

# Case Law Update

PRESENTED BY:

**HON. THOMAS STUCKEY**, ASSOCIATE JUDGE,  
CENTEX CHILD PROTECTION COURT SOUTH

**ERIC TAI**, MANAGING ATTORNEY,  
TDFPS APPELLATE DIVISION

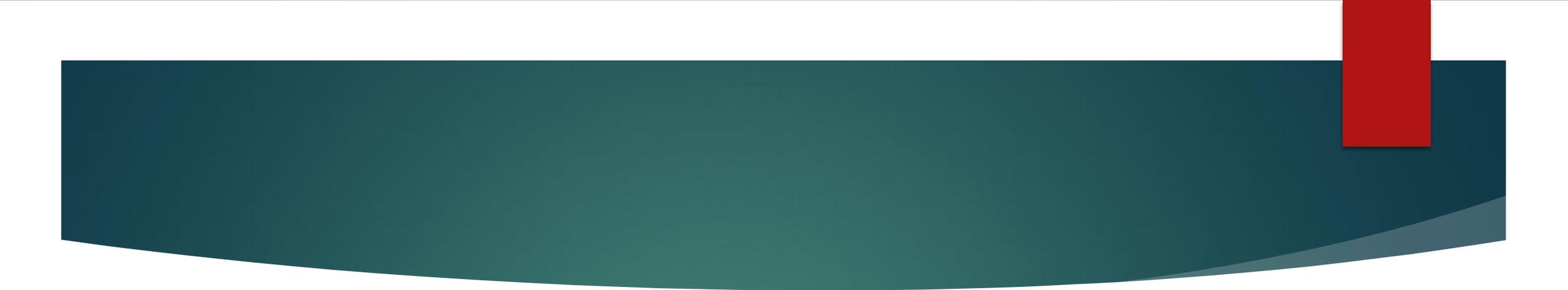
CHILD PROTECTION COURT AD LITEM SEMINAR  
KERRVILLE, TEXAS  
APRIL 13, 2018

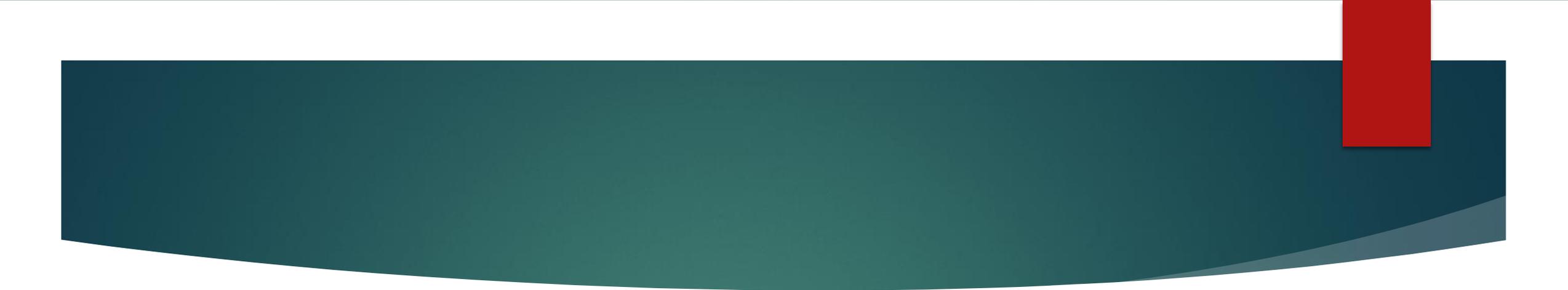
# Goals of Presentation

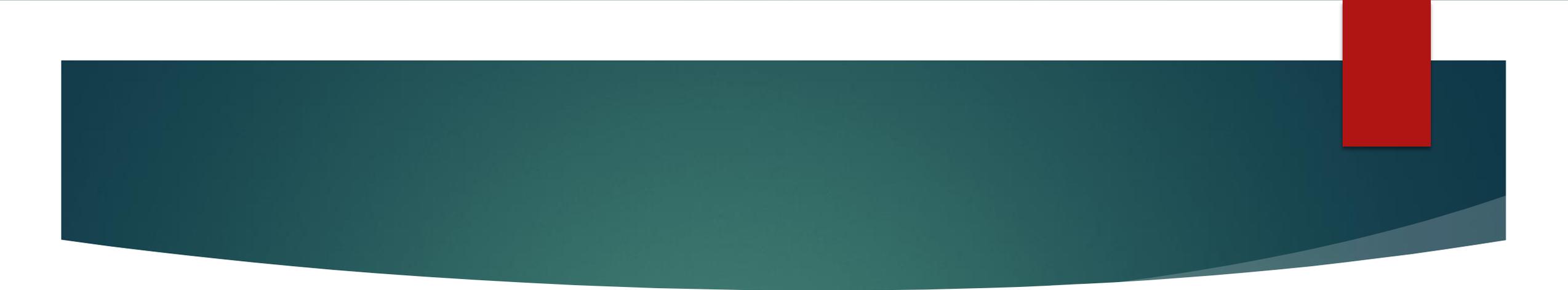
- To identify and discuss issues which have recently arisen in child protection cases.
- To approach these issues with a view from the bench as well as from an appellate perspective.

*In re E.C.Q.L., No. 12-16-00297-CV* (Tex. App.—Tyler Apr. 28,  
2017, no pet.)

- ▶ How Much Due Diligence is Required for Citation by Publication?

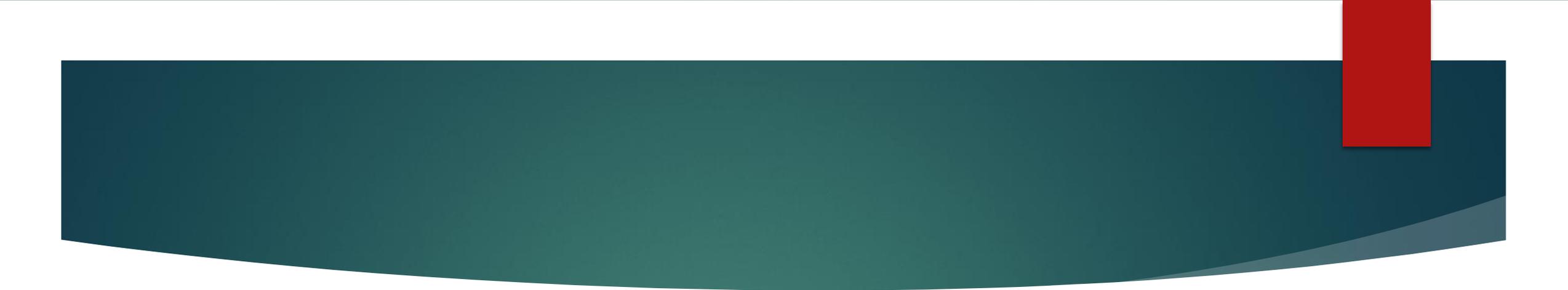
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- ▶ Father and Mother were married in 2007 and lived in California.
  - ▶ Mother left in 2009 and gave birth to the child in Texas in 2010.
  - ▶ The child was removed from Mother at birth due to a positive drug test. Mother told Father in early 2011 that the child was in the custody of the government until her criminal issues were resolved.

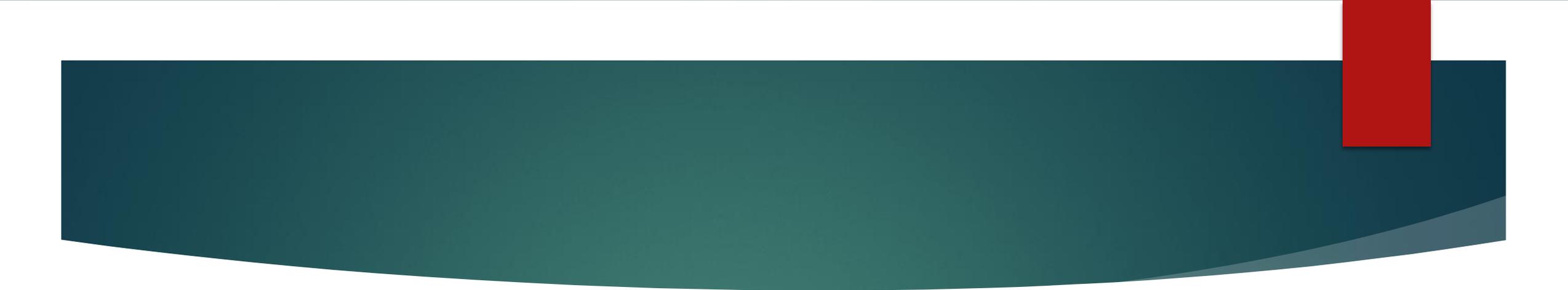
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- ▶ In March 2011, the Department filed its petition to terminate the parents' parental rights.
  - ▶ Father was appointed counsel.

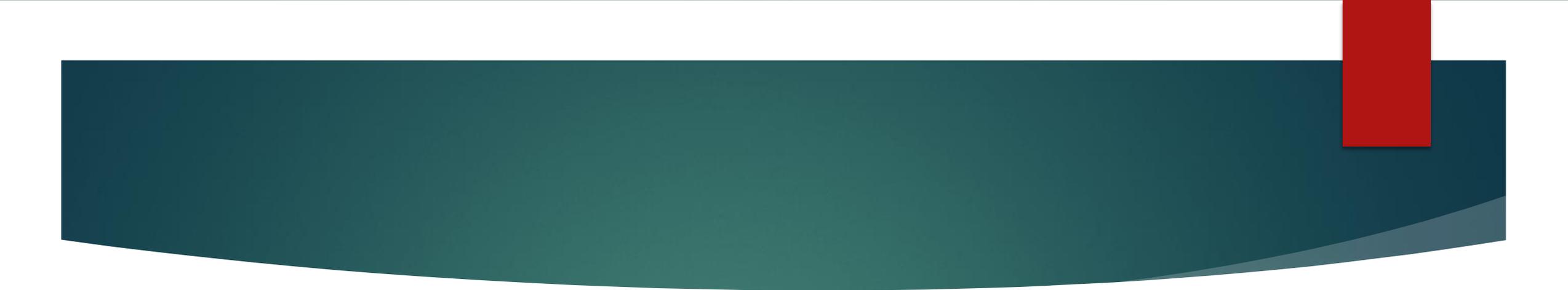


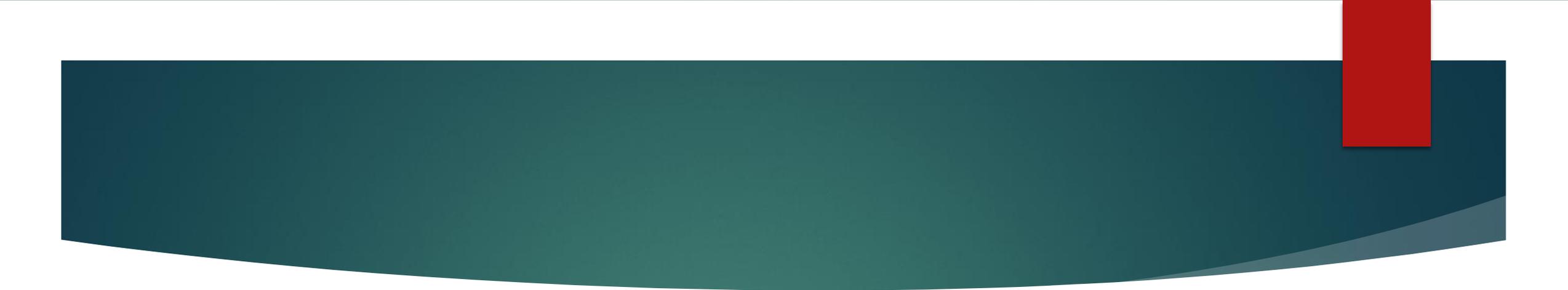
▶ Attempts to find Father (according to affidavit):

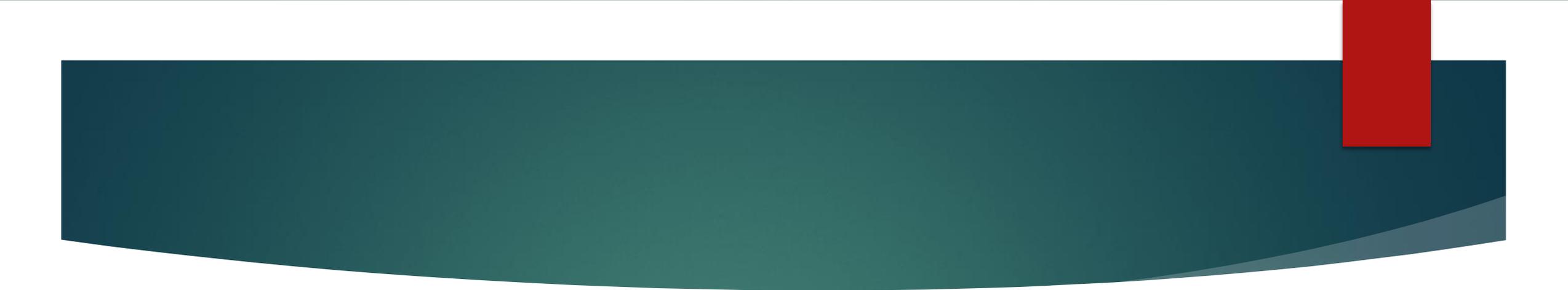
- ▶ Caseworker calls business number provided by Mother, leaves message;
- ▶ CASA volunteer also calls attempts to leave message, but language barrier makes it unsure;
- ▶ Caseworker sends letter to business address. The “green card” is returned, but not signed by Father.
- ▶ Inquiries to the Diligent Search Unit, Google, Department of Public Safety Databases, and the Department of Human Services yielded no results;
- ▶ Caseworker executes affidavit indicating that Father was unknown to her and a transient.

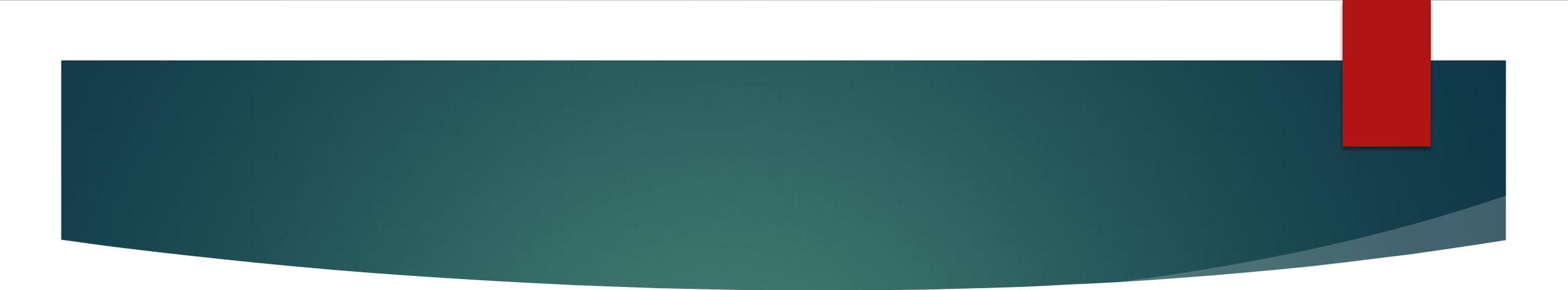
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- ▶ The Department effectuated service on Father by publication.

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- ▶ Father's parental rights were terminated and the order was filed in July 2011.

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- ▶ In January 2016, Father filed a bill of review, contending that he was not personally served and was unaware that a court proceeding concerning his parental rights was pending-denied by trial court.

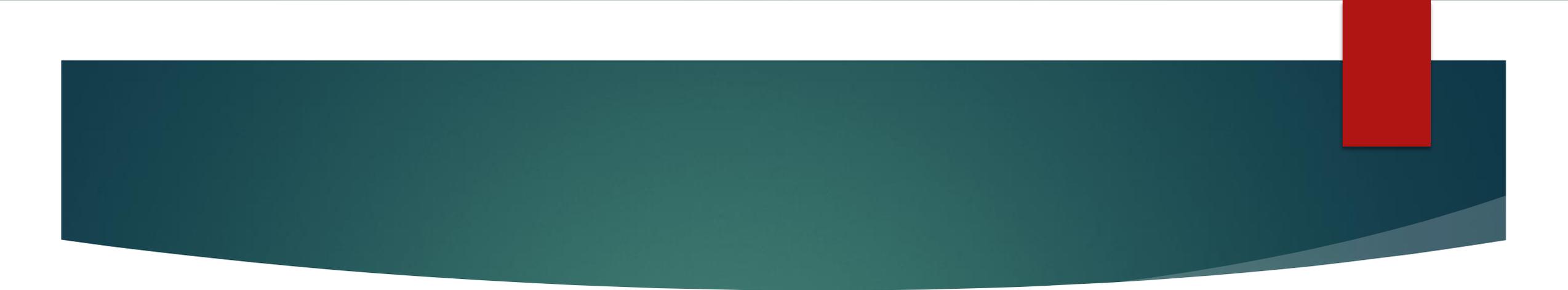
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- ▶ TRCP 109(2) allows citation by publication if a party states under oath that the defendant is a transient person, and that after due diligence, the affiant is unable to locate the defendant's whereabouts.

