SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2563-15T3

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

L.L.,

Defendant-Appellant,

and

J.N., Sr.,

Defendant.

IN THE MATTER OF B.N., J.N., Jr. and
J.N., minors.

Submitted May 31, 2017 – Decided July 20, 2017

Before Judges Suter and Grall.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-86-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Mary Potter, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Arielle E. Katz, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Noel C. Devlin, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Following a fact-finding hearing, the judge determined the Division of Child Protection and Permanency (Division) established L.L. neglected her three sons by failing to exercise a minimum degree of care in supervising them. N.J.S.A. 9:6-8.21(c)(4)(b), -8.44, -8.46(b).[1] L.L. appeals and argues the Division failed to establish imminent danger or substantial risk of injury to her sons' physical, mental or emotional condition. For the reasons that follow, we reverse.[2]

The Division removed the boys from L.L.'s care in the early hours of August 14, 2014, pursuant to N.J.S.A. 9:6-8.29 and

[1] Initials are used to maintain confidentiality consistent with Rule 1:38-3(d)(12); the hearing was conducted on December 12, 2014, and the judge issued a written opinion and order on April 15, 2015.

[2] L.L. also urges us to reverse because she was not the children's primary caretaker. Her argument on that point has insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

-8.30. L.L.'s first son, B.N., was twelve years old; her second son, Ju.N., was nine; and her third son, Jo.N., was four. Where necessary to distinguish among L.L.'s sons, we refer to them as the first, second or third son, based on date of birth.

I.

During the December 12, 2014 fact-finding hearing, the testimony of two Division employees, Thomas Josil, the family's caseworker, and Latia Williams, who removed the children, was presented. Additionally, photographs and documentary evidence were admitted into evidence. L.L. did not testify or present any witness or documentary evidence.

In April and May 2014, the Division received, investigated and determined that three referrals alleging abuse and neglect were all unsubstantiated or not established. Nevertheless, the Division asked L.L. and her sons' father, J.N., Sr., to undergo evaluations for substance abuse. L.L. agreed and complied. J.N., Sr., who was on parole, also agreed, but he left his family and moved to Texas.

L.L. was evaluated by Catholic Charities - CPSAI Group on June 23, 2014. L.L.'s drug test was positive for opiates/morphine, and that result was not explained by L.L.'s use of prescribed benzodiazepines, Xanax and Ambien. The intake counselor identified psychological and environmental problems

L.L. faced including: the loss of her cash benefits from welfare, inability to pay rent, recent break-up with her children's father and the Division's involvement with her family. She recommended out-patient treatment with the Center for Great Expectations (Center), and L.L. went to the Center for an intake interview on July 30, 2014.

Following L.L.'s intake interview, the counselor contacted Josil because she thought L.L. was under the "influence." Although L.L. kept the appointment, she could not complete the process because she was "nodding off," slurring her words, and unable to hold a pen or provide a urine sample.

Josil went to L.L.'s home on July 31. L.L. was able to communicate without slurring her words and exhibited no signs of intoxication. Although her apartment was "in disarray" (clothes and toys all over and food in the kitchen sink), Josil told L.L. "to clean up," and she complied.

L.L.'s mother, R.L., was present. Because of the Center's report and prior referrals alleging L.L.'s abuse of substances, Josil prepared a "safety protection plan" (SPP), which L.L. and R.L agreed to and signed.

The SPP listed two safety issues: L.L.'s "use and abuse of prescription medications" and "emotional instability." The SPP identified "specific safety action[s]" to address those issues.

Regarding "emotional instability," L.L. agreed to "attend mental treatment and undergo medication monitoring," and the Division agreed to "supervise." Regarding substance abuse, L.L. agreed to, "refrain from using and abusing prescription medications"; her mother R.L. agreed to "supervise and monitor" L.L.'s children "at all times"; and, the Division agreed to "supervise." As Josil testified, R.L. was obligated to supervise L.L. at home with the children, not to serve as her grandsons' primary caregiver. The SPP does not mention the condition of L.L.'s apartment, because L.L. had addressed the disarray Josil observed.

