

SHORTS



ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

Nicaragua: Mission Impossible, Mission Accomplished

OUR GOAL: Initiate the first-ever activities program for abandoned elders in Nicaragua.

OUR PLAN: Run a competition in *Shorts* to find the three best activities professionals in NC. Give them four weeks to plan a national program over the phone. Pay for them to spend seven days in Nicaragua and work them to the bone.

OUR CHALLENGE: These ladies had never been to Nicaragua, knew virtually nothing about it, didn't know each other, and frankly, didn't have a clue what they were getting into. But, thank goodness, they didn't care. They knew there was a need in someplace far away and believed they could help.

OUR OUTCOME: We did it. With financial support from Carron Suddreth of Wilkes Senior Village, Liberty Healthcare, Avante, Lutheran Services for Aging, Autumn Corporation, White Oak Manor Corporation, Kim and Jim Schmidlin, Grove Medical Supply, BB&T, Wincare Corporation, Cheryl Clapp and Denise Coleman, Brian Center of Eden, Lakeside Baptist Church of Rocky Mount, and dozens of other sponsors from around NC, we took three activities directors, a registered nurse (Angie Bunton from Wilkes Senior Village), Carron, and me, along with 18 bags of supplies, to Nicaragua. We traveled hundreds of miles in an uncomfortable minivan to five cities and seven training sites in seven days, trained over 200 people (residents, community volunteers, professors, and government officials) on the importance of activities for elders, and gave them skills and supplies to start their own programs.

OUR STORY: Sometimes it's good not to overthink an issue. I know that now that I'm back from my fifth trip to Nicaragua. But on January 11, 2012, when our activities team landed in Managua, Nicaragua, it finally hit me.

by Ken Burgess



"This," I thought, "is the dumbest, craziest thing I've ever done. What have I done?" I've asked my friend, Carron Suddreth, to spend thousands of dollars to help me bring three activities directors to Nicaragua, along with her RN (and my beloved pal), Angie Bunton, and to spend seven days with me in hot, rugged Nicaragua to plant the seeds of an activities program for an entire nation of abandoned and poor elders who barely have enough to eat and often lack the most basic medical care. But there they were — Carron, Angie, Brenda Zimmerman from Lutheran Home of Salisbury, Jamie Phillips from Avante of Wilkesboro, and Erica Johnson from Liberty of Wilmington — bearing bags of supplies from all over NC, weary from travel but bursting with excitement, and all looking at me and Carron with eyes that said, "OK, we're here, now what?"

In that moment, I was struck with sheer terror. What if this fails? What if someone gets lost or sick? What if Nicaraguan elders don't care about activities? What if this dream of mine and Carron's really is one of those "wild, harebrained schemes?" What if, what if, what if?

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ATTORNEYS AT LAW

Baby Doll: Miracle from Eden

By Ken Burgess



She had the darkest, saddest eyes I'd ever seen. Her name is Maria and she lives at the home for elders in Juigalpa, Nicaragua. I first met Maria on my trip to Juigalpa in January 2011.

Maria was hard to miss among the elders who lived at Juigalpa. First, she's not an elder. She is only 30-something and seemed a little out of place. More than that, she lived in a dark, almost detached emotional state. Maria lost a baby during childbirth and went into a deep depression — a true catatonic state. Her family, unable to understand this or care for her, eventually brought her to the Juigalpa center where they took her in.

During my time in Juigalpa in 2011, I saw Maria often but I never saw her smile, laugh, make eye contact, or show any other sign of conscious reality. You could stand directly in front of her and speak or wave your hands and there would be no response or even acknowledgement that she saw you.

So when we arrived on January 13, 2012, for my second visit to Juigalpa to start an activities program, I spotted her. There she sat, wearing a brightly colored dress, with those same blank eyes staring straight ahead into nothing. The colors of her dress were such a contrast to the darkness she seemed to live in. My first thought was that this woman is truly alive in body only.

We had 50 residents to see, touch, and hug, so I moved on — we had an activities program to teach. And frankly, that was much easier for me than looking at Maria.

I learned so much on this trip. For one, I learned that activities for elders is, well, organized chaos — a beautiful disarray. To see poor, abandoned elders who have never tossed a ball, danced, or glued little glass jewels on painted wooden boxes do it for the first time, then laugh and point with pride at what they've done is amazing. I also learned that I was WAY outside of my comfort zone. As my team members were very fond of pointing out, I'm apparently a control freak. But, in my defense, I'm used to man-



aging people, not being managed. I wanted this first-ever activities program in the Nicaraguan hogares to work, and I wanted everyone to have a great experience. My team just laughed at me lovingly and repeatedly said, "Ken, let go. This isn't law. It's activities and this is how we live! Just look, the elders are having a ball!" And, oh my, were they ever having fun.