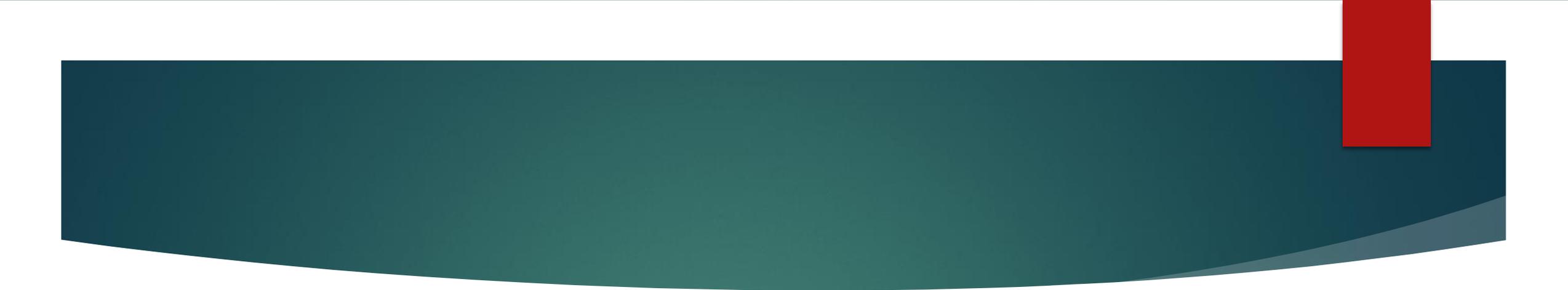
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- ▶ The Court cited to *In re E.R.*, 385 S.W.3d 552 (Tex. 2012) in stating that when a defendant's identity is known, service by publication is **generally inadequate**, and service by publication should be a **last resort**, not an "expedient replacement" for personal service. The Court stated that if personal service can be effected by the exercise of reasonable diligence, "substituted service is not to be resorted to".



What diligence is due?

- ▶ “A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search, but by its quality.”

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- ▶ Problems with due diligence:
    - Phone calls – language barrier
    - Letter – green card signed by someone else should have caused further inquiries.
    - Searches with google, diligent search unit and other Texas agencies only valid in Texas

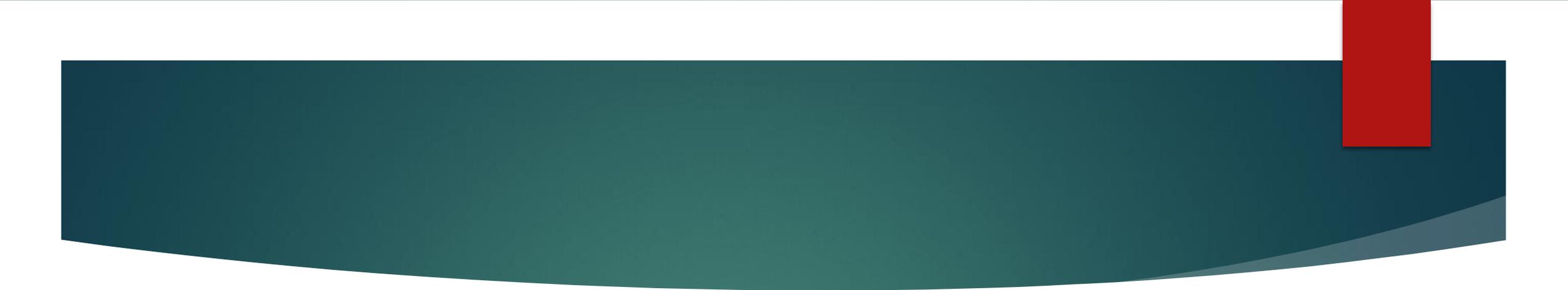
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- ▶ The Court noted that publication in Texas when Father was known to live in California was “a poor” and “hopeless substitute for actual service of notice.”
  - ▶ Court held that the trial court’s finding of fact regarding the diligence of the Department’s search for Father was not supported by the evidence and citation by publication in this case, was constitutionally inadequate.

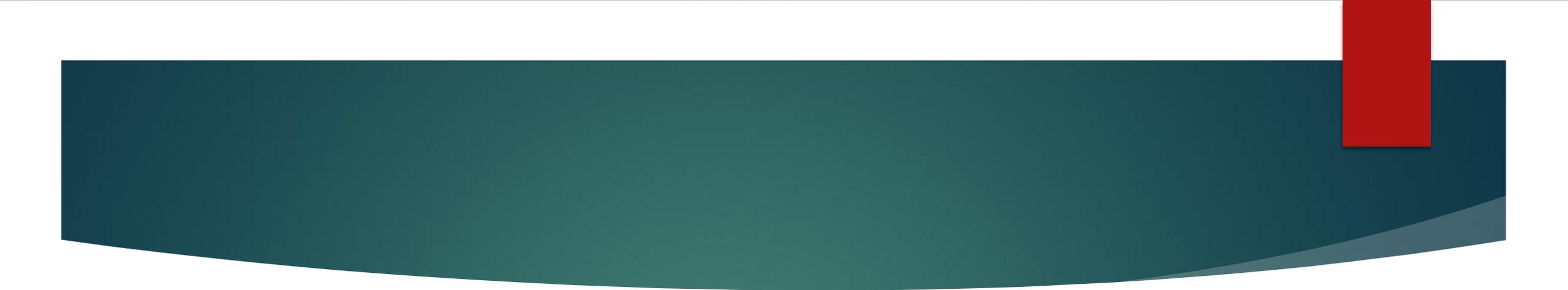
# Practice Tips

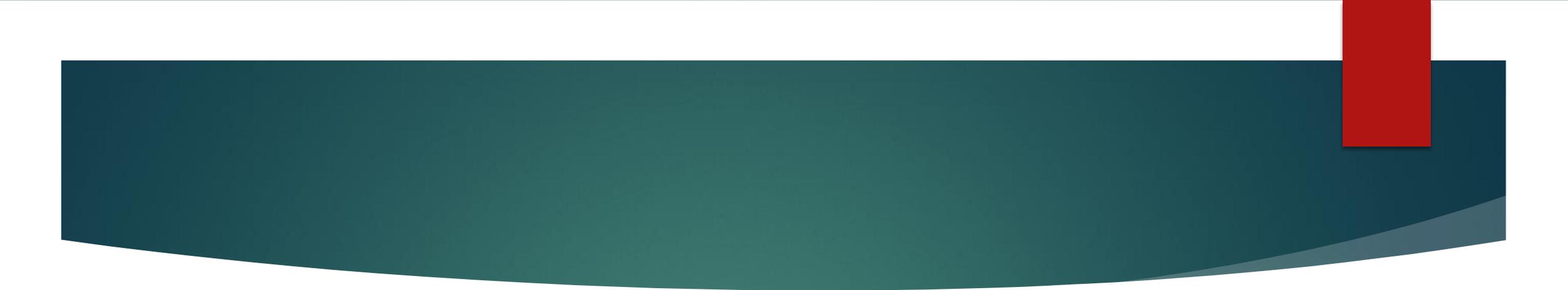
- ▶ Continue to interview parties and available family throughout proceeding.
- ▶ Follow-up with any leads.
- ▶ Utilize a native speaker to help make calls or send correspondence.
- ▶ Utilize any out-of-state resources, i.e. FBI criminal background check.
- ▶ Search Facebook & other social media.
- ▶ Publish in last known area where parent resided, especially if last contact was recent.
- ▶ Remember, the “Quality” of search is all that matters!

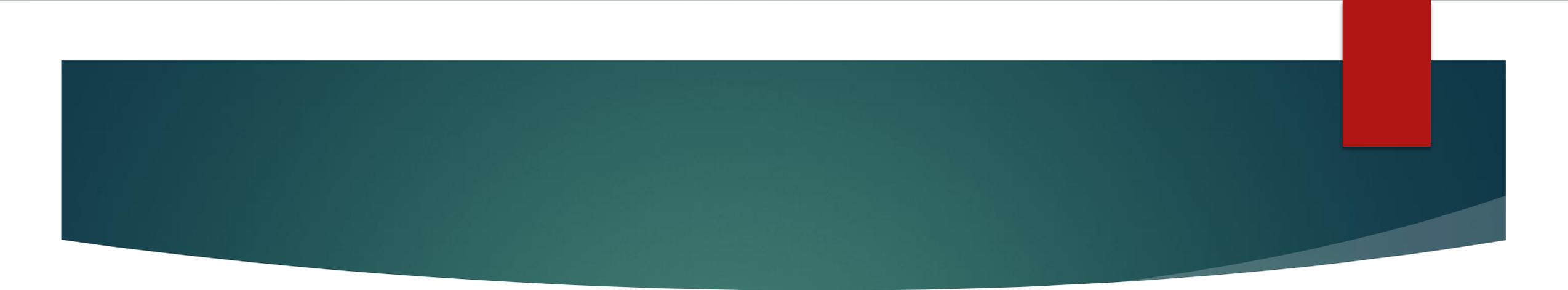
*In re A.A.T.*, No. 04-16-00344-CV (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (mem.op.)

- ▶ Did the trial court abuse its discretion in excluding testimony from TBBD or metabolic bone disease expert?

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- ▶ Part of the decision to terminate Mother's parental rights to the child was based on the numerous fractures suffered by the child's older sibling in the span of approximately one month, and because of the injuries, Mother's failure to acknowledge the injuries to the sibling and recognize the risks to her children.

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- ▶ Mother's expert sought to opine that the sibling suffered from temporary brittle bone disease ("TBBD") or metabolic bone disease, referred to by Mother's expert as multiple unexplained fractures ("MUFs") in infants.
  - ▶ The Department sought to exclude the expert's testimony, alleging it was unreliable. Although the trial court determined the expert is an expert in genetics, it concluded that his hypothesis of TBBD or metabolic bone disease, was unreliable as it failed to meet the standards required under *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993) and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

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- ▶ In considering the six Robinson factors, the Appellate Court found that:
    - ▶ Mother's expert's theory regarding the existence of metabolic bone disease has been negatively peer-reviewed in several publications.
    - ▶ the evidence showed that his ideas are based on his subjective interpretation regarding the existence of the factors that in his opinion denote the existence of metabolic bone disease
    - ▶ the Department provided evidence from two experts who testified that Mother's expert's theory has not been generally accepted by the relevant community and that several articles specifically renounced the existence of such a disease
    - ▶ One of the articles stated that the existence of such a disease "is neither clinically validated nor generally accepted by expert professionals and should not be invoked to explain multiple fractures in an infant."

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- ▶ Held that the trial court did not err in excluding [Mother's expert's] testimony relating to metabolic bone disease and that the “Department presented sufficient evidence for the trial court to conclude, in its discretion that [Mother's expert's] theory was unreliable due to an analytical gap between the data and his conclusion under the Robinson factors”

# Practice Tips

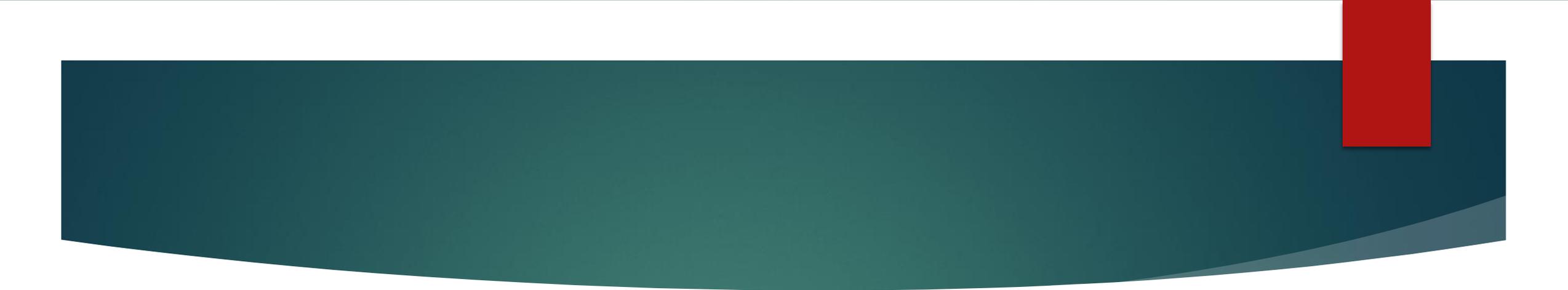
- ▶ Attorneys for Respondents – Request money early to consult with and/or hire an expert in complicated cases.
- ▶ Consult with and designate experts early. It also can help you learn about your case and look at settlement options if necessary.
- ▶ Attorneys for DFPS – Request that the court hold a Daubert/Robinson hearing prior to trial.
- ▶ Check out your desired expert's prior history -- Texas Criminal Defense Attorney networks and/or Texas County & District Attorney Association based upon who you represent.
- ▶ Ask your expert – Have you ever been disqualified in a court proceeding as an expert or had your testimony limited or excluded?

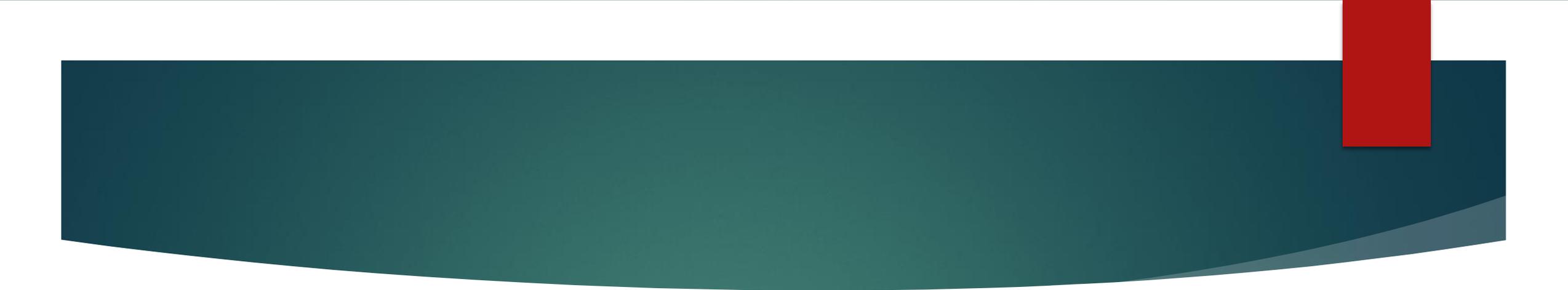
# Termination Grounds

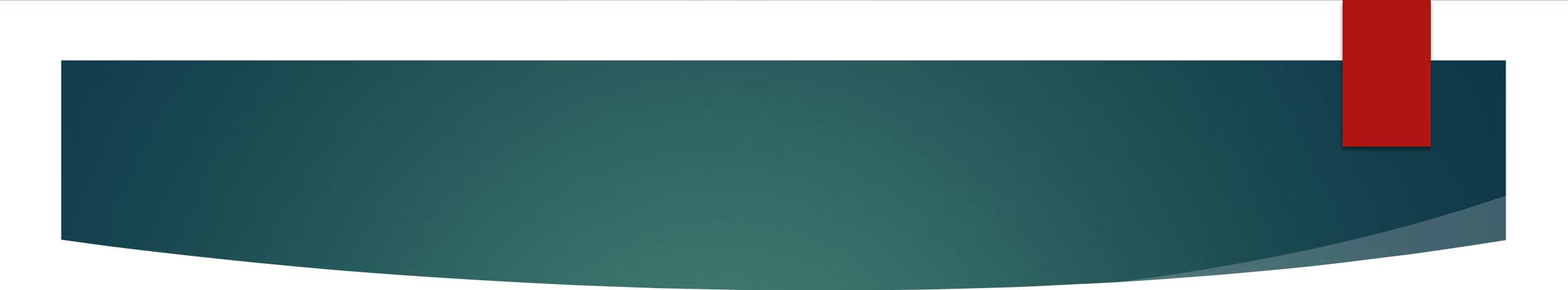
TEXAS FAMILY CODE  
§161.001

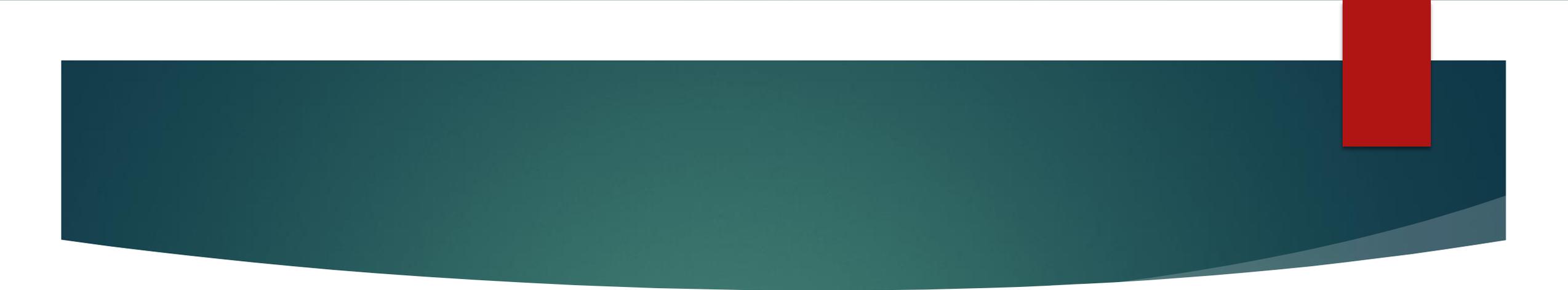
*In R.H. and D.H., No. 10-17-00054-CV (Tex. App.—Waco Sept. 17, 2017, no pet. h.)*

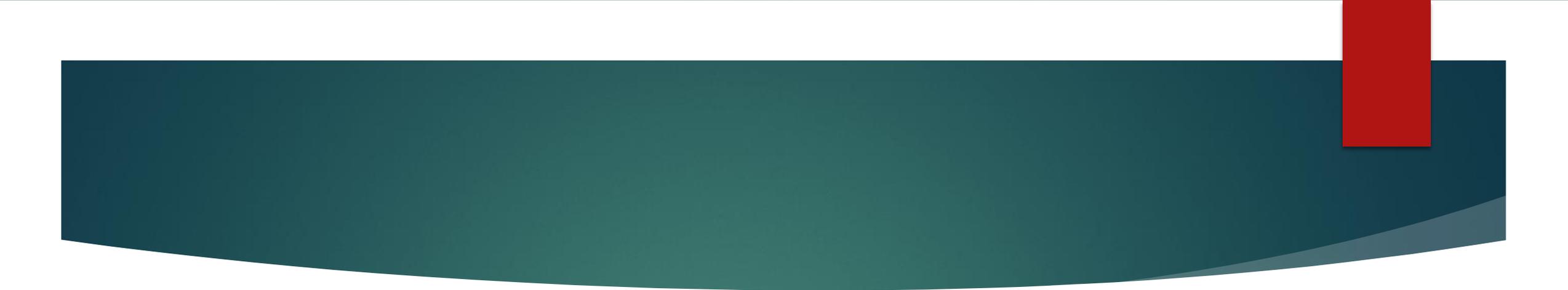
- ▶ Is the evidence legally and factually sufficient to support TFC §161.001(b)(1)(D)?