The SPP does not address L.L.'s financial difficulty either. It is not clear Josil was aware of L.L.'s finances on July 31, but he knew about it by August 5, 2014, when he reviewed and signed the report from Catholic Charities, which noted her loss of cash welfare benefits. At 10:00 a.m. on August 13, Josil went to L.L.'s home and brought L.L. "to Welfare." He did not go inside the apartment that day.

On the same day, August 13, at 10:45 p.m., the Division received the referral that led to the children's removal. According to the screener's summary, the caller ("reporter") advised that R.L., who was supposed to be supervising L.L. and her children, had "asked [her] for a ride home [that] evening."

The reporter explained: "the children are out of control and the grandmother could not take it anymore"; "there is no electricity in the home [, and L.L.] is running a wire from a neighbor's home." Although the reporter had not been inside the apartment for a week, she reported that it was filthy, with rotting food in the refrigerator and dishes in the sink. The reporter also stated L.L. did laundry once a month and was being evicted on August 27.[3]

Latia Williams, a family service specialist for the Division, arrived at L.L.'s apartment to investigate the referral at about 2:00 a.m. on August 14. On Williams's arrival, L.L. was "reluctant" to let her in and explained that her sons were sleeping and her house was "messy." When Williams entered, the boys were in fact asleep and the apartment was indeed messy.

To document her observations, Williams photographed L.L.'s three sons asleep on a sofa bed in the littered living room. There were wires protruding from the sofa bed, which Williams acknowledged were not shown in the photographs. Apart from

[3] The caller did not testify at the fact-finding hearing; the screener's summary of the call was in evidence for the limited purpose of explaining the Division's early morning visit.

stating that the wires were from the bed and not electrical, Williams did not describe the wires.

To Williams, L.L. "appeared to have slurred speech" and her affect was "flat." L.L. denied being under the influence and said she had taken her prescribed Xanax at 8:00 p.m. Based on her observations, Williams could not "confirm" that L.L. was under the influence. However, Williams did notice "marks" on L.L.'s arms that "appeared to be marks you would have if you were" injecting drugs, "like track marks." According to Williams, L.L. told her the marks on her arms were from her sleeping on the sofa bed with the exposed wires.

L.L. was using electricity from a neighbor, a refrigerator in the kitchen was leaking and "wires were actually in the leaky water that was [seeping] into the carpet." Using the photographs she took, Williams pointed out the extension cord conveying electricity from her neighbor's home that was crossing a dark spot on the floor, which was water leaked from the refrigerator. There was no evidence, testimonial or photographic, suggesting the extension cord was worn or unsuitable for outdoor use.

Williams noted other problematic features. There was an unwrapped sandwich on a littered kitchen table. Williams did not know how long the sandwich had been there and was concerned

because it was uncovered. There were also photos of a dirty bathroom with dirty fixtures.

Photographs of one bedroom showed it had one bed with a bare mattress. A disconnected air conditioner, trash and clothing were on the floor. Pictures of a second bedroom showed a bunk bed, with a bare mattress and a pile of clothing on the lower bunk and a mattress on the upper bunk, which was covered with a sheet that had a pair of folded pants and balled up fabric on top of it. None of the pictures showed furniture that could be used to hold clothing, papers or other belongings.

Josil was shown the photographs of the apartment during his testimony. Although he had been to L.L.'s apartments several times before August 14, he had not seen it in the condition depicted. In his words, the pictures showed the home "at its worst."

Williams asked L.L. about the children's medical/emotional conditions. L.L. accurately reported that her first son had a diagnosis of ODD/ADHD. Her first son reported, and L.L confirmed: the third son went to bed with a bottle; the second and third son both wet their beds at times; and, the third son sometimes used a diaper at night. No evidence linking the children's conditions to parental neglect was presented.

The children were given physical examinations following their removal. Their respective immunizations were current, and there were no indications of abuse or of problems attributable to poor hygiene. However, the children were not problem free. The third son was found to have speech delays, a stutter and irregular eye movement. A dental exam was recommended, not to address decay or infection, but to determine whether he needed care because of his prolonged use of a bottle.

Williams identified the following reasons for removing the children during the early hours of August 14: R.L.'s departure violating the SPP; L.L.'s slurred speech and flat affect; and the apartment's deplorable condition. Williams admitted she did not know whether L.L. had the funds to remedy the sofa bed and was aware that R.L. left of her own accord, not at L.L.'s request and despite L.L.'s first son urging R.L. to stay.