Somewhere in the midst of the pandemonium, I saw Jamie Phillips from Avante of Wilkesboro carrying a life-sized baby doll. She was headed straight for Maria. Jamie didn't know that Maria had lost a baby and gone into some dark, unknown place ever since, but I did.

Every ounce of my being was screaming, "No, Jamie, don't give Maria the doll! She might go into some darker place, or a wound she has buried deep could reopen." But I couldn't get to Jamie. From the corner of my eye, I saw Dona Hana, the remarkable Nicaraguan woman who chairs the volunteer group supporting the center. She had seen Jamie, the baby doll and Maria, and her eyes were as wide as mine in horror.

Before anyone could stop her, Jamie knelt down beside Maria, handed her the doll, and began rubbing Maria's hand, talking softly to her, and showing her how to hold the baby and rub it's bottom. Maybe it was my imagination, but for a moment that seemed like an eternity, time and all sound and all movement stopped as I waited for the moment when we unintentionally sent Maria into some deeper catatonic state.

I looked back at Dona Hana, unable to speak or move, and Dona Hana began to smile. She pointed toward Maria. When I turned, I saw it: the Miracle from Eden. Maria, who I'd never seen show any signs of life, was holding Jamie's hand, smiling, laughing, and petting that baby doll's bottom just like Jamie showed her. She smiled and laughed for the next hour, and our team members momentarily left the other elders to be with Maria.

If I told you that I saw the hand of God in that moment, or if I told you that it was the most beautiful thing I'd ever seen, or if I told you that my logical, linear, lawyer's heart melted, I still couldn't convey to you the magic of that moment.

The funny thing about that baby doll is that it was the very last thing I packed. It was donated by Brian Center of Eden (hence the title *Miracle from Eden*), but I was worried about two things: 1) the fear of treating elders like children by giving them a baby doll, of all things, and 2) our already bulging and overweight luggage that we had to get on an airplane. So, I thought, the doll can stay in NC. At the very last second, it hit me. "This doll was given in love and it has to go with us." So I stuffed it into the very last bag we had that would hold it.

Thank God I did. And thanks to Brian Center of Eden for donating that doll.

The Hokey Pokey

By Ken Burgess



It's day one of our grand adventure in Nicaragua and we're on the way to our first training site in Jinotepe. Our team, or "my girls" as I call them, had only landed a few hours earlier in Managua. We hustled them to the hotel, fed them fried chicken from a local convenience store (only the best for these ladies!), and off to bed we went.

A few hours later, we would find out if we could really take three strangers with no Spanish-speaking skills to a foreign land and teach an entire country about the importance of activities for elders.

We arrived in Jinotepe right on schedule to find no one there. I had forgotten from my prior trips that 1 p.m. in Nicaragua means "whenever people show up." I panicked, thinking no one was going to come. By 2 p.m., instead of the 20 people we had planned for, 58 showed up — residents of the Jinotepe hogare, local volunteers, the mayor, the press, and others I can't recall.

Suddenly, I looked around and we were in full swing. I, of course, was totally out of control (which, as you know, I HATE). Erica Johnson from Liberty at Wilmington was teaching a crowd about exercise and rhythm therapy and the joy of "stretchy bands" (which build muscle). Brenda Zimmerman of Lutheran had two tables of crafts going on and quite a crowd. Jamie Phillips of Avante of Wilkesboro was doing something with another crowd of elders. And 1/3 of our crowd was sitting in chairs, doing nothing.



If you've never tried to teach elder activities to 58 people in a foreign country (when you planned for 20), in an outdoor rotunda with one interpreter and three teachers, then you haven't lived.

If you like structure and organization, like me, then forget it. It ain't gonna happen. Instead, you have to innovate, create, and keep moving.



As I watched these three scenes play out in utter pandemonium, amid my own sense of panic, my little Carron Suddreth, all five foot two of her, grabbed one of our team members and said, "Go do a song with everyone who is not exercising or doing crafts." "Do a song?" I thought. "None of us speak or sing Spanish."

But, right on cue, one of our team members grabbed our only interpreter and that's when I heard it:

"You put your right foot in, you put your right foot out, you put your right foot in, and you shake it all about."

"You do the Hokey Pokey and you turn yourself about, that's what it's all about."