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- ▶ The undisputed testimony establishes that Mother and her children came to the attention of the Department after police were called to investigate a report of a vehicle on the train tracks.
  - ▶ A.H.'s SUV was sitting on the tracks about forty yards from the roadway. The two front tires were flat, and the SUV appeared to have been driven onto the tracks. The car was still in gear when officers arrived, and the reverse lights were activated
  - ▶ A.H. had removed R.H. and D.H. from her SUV, and they were in the vehicle of a passerby who had stopped to assist

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- ▶ A subsequent Breathalyzer test revealed that A.H. had a blood alcohol concentration of 0.17, more than twice the legal limit of 0.08
  - ▶ Mother was arrested at the scene for driving while intoxicated, and the children were taken into the custody of the Department.
  - ▶ Mother subsequently pleaded guilty to two counts of driving while intoxicated with a child passenger, and was sentenced to five years' probation

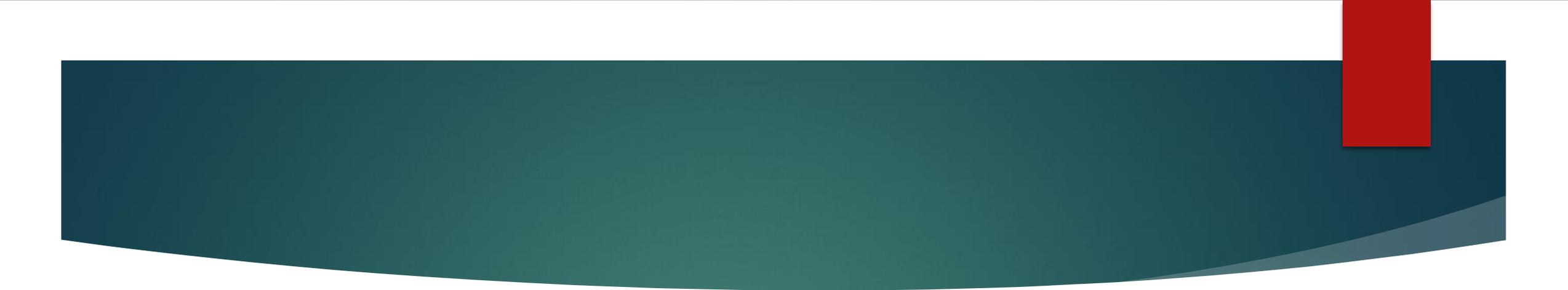
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- ▶ On appeal Mother argued that the Department failed to prove by clear and convincing evidence a violation of subsection (D) because there was no evidence presented of the children's living conditions
  - ▶ “While the endangerment analysis focuses on the evidence of the child's physical environment, the environment produced by the conduct of the parents bears on the determination of whether the child's surroundings threaten his or her well-being”
  - ▶ Here, Mother's conduct on the night she was arrested caused the children to be placed in an endangering environment

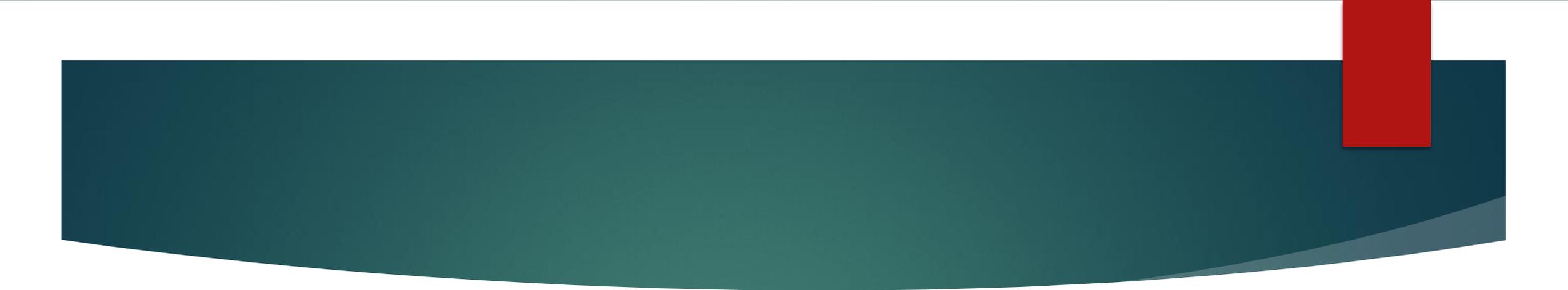
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- ▶ A.H. argues that the events of that night were insufficient to establish that the children were in a dangerous condition or surrounding
  - ▶ A.H. bases this on her assertion that “sitting in a vehicle on the shoulder of the road” did not endanger the children
  - ▶ However, before the children were in a vehicle on the side of the road, they were in A.H.’s disabled vehicle on the railroad tracks—a dangerous situation despite A.H.’s argument to the contrary

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- ▶ A train does not have to be actually approaching a crossing for the danger it poses to be actual and imminent.<sup>3</sup> “Every railroad crossing is dangerous . . . .” *Rankin v. Union Pac. R.R. Co.*, 319 S.W.3d 58, 63 (Tex. App.—San Antonio 2010, no pet.) (quoting *Missouri Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 235 (Tex. 1978)). And the driver of a vehicle using a crossing “must exercise ordinary care to discover and avoid approaching trains.” *Port Terminal R.R. Ass’n v. Richardson*, 808 S.W.2d 501, 504 (Tex. App.—Houston [14th Dist.] 1991, writ denied). In this case, A.H. failed to use ordinary care, and her actions placed the children in a dangerous condition or surrounding

*In re A.B. and A.A.D.*, Nos. 12-16-00275-CV & 12-16-00276-CV  
(Tex. App—Tyler Mar. 22, 2017, no pet.) (mem. op.)

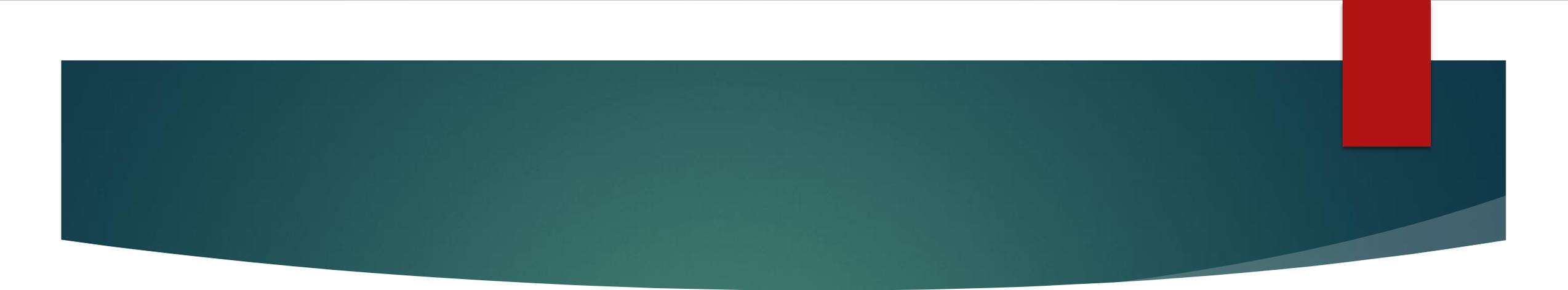
- ▶ Was the evidence legally and factually sufficient to terminate father's parental rights pursuant to TFC 161.001(b)(1)(E)?

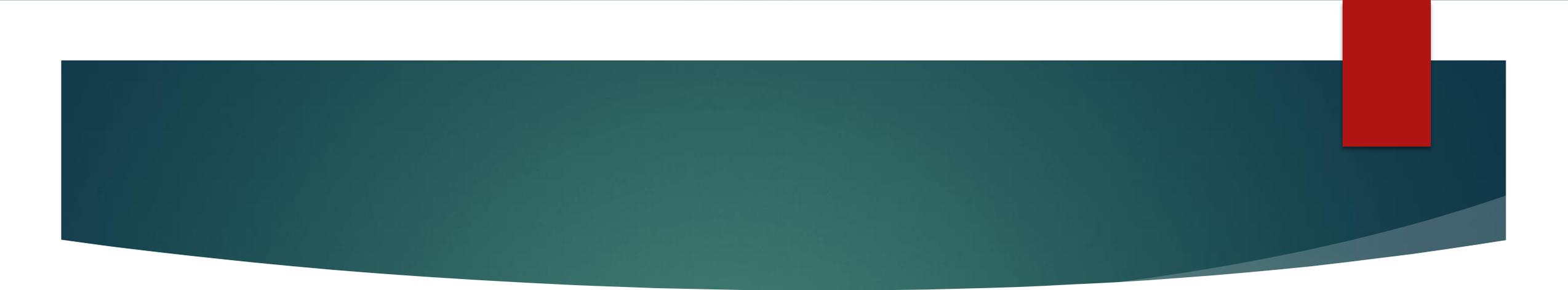
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- ▶ Mother had major mental health issues, drug abuse problems
  - ▶ Father allowed the children to stay with Mother
  - ▶ Failed monitored return
  - ▶ Father argued Mother “fooled” him, no signs she was using drugs
  - ▶ Father could or should have been able to recognize drug abuse symptoms
  - ▶ Continued to cohabitate despite drugs and Mother’s voluntary relinquishment
  - ▶ Volatile relationship

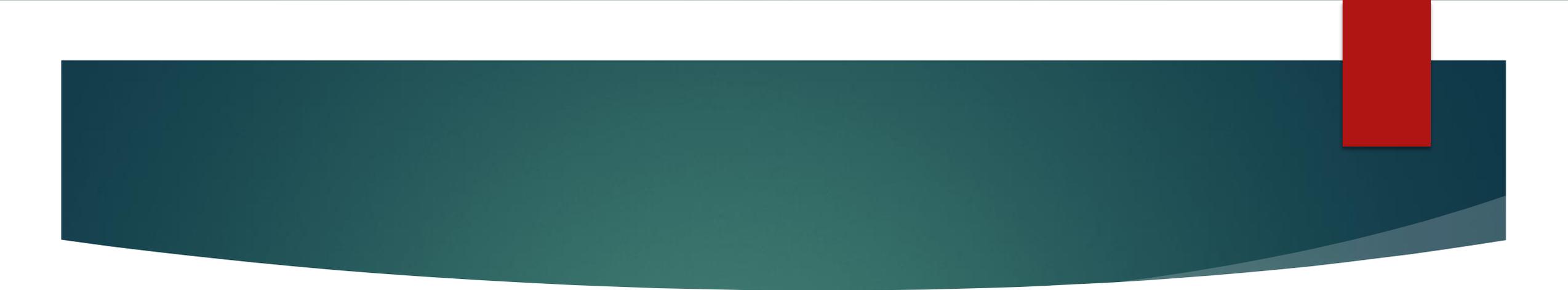
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- ▶ Termination affirmed
    - ▶ Failure to remove children from Mother's presence
    - ▶ Could not ascertain drug use
    - ▶ Did not end relationship after Mother relapsed

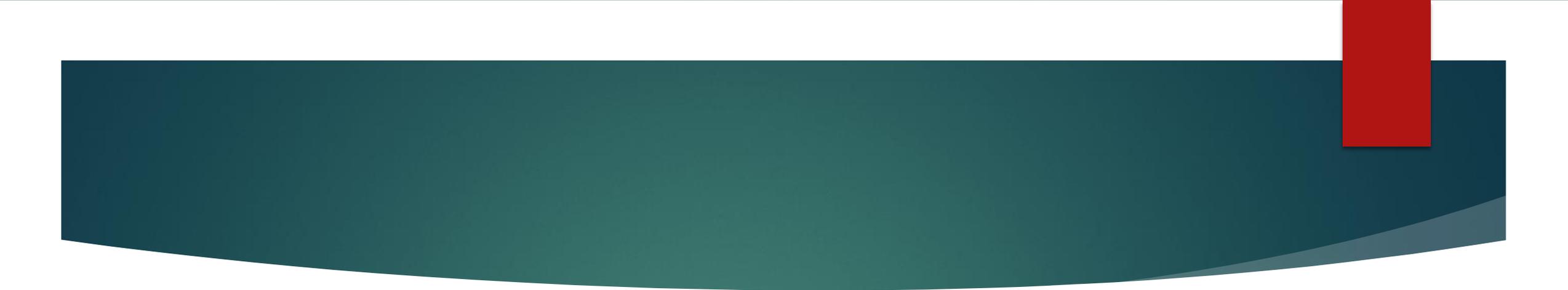
*In re Z.O.*, No. 02-17-00166-CV (Tex. App.—Fort Worth, Sept. 7, 2017, no pet. h.) (mem. op.)

- ▶ Is the Mother's emotional abuse of the child sufficient to support termination of her parental rights pursuant to (E)?

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- ▶ Mother continuously threatened to place the child in foster care if she misbehaved
  - ▶ Mother, with child present, affirmatively requested that child be placed in foster care due to her behavior
  - ▶ The caseworker overheard A.G. threaten Z.O. on another occasion,
    - ▶ when A.G. told Z.O. that “if she’s bad, she would go back to foster care. That [A.G.] would . . . go back to Illinois and take care of [Z.O.’s] siblings who behaved.”
  - ▶ Children cannot feel safe, added the caseworker, when their parents are constantly trying to give them away.
  - ▶ Indeed, threats to have others take a child away for bad behavior have “a profound impact on [the child’s] emotional stability,” the Department program administrator admonished.

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- ▶ a therapist who specialized in treating traumatized children averred that Z.O. exhibited “separation fear-based behaviors” and that the threat of losing her home at any time created the type of anxiety that “handicaps a child’s ability to make effective developmental progress across all domains.”
  - ▶ The evidence further showed, poignantly, that when the trial court removed Z.O. from the monitored return, Z.O. was persuaded that A.G. would kill herself and shouted, “Mommy, please don’t kill yourself.” (A.G. had ill-advisedly brought Z.O. to the removal hearing.) A.G. admitted being the source of Z.O.’s fears because Z.O. had overheard her tell someone over the phone that, “[i]n so many words,” she would kill herself if Z.O. went back into care. Notwithstanding the Department supervisor’s admonishing A.G. to reassure Z.O. that A.G. would not kill herself, A.G. stubbornly balked. The best she could muster was “I don’t know.” When asked if the second removal damaged Z.O.’s emotional well-being, the trauma therapist responded, “It made a pretty good dent.”

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- ▶ Mother was not functioning as a parent:
    - ▶ when Z.O. would protest about going to school in the morning, A.G. would simply tell Z.O. to go back to bed
    - ▶ And once when A.G. and Z.O. accidentally found themselves locked out of A.G.'s room at the Wheeler House, A.G., having no solution to the problem, got frustrated, sat down, and declined to ask for any help

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- ▶ During visits with Z.O., A.G. was described as not being engaged.
  - ▶ Visitations would consist largely of A.G.'s braiding Z.O.'s hair with very little interpersonal interaction. The visitation observer said that normally she preferred for parents and their children to “actually talk, play[,] and interact with each other.” A.G.'s cell phone was also a distraction, as sometimes A.G. would let Z.O. play with it or would try to place or take a call for one reason or another.
  - ▶ Inexplicably, A.G. even forgot Z.O.'s birthday. When A.G. spoke with Z.O., A.G. chose topics that were more appropriate for an eighteen-year-old than an eightyear-old, and one witness described Z.O. as acting more like an eighteen-yearold than an eight-year-old in the way she interacted with adults

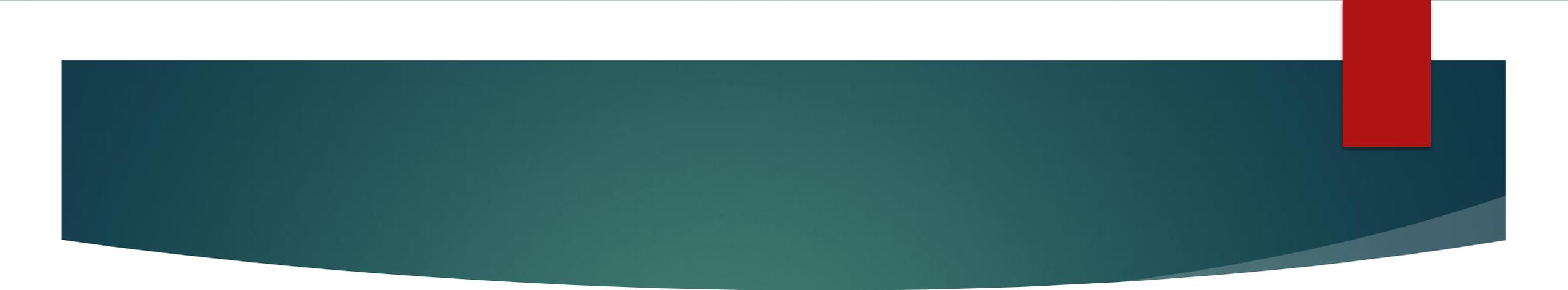
# Practice Tips

- ▶ Spend time to learn your case.
- ▶ Determine what facts and evidence support or disprove the two endangerment grounds – TFC 161.001 (b)(1)(d) & (e).
- ▶ Remember, (d) requires a parent's knowing conduct. Although, (e) only requires conduct.