L.L. was still struggling with drug addiction on August 14. A letter from the Center for Great Expectations dated September 5, 2014 reports L.L. "engaged in treatment on [August 5, 2014] and attends the IOP group on Mondays, Tuesdays and Thursdays" and "demonstrates motivation for treatment" by her "consistent attendance." Noting her positive drug tests, including a test on August 14 disclosing benzodiazepines and opiates, the Center's letter advises it is "evaluating" whether L.L.'s

prescribed benzodiazepines are "the best medication to manage her symptoms of anxiety and depression as well as her substance use disorder diagnosis." The Center noted L.L. is "struggling with sobriety and presents with an inability to achieve abstinence at this level of care."

L.L.'s children were not in her custody or care between their removal and the fact-finding hearing, and L.L. had not resolved her substance abuse when the hearing commenced. A letter from the Primary Clinician for the Center dated October 28, 2014, just short of two months before the hearing, described L.L.'s effort and failure. L.L. had completed a detoxification (detox) program on September 21, 2014, but she continued to submit samples testing positive for opiates (one positive for heroin as well) and was "not actively seeking inpatient treatment independently of [the Center]." In the closing paragraph, as it had in its September letter, the Center explained:

> [L.L.] is currently struggling with sobriety and presents with an inability to achieve abstinence at this level of care. Therefore, I am recommending that she complete a Level III. 7 [inpatient] short term rehab program. [L.L.] may return to CGE Outpatient treatment once she completes short term [inpatient] treatment.

At the hearing, Josil testified to L.L.'s participation in a seven-day detox inpatient program and her continued, regular, daily and unsuccessful phone calls to obtain a spot for inpatient treatment.

II.

The judge credited Williams's and Josil's testimony. He found that L.L. was subject to and violated the SPP when her mother left her unsupervised with her children for over three hours, "and likely longer since her mother left during the 'day.'" He concluded L.L. should have but failed to immediately contact the Division when R.L. left, and that L.L. knew R.L.'s departure "would likely result in the children's removal." The judge further found L.L.'s drug abuse remained unabated, as evidenced by the positive test on August 14. He also found that L.L. exposed her sons to a risk of danger by allowing them to sleep on the sofa bed when she knew the bed's wires injured her.

The judge wrote: "Here, the evidence when considered appropriately in context establishes that [L.L.], with an active substance abuse problem, was caring for her minor children unsupervised and in violation of a SPP." In a footnote accompanying the preceding sentence, the judge explained that he was not relying "exclusively on . . . [L.L.'s] slurred speech and flat affect," but on "the combination of her active

substance abuse problem, lack of appropriate supervision and active risks to the children[.]"

The judge further wrote:

> The violation of that SPP was known to [L.L.] both by her admission and her [first] son's actions [presumably referring to that son's attempt to get R.L. to return] on August 13, 2014. In violation of the [SPP], the trial evidence does not establish that she made any attempt to contact the Division or seek other appropriate care for her children that day or night after her mother left the home. On the night of removal, her speech was slurred, and she had a flat affect. Later testing confirmed her active drug use on August 14, 2014, the date of the removal. The condition of the home was indisputabl[y] deplorable and contained general and specific dangers to the children. Most notably the admitted projection of "wires" from the sofa [bed] where the children were sleeping and which wires were stated to have caused injury to [L.L.]. Her unauthorized supervision of her children, with an active drug problem, subjected her children to the dangerous conditions of the home, including harmful wires protruding from the bedding and extension cords traversing through wet and damp conditions, when combined, in toto, supports a finding that [L.L.] was grossly negligent and acted with a reckless disregard for the safety of her children, thereby exhibiting a failure to exercise a minimum degree of care in their supervision. Such failure placed the children at substantial risk of harm.
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> In reaching the determination, the [c]ourt considered whether [L.L.] could have performed some act to remedy the situation or remove the danger understanding that not

every failure constitutes abuse or neglect. Here [L.L.'s] failures to act were numerous. First, she was caring for her children without an appropriate supervisor while knowingly violating a [SPP] and while she had an active substance abuse problem. Her inability to properly supervise was evidenced by the dangerous conditions of the home and the specific decision to permit the children to sleep on a bed with exposed wires that caused injury to herself.

