bankr. N.D. Tex. 2006)

as a result of the proceedings in the prior case ¹¹.

From these decisions some principles become clear. When there is a specific bankruptcy procedure to resolve an issue (e.g. claim objection, adversary proceeding) a party cannot substitute an alternate procedure and claim a *res judicata* effect. In this case Chesnut sought to avoid an adversary proceeding to determine his interest in the Eastland Property, by inserting a provision in the Chapter 13 plan providing for a release of Templeton's lien. All of this was accomplished without Chesnut ever having obtained an explicit order rebutting the presumption that the Eastland Property was Ms. Chesnut's sole management community property and was therefore not property of the Chesnut bankruptcy estate. In fact, the confirmation order was signed *after* the district court ruled that there was no finding that the Eastland Property was property of the bankruptcy estate and ordered the bankruptcy court "to restore appellants to the position they were in prior to entry of the December 24, 2003, judgment". Prior to the entry of the December 24, 2003, judgment, record title to the Eastland Property was in Templeton, not Ms. Chesnut.

Chesnut should have filed an adversary proceeding against Templeton to determine the extent of his interest in the Eastland Property. Chesnut's burden is to allege and prove facts sufficient to rebut the presumption of Tex. Fam. C. §

¹¹ As this brief is filed the district court decision in Kleibrink is on appeal before this Court.

3.104(a). Templeton would then be heard on the merits of its pleadings and its additional argument that both Chesnuts are estopped from claiming that the Eastland Property is anything other than the separate property of Ms. Chesnut.

F. The Bankruptcy Court did not have jurisdiction to order Templeton to release its lien on the Eastland Property.

The proceedings leading to *Chesnut I* only determined that the Eastland Property was subject to the automatic stay since it fell within the bounds of property which was “arguable” property of the estate. It did not determine as a matter of law or fact that the Eastland Property was property of the estate. Without an explicit order the only legal determination of the status of the Eastland Property is the presumption that it is not property of the estate. As such, the bankruptcy court did not, and still does not, have subject matter jurisdiction over the Eastland Property, because a finding that the Eastland Property is property of the bankruptcy estate is necessary to establish subject matter jurisdiction over the proceedings involving the Eastland Property. *McCloy, supra*, at 374. The lack of subject matter jurisdiction may be raised at any time, and this Court may examine the lack of subject matter jurisdiction for the first time on appeal. *McCloy, supra*, at 373, citing *Giles v. NYL Care Health Plans, Inc.*, 172 F. 3d 332, 336 (5th Cir. 1999).

CONCLUSION

The judgments of the bankruptcy court and district court ordering Templeton to release its lien on the Eastland Property should be reversed. No remand is necessary.

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The undersigned certifies that a true and correct copy of the foregoing Brief was served upon:

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CERTIFICATE OF COMPLIANCE

This is to certify that the above and foregoing brief complies with the type/volume limitations of Fed. R. App. P. 32(a)(7). The brief consists of no more than 31 pages, 744 lines of text and 5709 words as determined by the properties function of Corel WordPerfect 11.

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