*In re K.S.L.*, No. 16-0558, \_\_\_ S.W. 3d. \_\_\_ (2017)

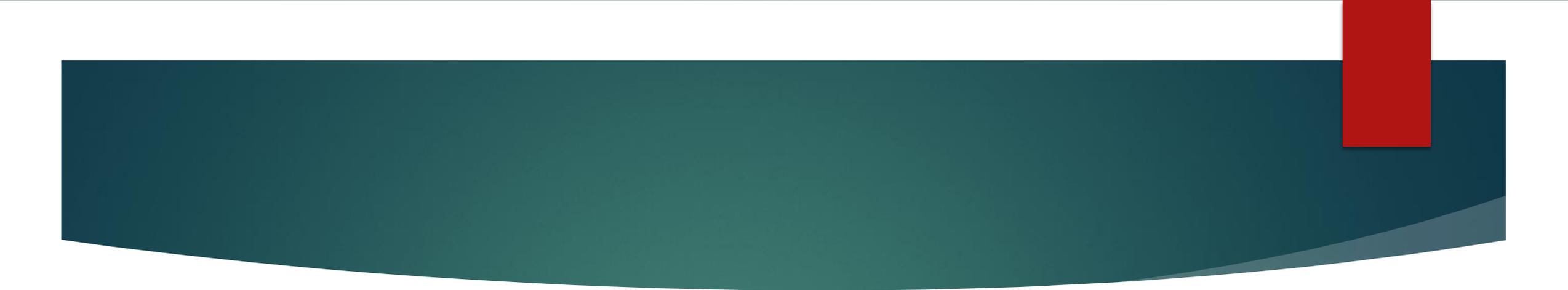
▶ Texas Supreme Court – Affidavits of Relinquishment

“But even under a clear-and-convincing standard, we think in the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child’s best interest, would satisfy a requirement that the trial court’s best-interest finding be supported under this higher standard of proof.”

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- ▶ The attack-on-termination provision, section 161.211 (titled “Direct or Collateral Attack on Termination Order”), states in subpart (c):

A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit.

- ❖ section 161.211(c)-which limits appellate reviews--bars a challenge to the sufficiency of the best interest evidence does not violate federal due process

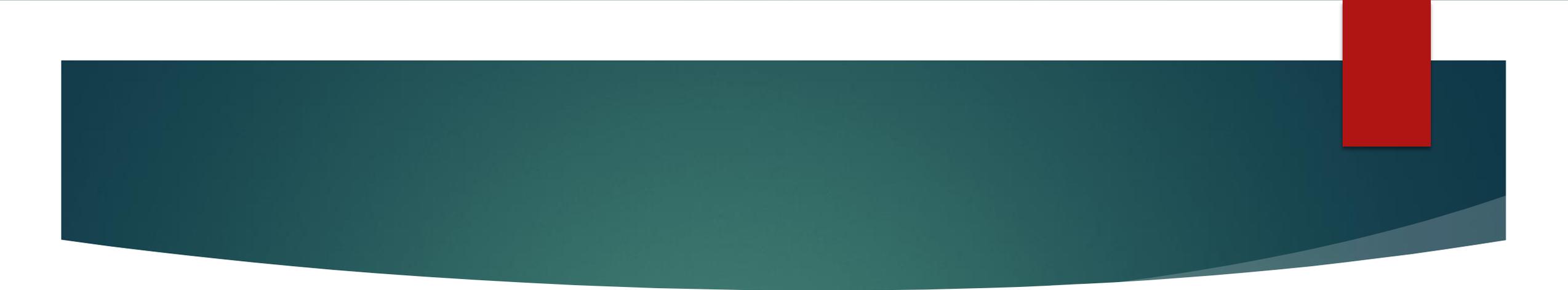
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- ▶ A parent's willingness to voluntarily give up her child, and to swear affirmatively that this is in her child's best interest, is sufficient, absent unusual or extenuating circumstances, to produce a firm belief or conviction that the child's best interest is served by termination.

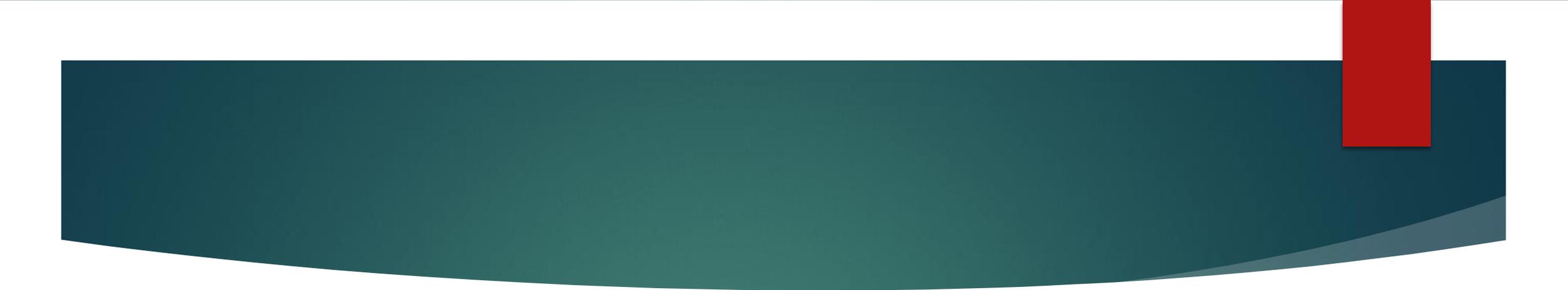
# Practice Tips

- ▶ Continue to use Best Practices:
  - ▶ Spend a few minutes to put on testimony and evidence of permanency & future plans for the child to further support best interest and the designation of DFPS as managing conservator.
  - ▶ If the parent is available – Ask questions to refute later attacks alleging fraud, duress, or coercion in the execution of the affidavit.
- ▶ Remember, five minutes of testimony could create a quicker opportunity for long-term permanency for a child.

*In re M.A.S. and K.D.S.*, No. 06-16-00059-CV (Tex. App.—  
Texarkana Dec. 22, 2016, no pet.) (mem. op.)

- ▶ Father's rights terminated under TFC § 161.001(b)(1)(L) - the parent has “been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child” under specific provisions of the Texas Penal Code

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- ▶ Family code does not define “serious injury”
  - ▶ Case law defines “serious” as “having important or dangerous possible consequences” and defines “injury” as meaning “hurt, damage, or loss sustained”
  - ▶ Documents admitted at trial
    - ▶ Deferred adjudication community supervision for aggravated sexual assault of a child younger than fourteen
    - ▶ Motion to revoke community supervision
    - ▶ June 2015 judgment

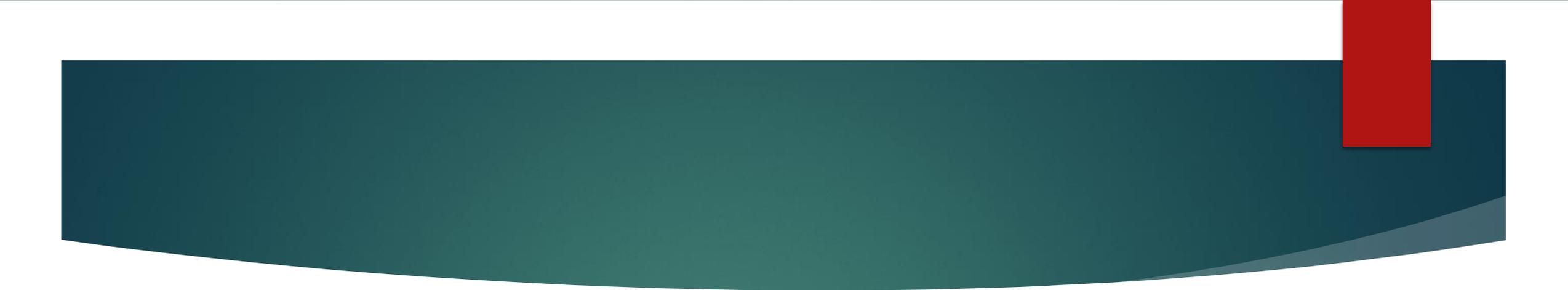
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- ▶ Documents admitted at trial
    - ▶ Deferred adjudication community supervision for aggravated sexual assault of a child younger than fourteen
    - ▶ Motion to revoke community supervision
    - ▶ June 2015 judgment
  - ▶ Court overrules Father's argument, disavowing his assertion that "aggravated sexual assault of a child younger than the age of fourteen does not cause serious injury to a twelve- or thirteen-year-old child."
  - ▶ Termination affirmed

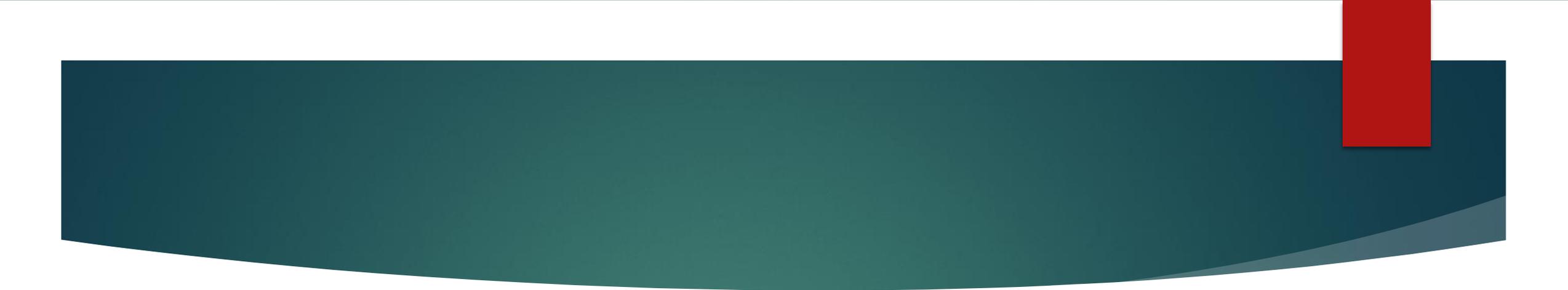
*In re A.K.L. and S.A.A.P.*, No. 01-16-00489-CV (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, pet. denied) (mem. op.)

- ▶ Mother's parental rights were terminated, inter alia, under TFC § 161.001(b)(1)(N).

“Constructive Abandonment” Ground

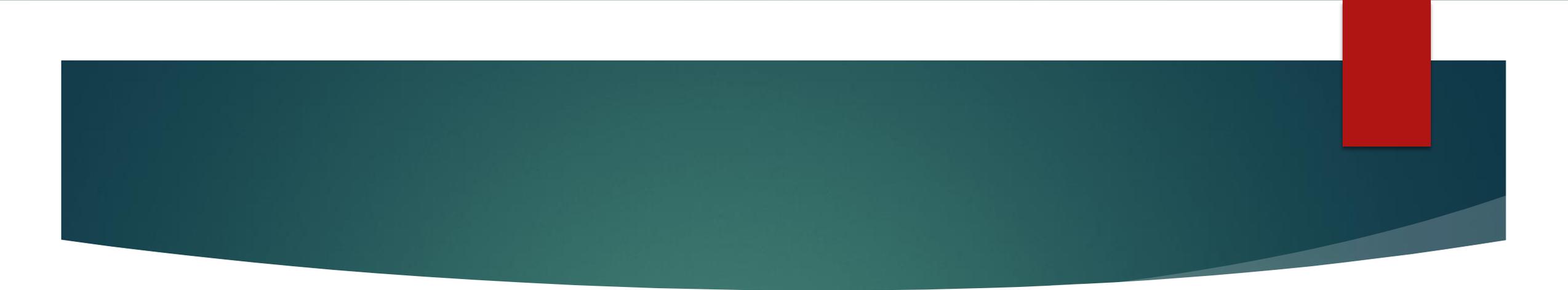
- ▶ termination may occur if the parent has constructively abandoned the child who has been in the temporary managing conservatorship of the Department for not less than six months, and: (i) the Department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment.

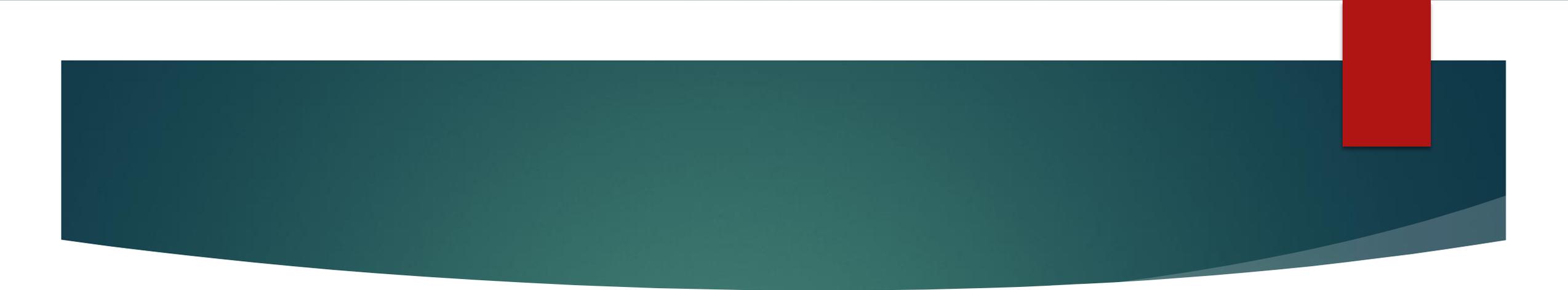
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- ▶ 2010 decree—Department appointed managing conservator of both children
  - ▶ Mother had visitation with younger child, but no visitation with older until child's and Mother's therapist agreed visitation would be in child's best interest.
  - ▶ Mother was ordered to undergo a psychiatric evaluation and continue therapy
  - ▶ The older child was diagnosed with an intellectual disability, schizophrenia, and post-traumatic stress disorder;
  - ▶ the younger child was diagnosed with bipolar disorder and social communication disorder.

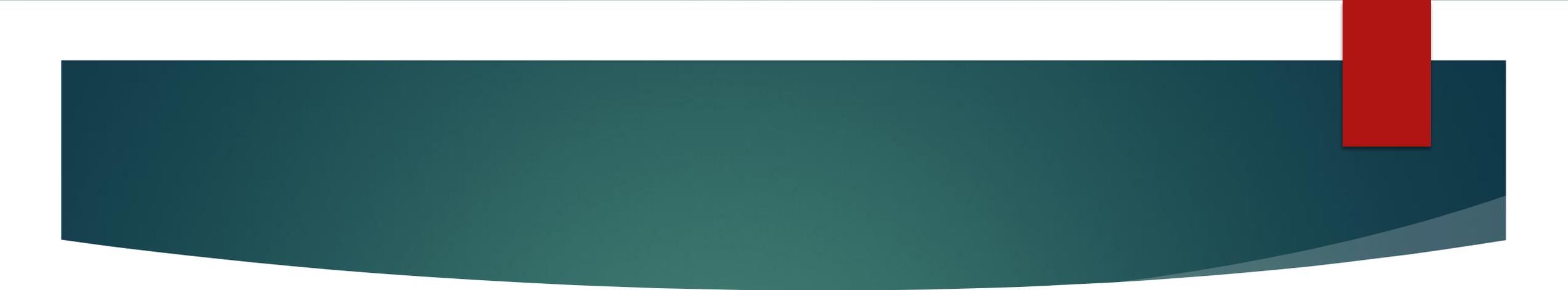


▶ By early 2014:

- ▶ younger child had developed significant behavior problems after visits with Parents—was moved to a residential treatment facility—visitation was suspended.
- ▶ Parents failed to make their home safe, failed to demonstrate they understood the children's special needs, and were not participating appropriately in either child's care.

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- ▶ 2014—the Department moved to modify the 2010 decree and terminate parental rights.
  - ▶ New service plan for Mother:
    - ▶ demonstrate an understanding of the children's “severe” special needs,
    - ▶ address her own mental health needs,
    - ▶ participate in family therapy,
    - ▶ and complete a Trust Based Relational Intervention class.