In evaluating the totality of the circumstances, the [c]ourt also considered [Josil's testimony that the apartment was at its worst on August 14.] It is a reasonable conclusion, based on this testimony, that the situation in the home and the circumstances that led to the Division's involvement were getting worse. In sum, that [L.L.] and any supervisor were not addressing the situation. She still had an active drug issue. The home environment was devolving[,] and she placed her children in a situation where they were at risk of harm due to the sleeping conditions and other risks in the home, at a minimum.

. . . .[4]

Finally, it should be noted that the [c]ourt reviewed all the trial evidence in its appropriate context and concludes its decision here is not based on [L.L.'s] economic or social circumstances . . . . Rather, the [c]ourt's decision is based on the actions and decisions of [L.L.] when she placed her chid[ren] in substantial risk of harm while acting as a caretaker in violation of a safety protection plan

[4] The judge's rejection of L.L.'s argument that her mother was solely responsible under the SPP is omitted, because that claim, which she repeats on appeal, has insufficient merit to warrant discussion in this written opinion. R. 2:11-3(e)(1)(E).

> without an appropriate supervisor. She was observed to have a flat affect and slurred speech. [L]ater testing confirmed that on the day of the removal, she tested positive for opiates. Most critically, the condition of the home as previously detailed, and the decision to place the children in a bed with exposed wires — which had caused injury to her — was, in the totality of the circumstances, grossly negligent. In this regard, it is important to note that there were a number of beds in the home . . . . [None] contained a dangerous condition such as the bed in which all three children were permitted to sleep. As such, any claim that the children sleeping on the sofa bed was a result of [L.L.'s] inability to purchase another bed or sofa is misplaced as there were other options available in the home for the children to sleep in a setting safer than that selected by [L.L.].

III.

Our standard of review is deferential. In recognition of the special expertise of Family Part judges in matters of parental abuse and neglect, this court defers to findings supported by substantial credible evidence in the record. N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010). In evaluating the sufficiency of the credible evidence, "Judges at the trial and appellate level cannot fill in missing information on their own or take judicial notice of harm. Instead, the fact-sensitive nature of abuse and neglect cases, turns on particularized evidence." N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 28 (2013) (citation omitted).

Nevertheless, we intervene to ensure fairness if the judge's "conclusions are 'clearly mistaken or wide of the mark.'" L.L., supra, 201 N.J. at 227 (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Moreover, our deference does not extend to a "trial court's interpretation of the law and the legal consequences that flow from established facts[.]" Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995); accord N.J. Div. of Youth and Family Servs. v. R.G., 217 N.J. 527, 552 (2014) (quoting Manalapan in a case involving termination of parental rights).

The judge in this case relied, in part, on this court's decision in New Jersey Division of Child Protection and Permanency v. M.C., 435 N.J. Super. 405 (App. Div.), which was pending before the Supreme Court on a grant of certification at the time of his decision, 220 N.J. 41 (2014). After the judge issued that opinion, the Supreme Court remanded M.C. "to the Superior Court, Appellate Division for reconsideration in light of the Court's recent opinion in Department of Children & Families v. E.D.-O., 223 N.J. 166 (2015)." N.J. Div. of Child Protec. & Permanency v. M.C., 223 N.J. 160 (2015).

In E.D.-O., the Court rejected our reading of N.J.S.A. 9:6-8.21(c)(4)(b) in M.C., which interpreted the same provision to require an assessment of the "risk of harm to any child at the

time the complaint seeking care and supervision of her children is heard or the Director renders a decision." E.D.-O., supra, 223 N.J. at 174-75. The Supreme Court explained its disapproval of our reliance on circumstances as they are at the time of the hearing in M.C.:

> The myriad dispositions available to the trial court after it enters a finding of abuse or neglect are fashioned based on current circumstances. For example, N.J.S.A. 9:6-8.50(e) expressly permits a trial court to suspend a dispositional hearing indefinitely to permit the Division to report the current status of the parent and child and whether any further services or supervision are required.
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> [Id. at 189-90.]

We review this case in light of E.D.-O..

The Division alleged and the judge found neglect as defined in N.J.S.A. 9:6-8.21(c)(4)(b).

> Title 9 defines an "abused or neglected child," in pertinent part, as
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> > a child less than 18 years of age . . . whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof[.]