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- ▶ In upholding Mother's termination under subsection (N), the Court of Appeals held that:
  - ▶ Mother failed to visit or maintain significant contact with the children based on evidence that:
    - ▶ Mother was no longer involved in the younger child's care as of early 2014
    - ▶ "Mother would not participate in addressing [the older child's] behavioral and mental health problems";
    - ▶ and Mother last visited the older child one year before trial,
    - ▶ and last visited the younger child six months before trial



▶ The evidence also demonstrated Mother's inability to provide the children with a safe environment:

▶ She “failed to adequately address her own mental health issues”

▶ failed to follow MHMR recommendations

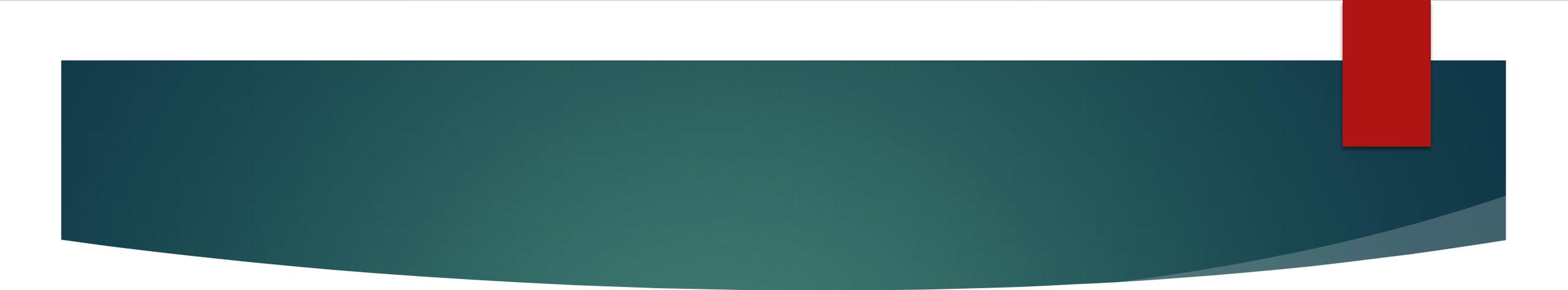
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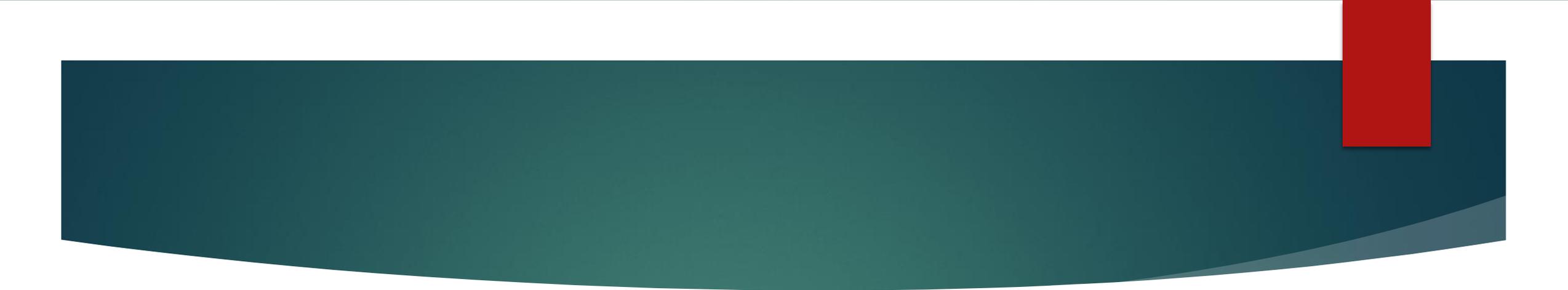
▶ She lacked the parenting skills to provide the care the special needs children required

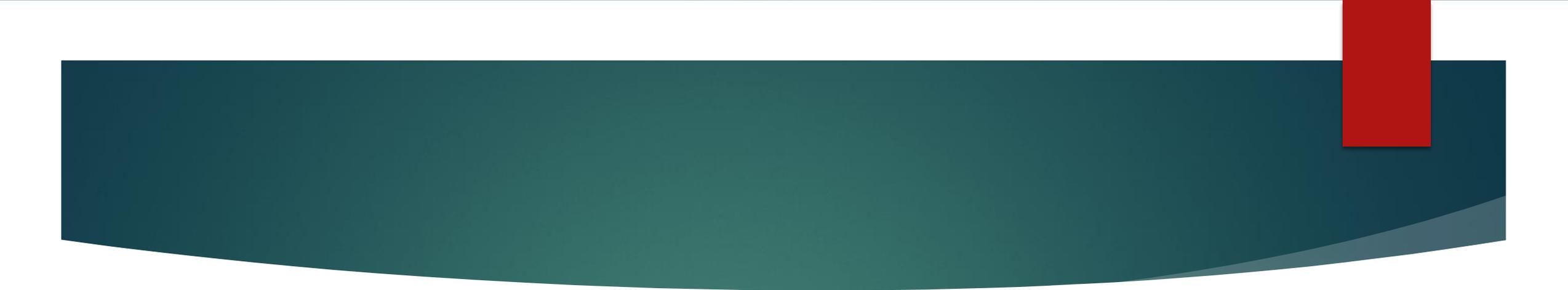
▶ Failed to complete trust-based intervention class

*In re A.C. and S.C.*, No. 10-17-00060-CV ( (Tex. App.—Waco July 12, 2017, no pet) (mem. op.)

- ▶ Was Father's regular phone contact with the Caseworker sufficient to overcome the trial court's finding under (N) that he failed to visit or maintain significant contact with the child?

- 
- ▶ In challenging the Court's finding that he failed to visit or maintain significant contact with the child, Father argued that "he maintained regular phone contact with the Department and visited with [one of the children] three times during the pendency of the case."

- 
- ▶ The Appellate Court noted, however, that Father had: (1) not seen the older child since six months prior to the child's removal by the Department; and (2) declined numerous Department efforts to facilitate visitation with the younger child, citing "work and transportation issues".

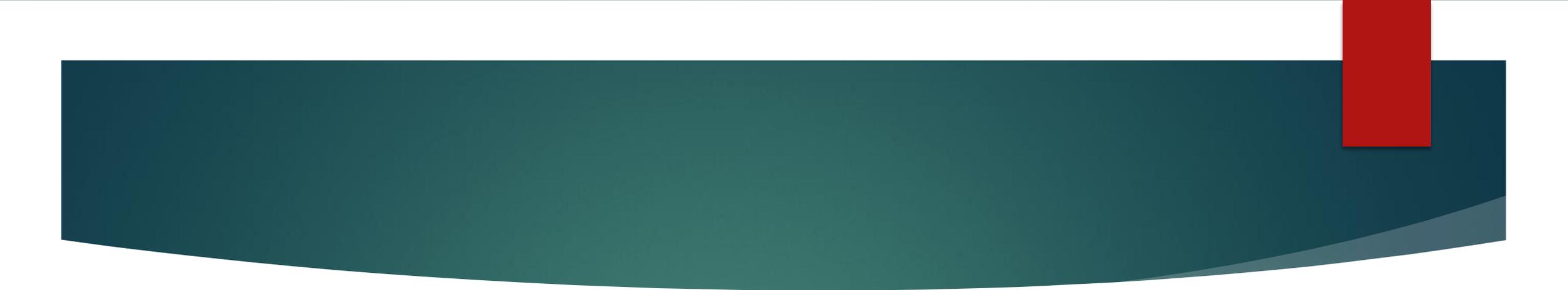
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- ▶ The Appellate Court rejected Father's contention that his regular phone contact with the caseworker overcame the trial court's finding under (N), stating that "[e]ven if [Father] maintained regular contact with the caseworkers, his argument would not defeat the ground for termination because the Department was required to prove that [Father] did not regularly visit or maintain significant contact with the children, not that he lacked the desire to visit them or communicated with the Department regularly regarding issues not always related to visitation."

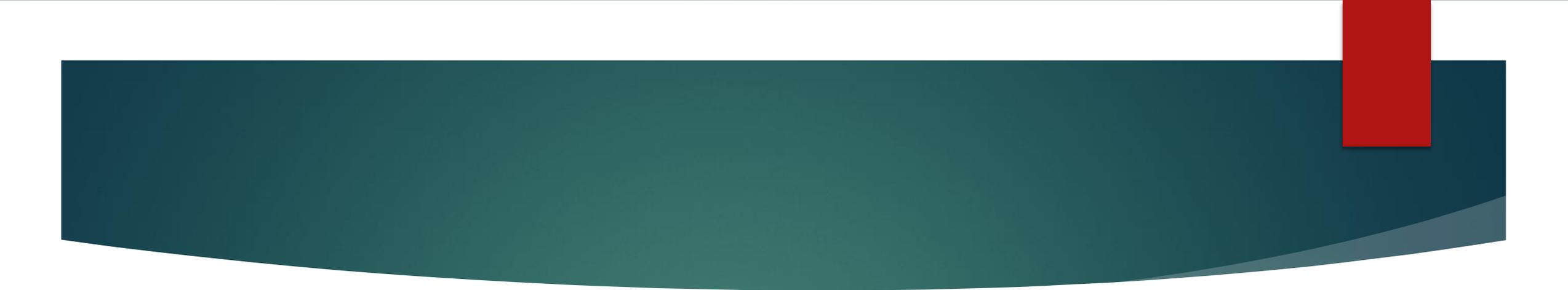
# Practice Tips

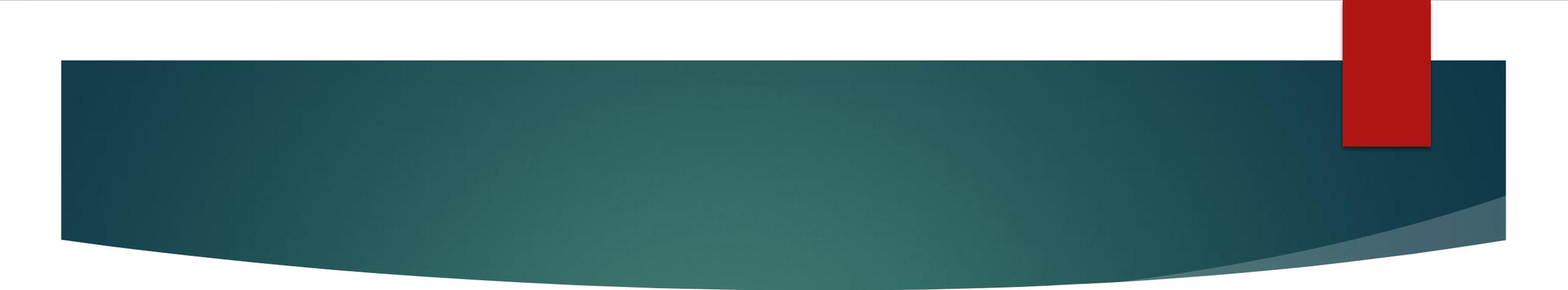
- ▶ Ask Respondent Parents to keep activity & contact logs:
  - ▶ for Caseworker,
  - ▶ each child,
  - ▶ each service provider, &
  - ▶ each court ordered service or item on service plan.
- ▶ Have them list dates & times for both contact and attempted contact with DFPS. Discuss keeping contact via text message so communication can be documented.
- ▶ Stress importance of keeping contact with child(ren) and caseworker

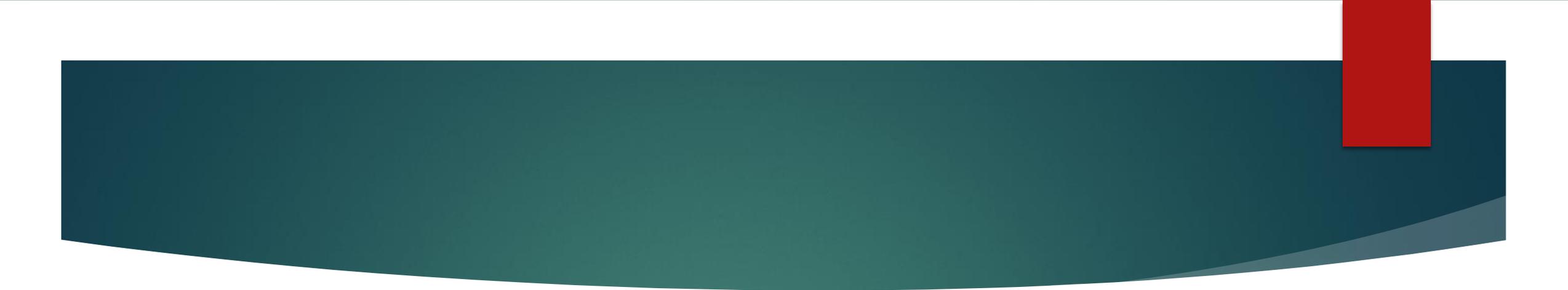
*In re J.M.G.*, No. 07-16-00202-CV (Tex. App.—Amarillo Oct. 27, 2016, no pet.) (mem. op.)

- ▶ Was the evidence legally and factually sufficient to support the termination of father's parental rights pursuant to (Q) when the criminal conduct, for which he was eventually sentenced, occurred prior to the child's conception?
- ▶ TFC § 161.001 (b)(1)(Q) permits termination of parental rights if the parent “knowingly engaged in criminal conduct that resulted in the parent's (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.”

- 
- ▶ The evidence at trial demonstrated that Father:
    - ▶ committed a felony offense, burglary of a habitation, and numerous violations of his community supervision.
    - ▶ sentenced to 14 years of imprisonment.
    - ▶ expected to be released from prison in 2020.
    - ▶ acknowledged he had never cared for, or had contact with, the child, nor had he ever made any efforts or arrangements for the child's care.

- 
- ▶ The Court concluded “[h]ad the Legislature intended the criminal conduct required by subsection Q to post-date the conception of the child, it easily could have so provided . . . and we see no ‘indication the Legislature meant anything other than what it said.’”
  - ▶ The Court affirmed the termination of Father’s parental rights under (Q).

- 
- ▶ See also *In re A.O.*, No. 07-16-00331-CV (Tex. App.—Amarillo Mar. 3, 2017, pet. denied) (mem. op.) (Father’s awareness of paternity not dispositive of Q).



# Best Interest

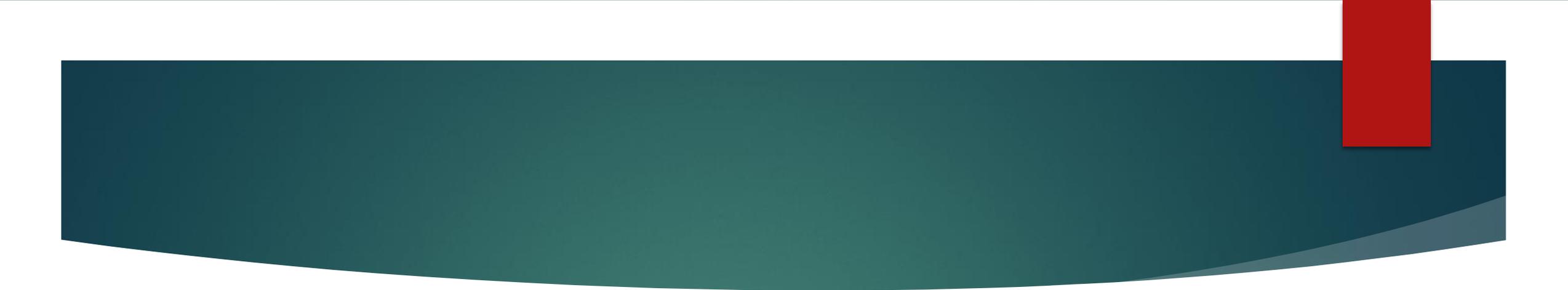
*In re J.C.C. No. 04-17-00120, 2017 WL 3722034 (Tex. App.-San Antonio August 30, 2017).*

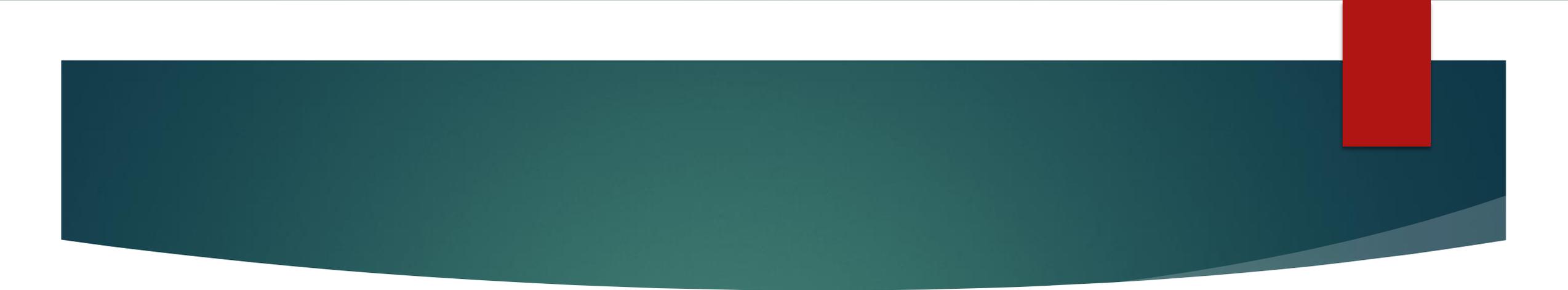
- ▶ Was the evidence factually sufficient to support the trial court's best interest finding against Father?

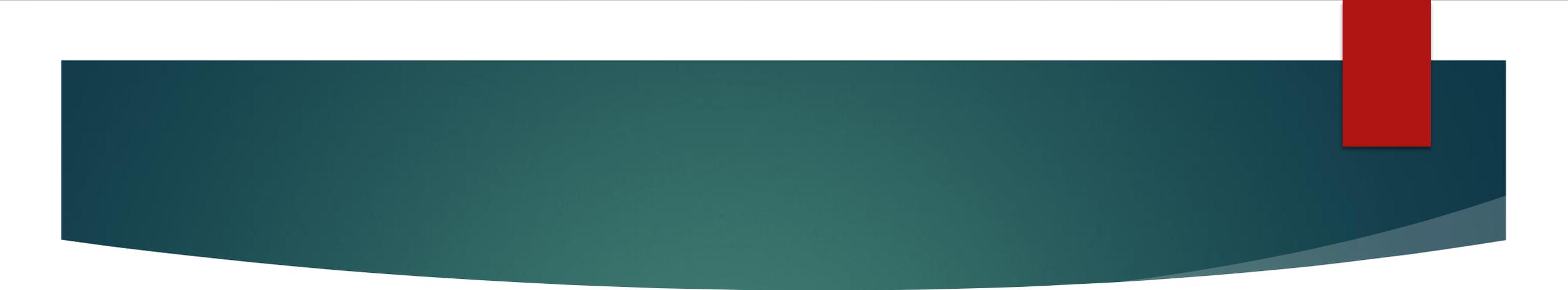
# Holley Factors:

- ▶ (1) Desires of the child;
- ▶ (2) the present & future emotional and physical needs of the child;
- ▶ (3) the present & future emotional and physical danger to the child;
- ▶ (4) the parental abilities of the individuals seeking custody;
- ▶ (5) the programs available to assist these individuals to promote the best interest of the child;
- ▶ (6) the plans held by the individuals seeking custody of the child;
- ▶ (7) the stability of the home of the parent and the individuals seeking custody;
- ▶ (8) the acts and omissions of the parent which may indicate the that the existing parent-child relationship is not a proper one; and
- ▶ (9) any excuse for the acts or omissions of the parent.