[N.J.S.A. 9:6-8.21(c)(4)(b).]

> Accordingly, Title 9 initially looks for actual impairment to the child. However, when there is no evidence of actual harm, the focus shifts to whether there is a threat of harm. Thus, "a finding of abuse and neglect can be based on proof of imminent danger and a substantial risk of harm." Under those circumstances, "the Division must show imminent danger or a substantial risk of harm to a child by a preponderance of the evidence." Moreover, "[c]ourts need not wait to act until a child is actually irreparably impaired by parental inattention or neglect."
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> [E.D.-O., supra, 223 N.J. at 178 (citations omitted).]

With respect to "substantial risk of harm," the Court explained: "Each determination of whether the conduct of a parent or caretaker constitutes child abuse or neglect pursuant to N.J.S.A. 9:6-8.21(c)(4)(b) requires a determination of whether the child suffered actual physical, mental, or emotional harm or whether the conduct exposed the child to an imminent risk of such harm." E.D.-O., supra, 223 N.J. at 185 (emphasis added). The risk required to establish neglect is "a risk of serious injury to that child." Id. at 179 (quoting G.S. v. Dep't of Human Servs., 157 N.J. 161, 181 (1999)).

Addressing the showing required to prove a failure to exercise a "minimum degree of care," the Court explained: "The

text of N.J.S.A. 9:6-8.21(c)(4)(b) is designed to capture grossly negligent conduct that has harmed or poses a risk of imminent harm to a child." Id. at 186 (emphasis added). Where "[a]n ordinary reasonable person would understand the perilous situation in which [a] child [has been] placed, . . . [a] defendant's conduct amount[s] to gross negligence." Id. at 185 (quoting N.J. Div. of Youth & Family Servs. v. A.R., 419 N.J. Super. 538, 546 (App. Div. 2011)). Alternatively, a parent "fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." Id. at 175 (quoting G.S., supra, 157 N.J. at 181).

To the extent the judge's finding of imminent danger or substantial risk of harm rests on the sofa bed's wires, it is not supported by credible evidence in the record. The only basis for finding those wires dangerous is Williams's recitation of L.L.'s explanation for the marks on her arms. Even though the judge found Williams's testimony credible, the probative value of L.L.'s explanation of the marks on her arms relevant to danger of injury from the sofa bed's wires is dependent on the reliability of L.L.'s statement, not the credibility of Williams's testimony repeating what L.L. claimed. Nothing in

the record suggests that L.L.'s statement was anything other than a creative explanation for what appeared to be "track marks."

Even if we were to assume adequate support for the judge's determination that L.L.'s explanation for marks on her arms was reliable, those injuries were minor, punctures resembling track marks. If not caused by drug use, such "marks" are not injuries of the sort "[a]n ordinary reasonable person would understand" as "perilous." Id. at 185 (quoting A.R., supra, 419 N.J. Super. at 546). Similarly, L.L.'s awareness of a risk of such minor injury could not establish that she recklessly created an imminent danger or a substantial risk of serious injury. Cf. E.D.-O., supra, 223 N.J. at 185 (discussing A.R., supra, 419 N.J. Super. at 541, 543, 545-46, a case involving a father placing his ten-month-old son to sleep, unattended for several hours, on a twin bed without railings adjacent to a radiator hot enough to burn him). Therefore, L.L.'s decision about the sofa bed situation cannot support a finding of gross negligence or recklessness. Id. at 175, 185.

We recognize, as the judge did, that

> [w]hen determining whether or not a child has been abused or neglected, [courts' findings should be based] on the totality of the circumstances, since "[i]n child abuse and neglect cases the elements of proof are

> synergistically related. Each proven act of neglect has some effect on the [child]. One act may be 'substantial' or the sum of many acts may be 'substantial.'"
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> [N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329-30 (App. Div. 2011) (emphasis added) (quoting N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 481 (App. Div. 2010), certif. denied, 207 N.J. 188 (2011) (internal quotations omitted)).]