*See Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).*

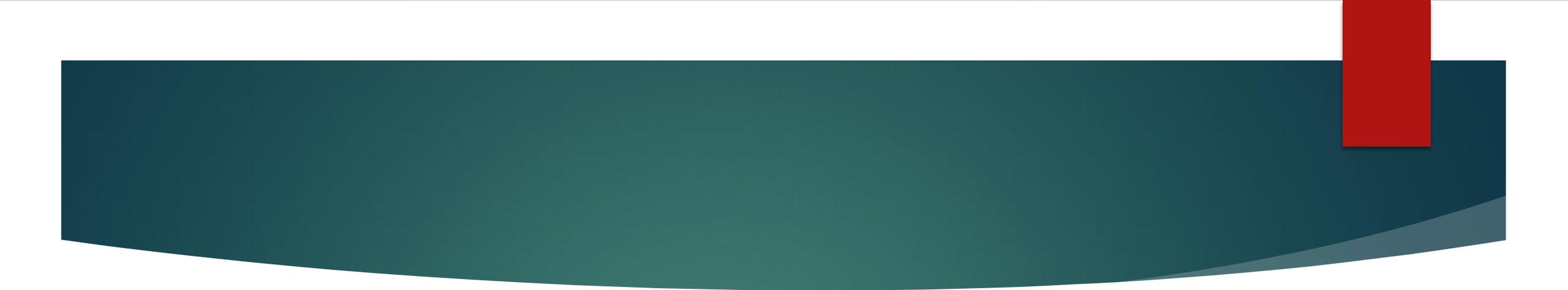
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- ▶ In April 2016, DFPS brought their suit to terminate the parental rights of mother and the fathers of the children.
  - ▶ The children were removed from their mother's care because of her ongoing drug use and her neglectful supervision of the children. Father was incarcerated.
  - ▶ The case proceeded to trial in February 2017 and Father's parental rights were terminated. Father appealed challenging the sufficiency of the evidence to support the Trial Court's finding that termination of his parental rights was in the children's best interest.

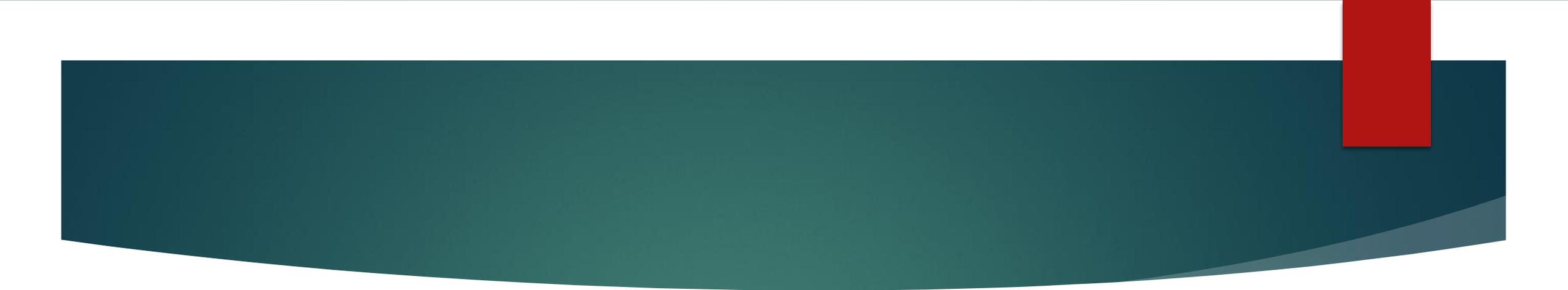
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- ▶ The Court found that at the time of the removal, J.C.C., Sr. (Father) was incarcerated for assault family violence and during the case had been incarcerated for two additional charges of possession of a controlled substance.
  - ▶ Testimony at trial established that Father completed several items on his service plan, including a domestic violence class, possibly a parenting class, a drug & alcohol assessment, and a few substance abuse treatment classes. Although, he was unsuccessfully discharged from his individual therapy due to his incarceration.
  - ▶ The caseworker testified that the children were living at St. Jude's because no potential caretakers had been located because the children have serious behavioral issues making them difficult to place.
  - ▶ On the day of trial, maternal grandmother expressed a willingness to care for the children.

- 
- ▶ No evidence was presented regarding the children's desires; however the Court stated, "their serious behavioral issues are a sign that the instability of their lives has affected them."
  - ▶ The Court further noted that, at the time of bench trial, Father was not employed, was living with a family member who had a history with CPS, and was pending sentencing on one of his possession offenses.
  - ▶ The Court held that the evidence was sufficient to support the trial court's finding that termination was in the best interest of the children.

*In re B.H.-M*, No. 13-16-00692-CV (Tex. App.—Corpus Christi May 4, 2017, pet. denied) (mem. op.)

- ▶ Was the evidence legally and factually sufficient to support the jury's best interest finding against Mother?

- 
- ▶ The case began when the then-seven-year-old child was taken to the hospital and diagnosed with severe injuries to her vagina which required surgery. The child abuse pediatrician believed the injuries were inflicted by an individual.
  - ▶ At the time of trial, a criminal sexual assault investigation was ongoing.
  - ▶ Mother denied throughout the proceedings that the child was sexually assaulted.

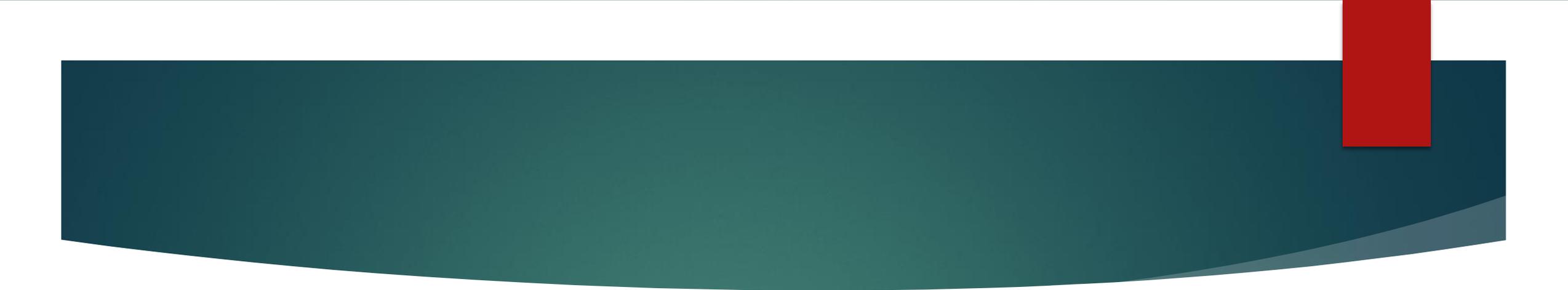
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- ▶ The evidence, including the child's statements to her initial foster placement, during forensic interviews by the Children's Advocacy Center, and to her therapist, showed that she had been sexually assaulted and, as a result, seriously injured, by a cousin. The evidence also showed that Mother knew the cousin was a registered sex offender, and despite her testimony to the contrary, allowed the cousin to be around the child resulting in the cousin sexually assaulting the child. The child's therapist testified that the child was "very clear" that she loved Mother, but the child also told her that Mother "could not keep her safe." At the time of trial, the child had been placed with her aunt out of state. The aunt testified that the child told her she was happy living with the aunt and wanted to stay there, and also told her, "I know it's not safe to be with my mom. I know it's not a safe place."

*In re A.F.*, No. 14-17-00394 (Tex.App.-Houston [14<sup>th</sup>] October 19, 2017, no pet.)(mem.op.).

- ▶ Was the evidence sufficient to support the termination of mother's parental rights pursuant to TFC 161.001(b)(1)(D) & (E)?
- ▶ Additionally, was the evidence sufficient to support the trial court's best interest finding terminating mother's parental rights?

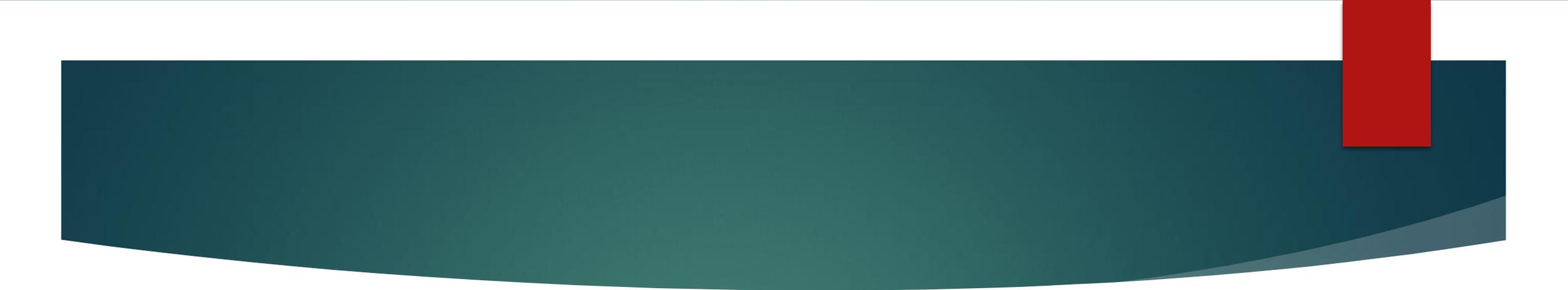
# Testimony at Trial

- ▶ Mother (S.J.F.) stated that she was in the process of divorcing the Father.
- ▶ S.J.F. recanted the prior story that her five year-old daughter was sexually assaulted by father. At trial, mother stated that she took her daughter to the hospital to undergo a SANE exam, but then testified that she made a false report and it didn't happen.
- ▶ Also, S.J.F. said she had previously lied to medical personnel when telling them that father had injected her with methamphetamines.
- ▶ Evidence established that Mother & Father had a long substance abuse history. Both children tested positive for methamphetamine on hair strand drug tests.
- ▶ It was undisputed that S.J.F. had finished all the tasks in her family service plan, had not tested positive for illegal drugs for almost a year, and had maintained regular visits with her children.
- ▶ Father also finished all his court-ordered services and asked that the children be placed with their mother.

- 
- ▶ The caseworker testified that both children were in a foster home and both exhibited significant behavioral issues. The caseworker further opined that the children's inappropriate behavior has led to issues trying to place them.
  - ▶ The Caseworker also stated that both children exhibited behaviors associated with being victims of sexual abuse.
  - ▶ The Child Advocate testified that she believed the female child had been sexually abused because she had been consistent in her statements about what occurred.

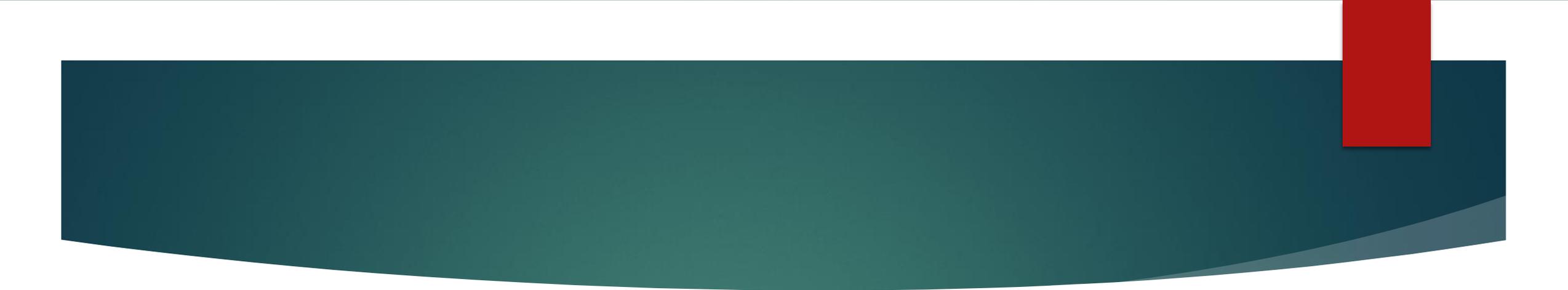
# Endangerment Grounds - Analysis of Evidence

- ▶ On appeal, mother argued that the completion of her family service plan effectively precluded an endangerment finding by the court.
- ▶ The Court rejected this argument.
  - ▶ Successfully completing a family service plan, particularly over an extended period of time is entitled to significant weight.
  - ▶ Although, “evidence of a recent turnaround should be determinative only if it is reasonable to conclude that rehabilitation, once begun, will continue.”

- 
- ▶ The Court citing *In re M.G.D.*, 108 S.W.3d 508, 514 (Tex. App.-Houston [14<sup>th</sup>] 2003) stated that “the elements of a safe, stable, and happy childhood cannot be reduced to a checklist in a service plan.”
  - ▶ The Fourteenth Court further cited to *In re J.F.C.*, 96 S.W.3d 256, 265-66 (Tex. 2002), stating, “the trial court is not required to ignore a long history of dependency and abusive behavior merely because the behavior abates as trial approaches.”

## Best Interest – Argument & Analysis

- ▶ Mother argued that CPS did not rebut the presumption that it is in the best interests of the children to keep them with their natural parents because her plans for the children were certain and the CPS's plans were tenuous.
- ▶ Mother further argued that she completed her service plan and has learned how to protect her children.



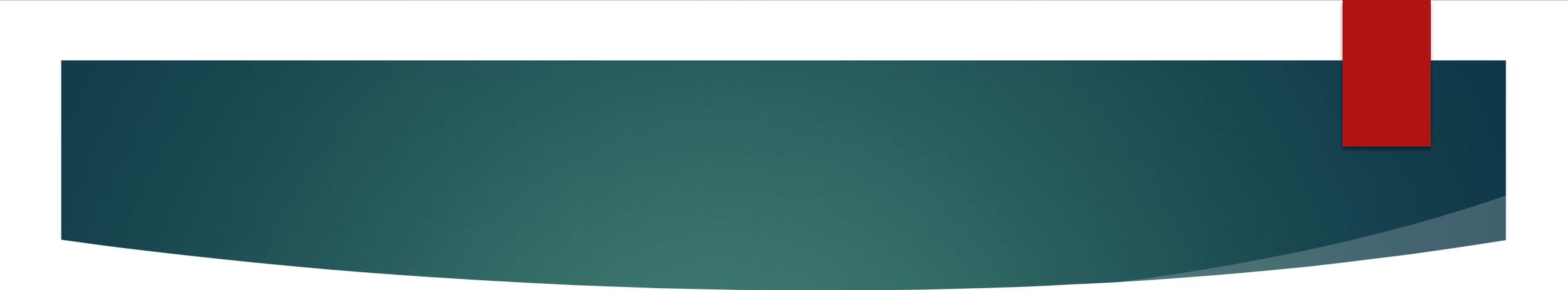
- ▶ *Holley* Factors considered by the Court

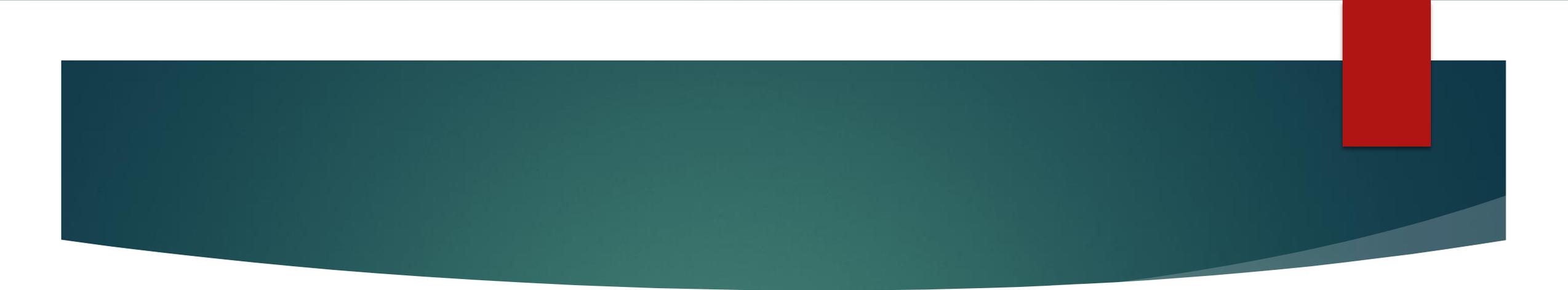
- ▶ (1) Desires of the Children

- ▶ Children continue to suffer consequences from their abusive upbringing;
    - ▶ Children are receiving therapy in foster care; &
    - ▶ Prior time with the parents was damaging.