Consideration of the totality of the circumstances, however, must focus on the competent evidence. As previously noted, "Judges at the trial and appellate level cannot fill in missing information on their own or take judicial notice of harm. Instead, the fact-sensitive nature of abuse and neglect cases, turns on particularized evidence." A.L., supra, 213 N.J. at 28 (citation omitted). Because the competent evidence did not establish use of the sofa bed posed a danger, that situation adds nothing that could raise other risks to the level of a substantial risk of serious injury. By other risks we refer to, L.L.'s failure to report R.L.'s sudden departure, her active drug use, or use of an extension cord, not shown to be unsuitable, by design or condition, for conveyance of electricity.[5]

[5] L.L.'s use of the extension cord to convey electricity, unlike the use of the bed, had to be considered in light of L.L.'s

Before turning to L.L.'s failure to notify the Division of her mother's departure, we stress that R.L.'s departure time was not established. The summary of the 10:45 p.m. referral was not admitted for the truth of what the caller said, and viewed in context, the references to "day" and "that day" elsewhere in the record are too ambiguous to permit an inference about the time R.L. left L.L.'s apartment on August 13.

L.L.'s failure to notify the Division after R.L. left her apartment establishes neglect but not gross negligence. As Josil explained, R.L.'s supervision was a cautionary measure imposed because L.L.'s history of substance abuse.

The Supreme Court emphasized in E.D.-O., "[f]ailing to perform a cautionary act . . . is not necessarily abuse or neglect." 223 N.J. at 180 (citing Dep't of Children & Families v. T.B., 207 N.J. 294, 306-07 (2011)). In the totality of these circumstances, R.L.'s sudden departure was "extenuating," and, as such, had to be considered in determining whether L.L.'s conduct was grossly negligent. Id. at 174. There was no evidence establishing unreasonable delay; the children were

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efforts to obtain assistance in meeting her bills, which was an aspect of the situation relevant to the question of gross negligence. The shut-off of power occurred despite her efforts, and that was an extenuating circumstance that had to be considered. E.D.-O., supra, 223 N.J. at 174.

asleep and the record does not permit a finding as to when R.L. left. Moreover, despite L.L.'s slurring and flat affect when Williams arrived at 2:00 a.m. on August 14, L.L. was fully aware of the situation. She knew her children were sleeping and her house was messy, and she was able to describe the event that led to R.L.'s departure and her first son's diagnosis. While there was evidence that she submitted to a drug test on August 14 that was positive for her prescribed medication and un-prescribed opiates, there was no expert evidence explaining what, if anything, the drug levels present in her tested sample indicated about the time of her drug use or her degree of impairment. See A.L., supra, 213 N.J. at 28. "Addiction is not easy to successfully remediate; a failure to successfully defeat drug addiction does not automatically equate to child abuse or neglect." V.T., supra, 423 N.J. Super. at 331. The evidence did not establish that L.L. was impaired or took drugs knowing she would be unsupervised.

The judge found gross negligence based on L.L.'s awareness of the risk the Division would likely remove her children if she was unsupervised. L.L.'s awareness of that risk is clearly supported by the record, but removal by the Division is not a risk cognizable as gross negligence. As previously noted, a failure to perform a cautionary act amounts to gross negligence

if a parent is aware of imminent danger or a substantial risk of harm to a child's physical, mental or emotional condition. In any event, L.L.'s notification of the Division about R.L.'s departure would not have diminished the risk of removal.

Alternatively, gross negligence can be shown by evidence establishing a situation that an ordinary reasonable person would recognize as perilous for a child. E.D.-O., supra, 223 N.J. at 175, 185.[6] However, the judge did not determine that an ordinary person in L.L.'s situation would recognize her failure to notify the Division she was caring for the children without supervision while continuing to struggle with addiction created a risk of serious injury to the children. And, as the Court explained in E.D.-O., "[i]n all but the most obvious instances, that assessment must avoid resort to categorical conclusions." Id. at 180.

[6] Removal by the Division is undoubtedly difficult for children. But parental incapacity and the harm of separation that accompanies it are pertinent to questions that arise when termination of parental rights is at issue, and capacity to parent, time needed to acquire or regain it and withdrawal of parental attention in the interim are important. N.J.S.A. 30:4C-15.1(a)(1)-(4). In abuse and neglect proceedings, such matters are addressed at disposition hearings. See E.D.-O., supra, 223 N.J. at 189-90.

Because the Division failed to establish neglect pursuant to N.J.S.A. 9:8-6.21(c)(4)(b), we reverse.

Reversed.