- ▶ (2) Present & future physical & emotional needs of the children

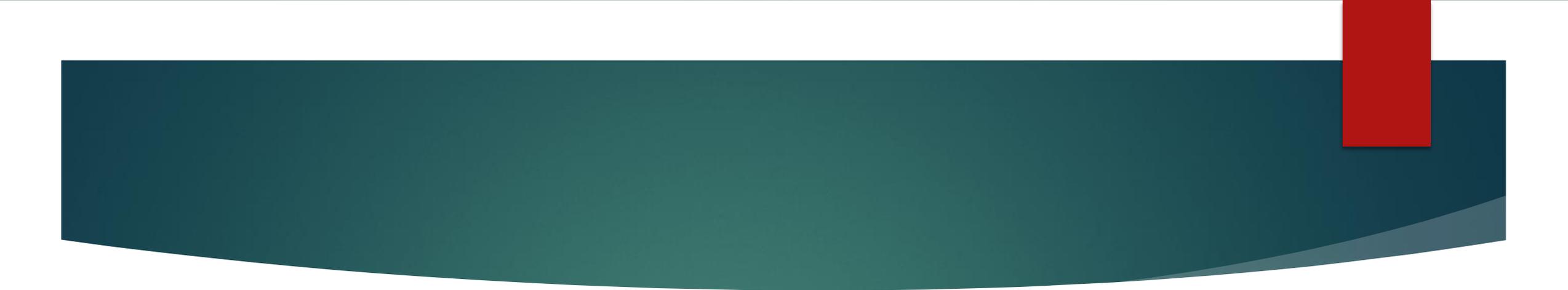
- ▶ Evidence was undisputed that while in mother's care the children witnessed repeated drug use and domestic violence.
    - ▶ Daughter made an outcry of sexual abuse – Either mother lied and subjected her daughter to an unnecessary SANE exam or she is now showing she can not be protective of her from the Father

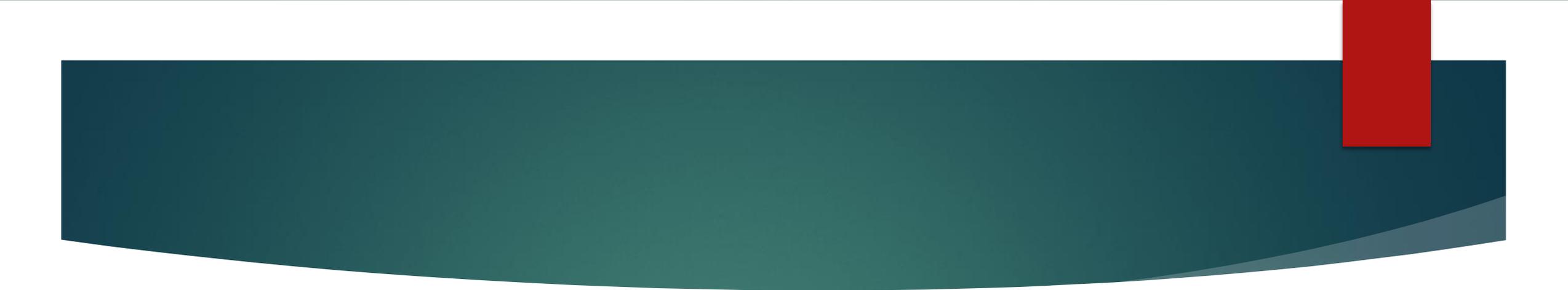
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- ▶ (3) Acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate, and any excuse for the parent's acts or omissions.
    - ▶ Mother's history of drug use and accompanying lifestyle;
    - ▶ Participation in a long-term domestic violence relationship; and
    - ▶ Disbelief or untruthfulness about daughter's sexual abuse outcry;
  - ▶ (4) Parental abilities of those seeking custody, stability of the home or proposed placement and plans for the children by the individuals or agency seeking custody
    - ▶ Caseworker testified that children were in a safe foster home;
    - ▶ Lack of evidence of definitive plans for permanent placement is not dispositive;
    - ▶ Inquiry should be whether the fact finder reasonably could form a conviction or belief that termination of parental rights is in the child's best interest even if the agency is unable to articulate or identify with precision the child's future home environment.

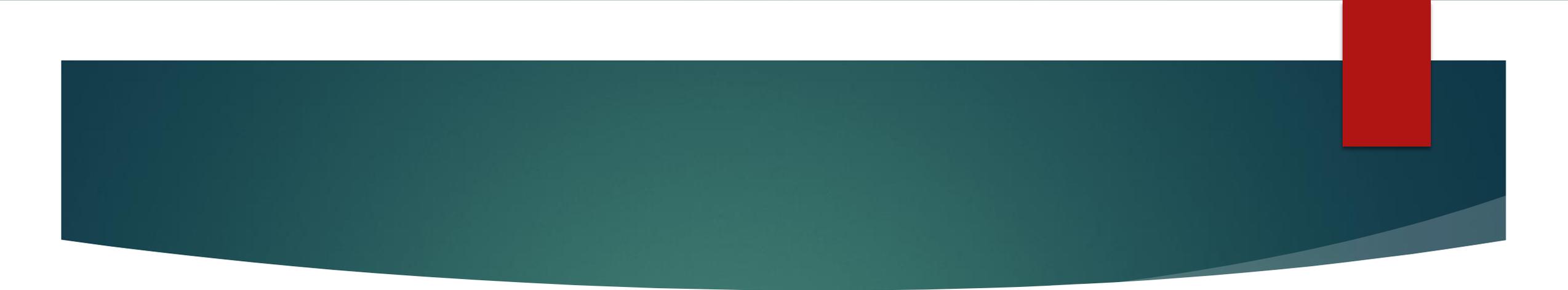
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- ▶ The Fourteenth Court affirmed the trial court finding that the evidence was legally and factually sufficient to support the endangerment grounds and that termination of the mother's parental rights was in the children's best interest.

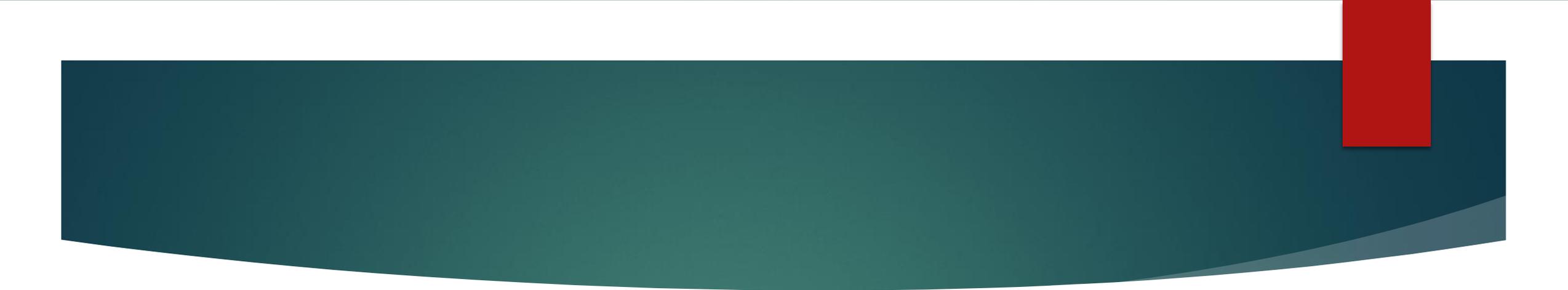
*In re J.J.T.*, No. 08-17-00162-CV, \_\_\_ S.W.3d \_\_\_ (Tex. App. El Paso,  
Dec 20, 2017, no pet.)

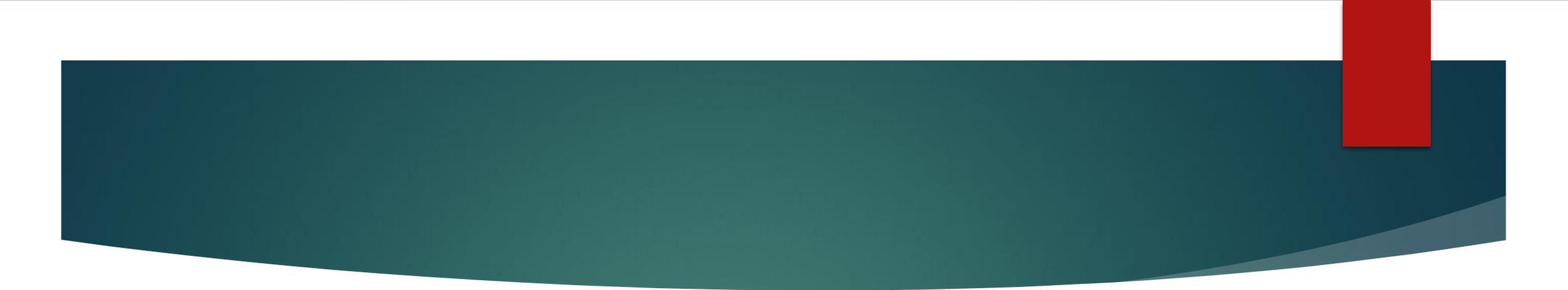
- Is there a time limit or a formal mechanism in which an Indian Tribe must intervene in an ICWA case prior to trial?

- 
- ▶ Young child is a member of the Cherokee Nation
  - ▶ January 2016: At five months old, mother took the child to the hospital, where numerous skeletal fractures and brain hemorrhaging was discovered. The child required immediate brain surgery to relieve brain pressure.
  - ▶ Mother had no explanation for the child's injuries.
  - ▶ Child was removed and placed in non-Indian foster home, where it is undisputed that the child's medical, physical and emotional needs are being met and the child is thriving.

- 
- ▶ April 2016: Cherokee Nation is notified.
  - ▶ August 2016: Cherokee Nation notifies the Department that the child is eligible for tribal membership. The tribe does not intervene at that time.
  - ▶ June 2017, court conducts bench trial. Both parents relinquish parental rights. Although the tribe does not receive notice of trial, the Department calls the Cherokee representative to testify telephonically regarding the child's best interest.

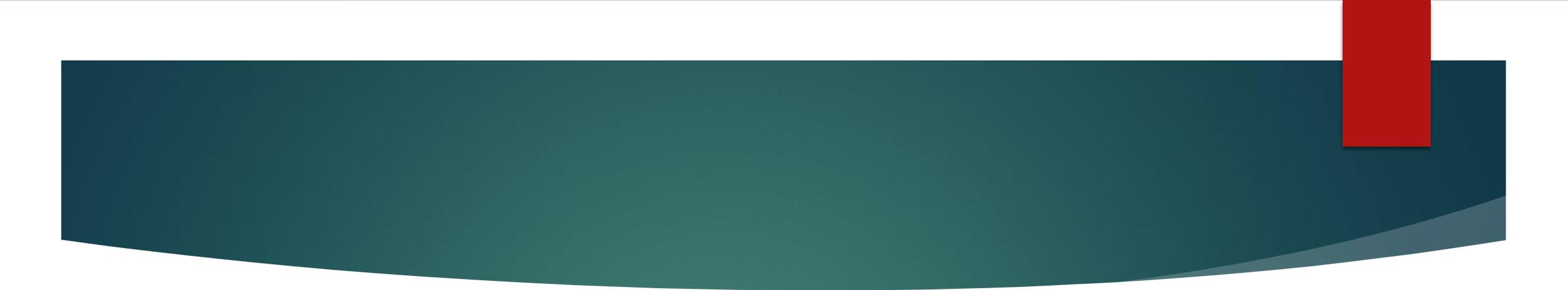
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- ▶ The Department also informed the court that the tribal representative had expressed that “the Nation was a party to the proceeding, and as the Nation’s representative, she should be allowed to hear all of the proceeding and not be excluded under the Rule of Witnesses.”
  - ▶ The tribal representative agreed that parental rights should be terminated; however, she informed the court that the Nation has identified a Navajo family for adoption.
  - ▶ Attorneys for the parents objected to the assertion that the Nation was a party to the suit and pointed out that the tribe had yet to intervene in the suit.

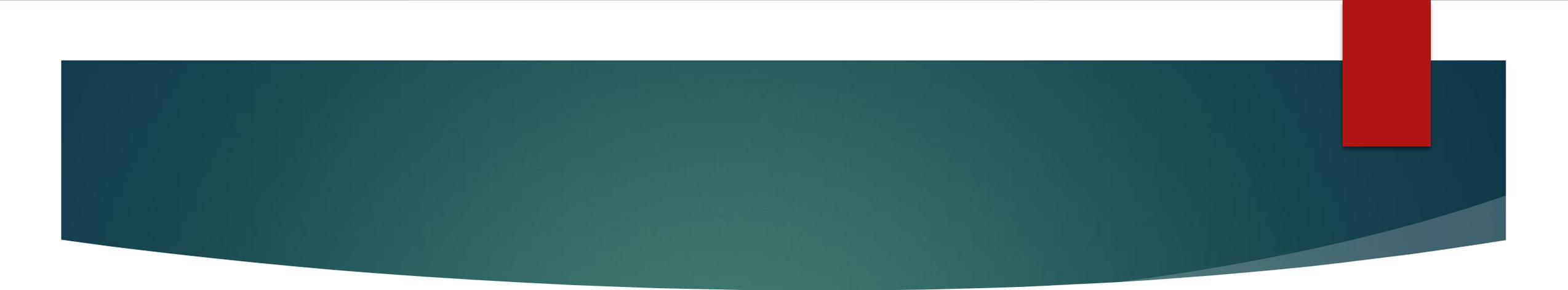
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- ▶ In response, the representative stated that “I think we are intervening at this moment”, and cited 25 U.S.C.A. 1911(c), which states: “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”
  - ▶ The trial court denied the intervention on the basis that there was no written intervention filed and that intervening on the day of trial was “too late”. The court did not allow the tribal representative to hear or participate in the rest of the trial.

- 
- ▶ The Appellate Court first considered the plain language of the statute and determined that a request to intervene, “even if it is made at the final hearing”, is not untimely.
  - ▶ Regarding the lack of a written pleading the court looked at Texas Rule of Civil Procedure 60, which requires a written pleading to intervene. However, the Court found that this Texas statute conflicts with the Federal law and congressional objectives. In the face of conflict, Federal law always prevails. Therefore, nothing prohibits a verbal Tribal intervention during a hearing.
  - ▶ The case was reversed and remanded for a new trial.

*P.R.M. v. Tex. Dept. of Family & Prot. Svcs.*, No. 03-16-00065-CV  
(Tex.App.-Austin Aug. 26, 2016, no pet.) (mem.op.)

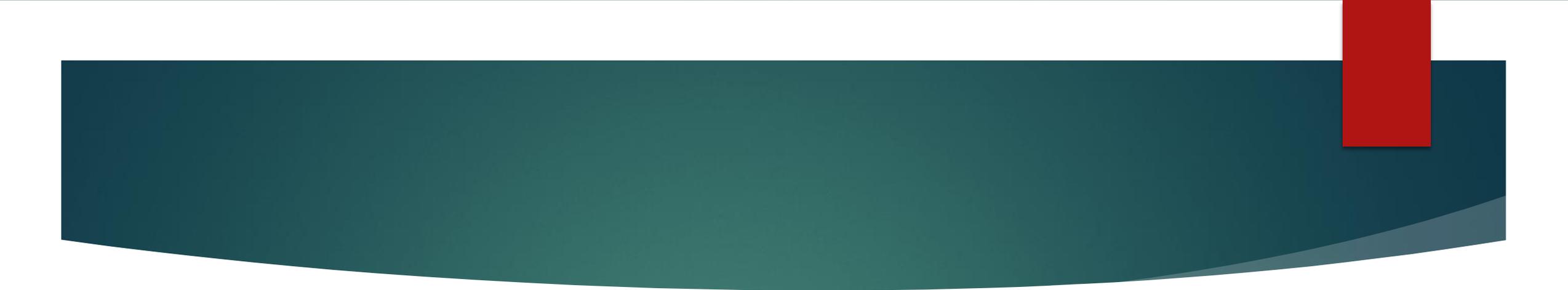
- ▶ What date does a Court's order to terminate become effective?

- 
- ▶ The grandmother (P.R.M.) sought conservatorship of her two grandchildren.
  - ▶ On March 15, 2015, the trial court held a termination hearing and made an oral pronouncement terminating parental rights to the children.
  - ▶ On May 1, 2015, the court signed an order stating that the court was terminating the parental rights and appointed the Department as permanent managing conservator.

- 
- ▶ On July 16, 2015, the grandmother filed a petition requesting managing conservatorship of the children. The Department filed a plea to the Jurisdiction. The Court held a hearing and granted the Department's Plea.
  - ▶ The appeal was brought after the trial court granted the Department's plea to the Jurisdiction against P.R.M.

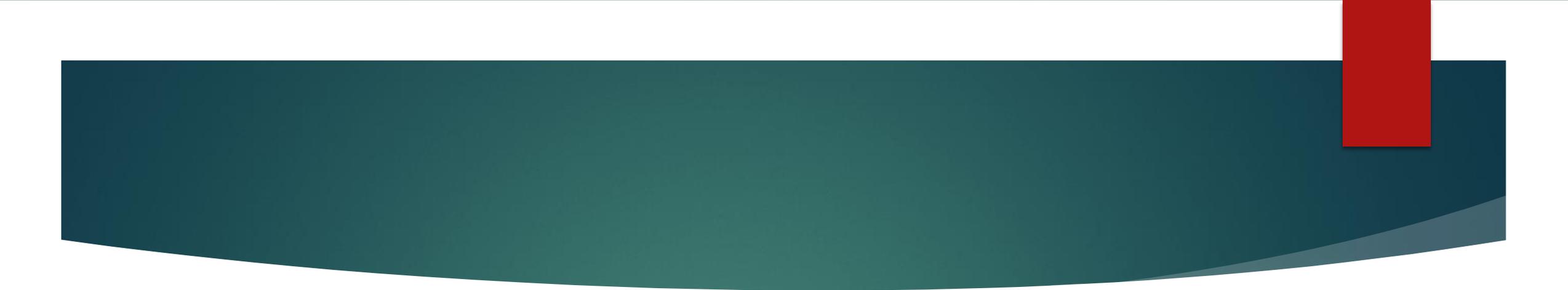
- ▶ The Appellate Court sought to determine whether grandmother filed her suit within 90 days of the date the parents' rights were terminated.
  - ▶ See TFC 102.006 (a) & (c) – Limitations on Standing.
- ▶ The Department argued that P.R.M. did not file timely because greater than 90 days had passed since the oral pronouncement of the termination and the written order merely memorialized the trial court's previously rendered decision.

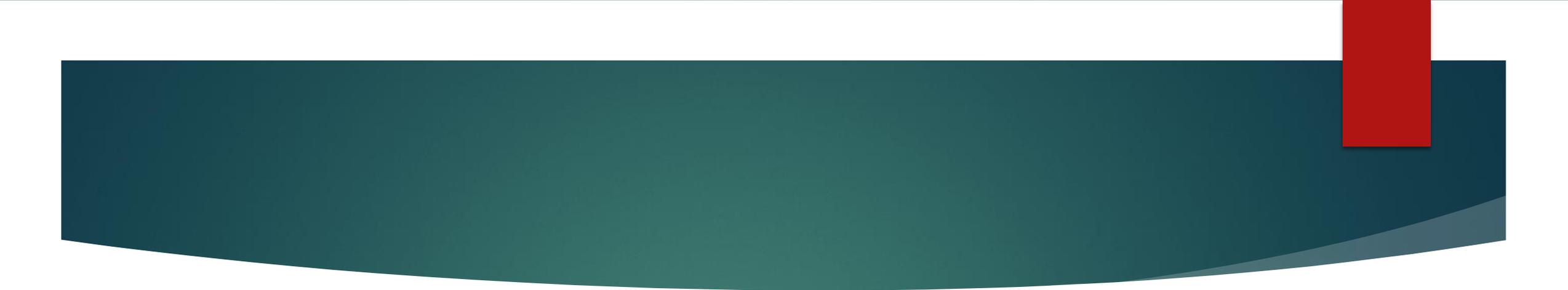
3/15/15      →      5/1/15      →      7/16/15  
Oral Announcement      Court Order      Grandmother's Petition

- 
- ▶ “When a trial court announces in open court that a parent’s rights are terminated, the termination is effective immediately, and the written order signed later by the trial court merely memorializes the termination.”
  - ▶ TFC § 101.026 – Render
    - ▶ “Render” means the pronouncement by the judge of the court’s ruling on the matter. The pronouncement may be made orally in the presence of the court reporter or in writing, including on the court’s docket sheet or by a separate written instrument.
  - ▶ Because P.R.M. did not file her petition within 90 days of the termination pronouncement, the Family Code deprives her of standing to bring suit.

*In re J.Y., G.Y., & B.Y.*, No. 06-16-00084, 2017 WL 1534013  
(Tex.App.-Texarkana April 28, 2017).

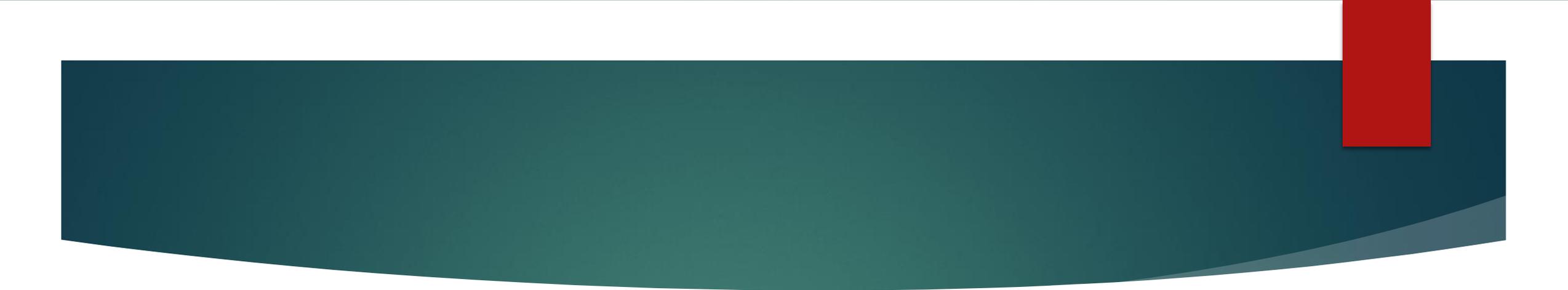
- ▶ Does the Trial Court's order naming mom as Possessory Conservator and ordering visitation as mutually agreed or possession at the discretion of the counselor amount to denial of access to the children?

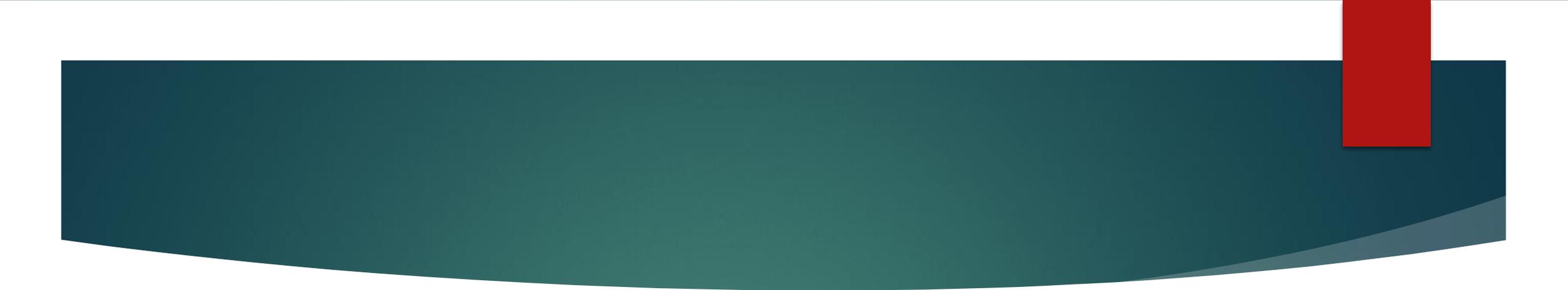
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- ▶ DFPS brought their suit for termination of parental rights against mother(Geri) and father (John).
  - ▶ After a bench trial, the trial court named DFPS as permanent managing conservator and Geri & John as possessory conservators.
  - ▶ The Court's order stated,
    - “[mother] shall have possession of the children at times mutually agreed to in advance by the parties and, in the absence of mutual agreement . . . Visitation between [mother] and [children], shall be pursuant to the children's counselor's recommendation.”
  - ▶ Geri appealed.



▶ TFC § 153.006 - Appointment of Possessory Conservator:

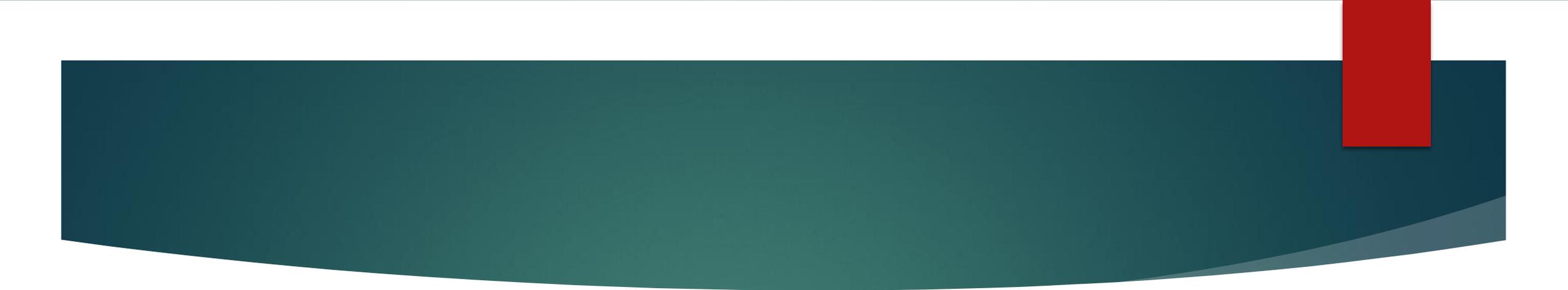
Subpart (c) states, “the court shall specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child.”

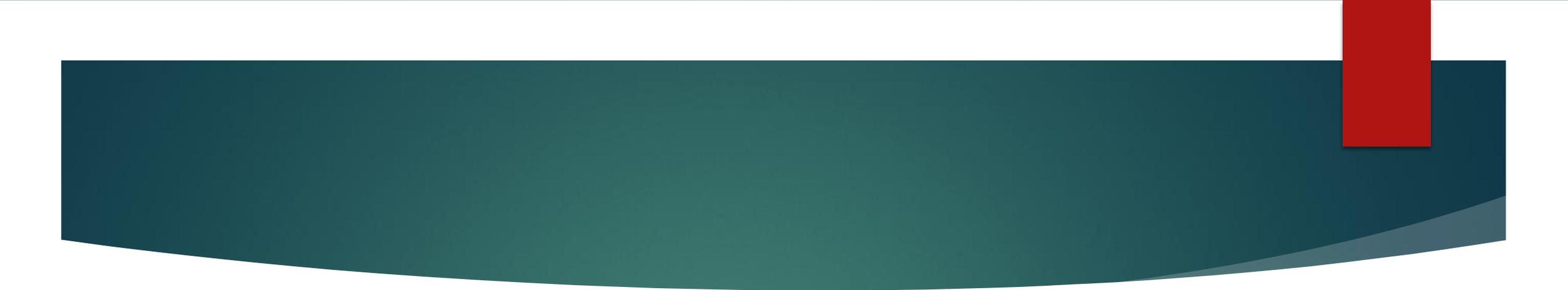
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- ▶ The Appellate Court held that the order entered could have the effect of denying Mother any access to her children for an indeterminate time since her visitation was up to the absolute discretion of DFPS and the children's counselor.
    - ▶ The Court pointed out that a complete denial of parental access amounts to a near-termination of a parent's rights and should be reserved for situations rising nearly to the level that would call for a termination of parental rights.
  - ▶ Consequently, The Court found that the trial court could not make an order that denied Mother access to her children unless it decided that the children's best interests warranted such an order.

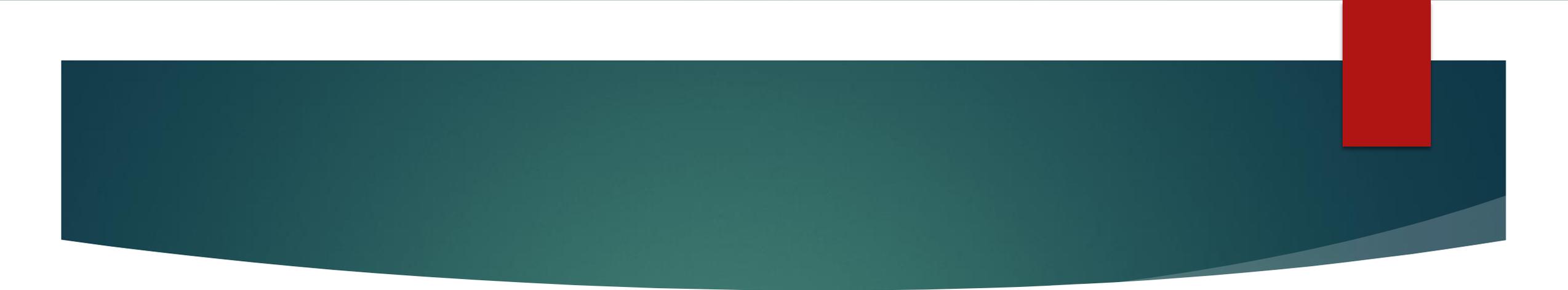
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- ▶ The Appellate Court found that in this case, the Trial Court did not do so based upon the record. Also, no indication was noted that the trial court intended to completely deny mother access to the children.
  - ▶ Therefore, the real issue was that the trial court was not sufficiently specific as to the times and conditions for mother's possession of or access to the children.

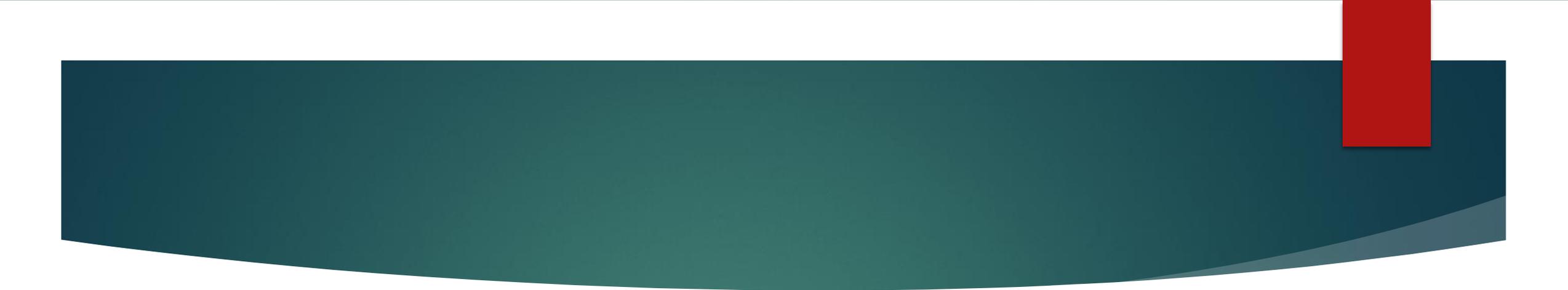
*In re. C.Z.H.-O.*, No. 03-17-00016, 2017 WL 4900499 (Tex.App.-Austin Oct. 27, 2017, no pet.(mem.op.))

- ▶ Does a court naming a nonparty as conservator of a child violate the parents' due process?

- 
- ▶ In 2013, mother and father were named as joint managing conservators of their two minor children and mother was named as the custodial parent with the exclusive right to determine residency.
  - ▶ In late 2014, the children began living with their paternal grandmother, Nellie Reese.
  - ▶ In 2016, David Hernandez (father) filed a *pro se* motion to modify requesting that he be named as SMC of the children. Mother filed a *pro se* answer and asked for a trial.

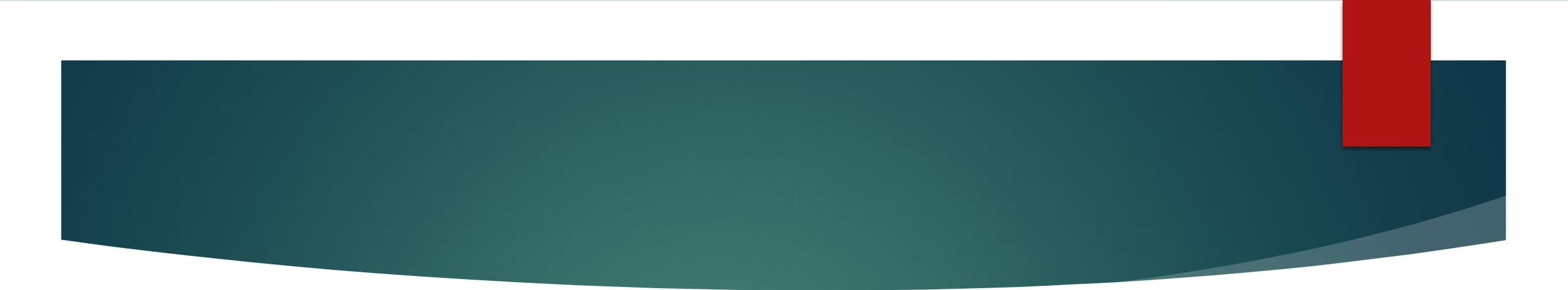
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- ▶ At Trial, Mr. Hernandez admitted that the children had been living with his mother for the last two years.
  - ▶ Father called his mother, Ms. Reese, as a witness. At no point, did she file any pleadings.
  - ▶ At trial, the court found that the appointment of the parents as joint managing conservators was not in the best interest of the children, and appointed Ms. Reese as sole managing conservator, and the parents as possessory conservators.
  - ▶ Father appealed arguing that the trial court exceeded its jurisdiction by appointing a non-party as conservator.

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- ▶ The Court cited to *Lewelling v. Lewelling*, 796 S.W.2d 164, 168 (1990) in stating that while trial courts have wide discretion in deciding family law questions, “the legislature has explicitly limited the exercise of that discretion in the appointment of a nonparent as managing conservator.”
  - ▶ The Third Court stated, “when there is an ongoing custody proceeding, a grandparent must *intervene* and present affirmative evidence sufficient to satisfy the burden of proof that the order sought is necessary because the child’s present circumstances would significantly impair the child’s physical health or emotional development.” See Tex. Fam. Code §102.004(a)(1).



▶ In this case:

- ▶ Paternal Grandmother did not intervene, attempt to file any pleadings, or participate in trial as a party.
- ▶ Grandmother didn't seek the appointment or seek any affirmative relief.
- ▶ Additionally, neither parent requested that grandmother be appointed as a conservator.

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- ▶ The Court cited to *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) in stating “If a trial court awards conservatorship to a nonparent that neither brought nor intervened in the conservatorship proceeding, the due process rights of the parents who are parties to the proceeding may be violated.” The surprise appointment violated the parents’ due process rights.
  - ▶ The Third Court of Appeals held that absent any proof fulfilling requirements of a grandparent intervention, that Ms. Reese’s appointment as managing conservator was not before the trial court and the trial court therefore abused its discretion in awarding conservatorship to the nonparty grandmother.