Every single senior, volunteer, staff member, government official, and member of our team was suddenly Hokey Pokey-ing. It was a HIT and we were a hit! English to Spanish, legs moving, butts shaking, people twirling, interpreter doing his thing, and everybody having the most marvelous time.

For the rest of our seven days in Nicaragua, every place we went, no matter what we had planned or how we had to improvise for larger crowds or limited supplies or physical impairments, we did one thing every time — the *Hokey Pokey*. Whether we were teaching abandoned elders, hogare staff, government officials, university professors, or kids, they all had one thing in common — they LOVED the *Hokey Pokey*! They all asked us to send them the words in Spanish. I do believe we made the *Hokey Pokey* go platinum in Nicaragua.

In our American world of political sensitivity, creature comforts, and video games, we tend to forget a universal truth. Sharing, in whatever form, the simplest things we have to give — our time, our attention, our creativity, the child within us — remains the greatest gift of all.

I have to admit, when our team first began the *Hokey Pokey* on Day one, I was sort of horrified. After all, I'm a well-known, respectable lawyer. By Day seven, in Managua, I couldn't wait to start the *Hokey Pokey* because I knew I'd see something really special — everybody — old, young, rich, poor, educated, uneducated, pretty, and ugly — sharing five minutes of delirious, childlike, laugh-out-loud joy as we put our right hands in, took our right hands out, put our right hands in, waggled our butts ridiculously, put our "whole selves" in, and shook 'em all about.

By the way, if you haven't done the *Hokey Pokey* in a while, say, since childhood, I highly recommend that you close the blinds, turn off the phone, make sure you are alone in the house, and throw down on some *Hokey Pokey*. It will do your soul good. Then do it with your friends. You are gonna LOVE it!

To our amazingly creative, inventive, flexible team of activities professionals from NC, thank you for reminding me how to shake it all about. I think I feel a song coming on. 😊

FOR NURSING HOMES & ASSISTED LIVING COMMUNITIES

Arbitration Clauses in Long Term Care Admission Agreements — U.S. Supreme Court Finds Them Permissible

By Ken Burgess

On February 21, 2012, the U.S. Supreme Court decided an issue involving arbitration agreements in nursing facilities which has been swirling around the nation for years. For the past several years, an increasing number of state courts have found pre-dispute arbitration agreements (i.e., signed before any dispute arises, and often during the admission process) signed by residents or family members of residents in nursing facilities void and unenforceable, finding them offensive to sound public policy. These decisions often focus on the stress involved in the nursing facility admission process, lack of understanding of the rights residents are waiving in signing such agreements, and other similar factors.

In *Marmet Health Care Center, Inc et al. v. Clayton Brown, et al.*, the U.S. Supreme Court found such arbitration agreements enforceable, even in the face of state laws that try to preclude them. The case involved families of three deceased residents, each of whom sued a nursing facility for medical negligence allegedly causing the death of their family member. In each case, a family member, acting for the resident, had signed at admission an arbitration agreement that required all disputes, other than actions for nonpayment for services provided, to be submitted to arbitration, and included waivers of the right to sue in state court for damages.

The West Virginia Supreme Court found all three arbitration agreements void and unenforceable, as offensive to the state's public policy. The U.S. Supreme Court clearly and unequivocally reversed the West Virginia Supreme Court, noting that the

Federal Arbitration Act embodies a national policy favoring arbitration over traditional lawsuits, unless the Act provides a clear exemption for the type of case at issue. The Court noted that no such exemption exists in the Act for personal injury or wrongful death cases brought on behalf of a deceased nursing facility resident. The Court also said the West Virginia court ignored clear precedent of the U.S. Supreme Court holding that the Act preempts state law and "public policy" decisions that purport to preclude enforcement of nursing facility pre-dispute arbitration agreements.

The Supreme Court remanded the case to the West Virginia court to reconsider an "additional ground" the West Virginia court said it considered in voiding the arbitration agreements, but noted in doing so that the "additional basis" seemed to be based on the same public policy argument that the Supreme Court soundly rejected in reversing the West Virginia Supreme Court decision.

North Carolina's Court of Appeals in 2006 upheld the validity and enforceability of arbitration agreements in long term care, specifically in the assisted living setting, in the case of *Raper v. Oliver House*. Resident advocates and plaintiffs' lawyers have been trying for years to pass a national statute that would preclude arbitration agreements signed during the admission process, and all pre-dispute arbitration agreements, between long term care facilities and residents.

This important decision by the U.S. Supreme Court stems the tide of state laws and state court decisions, voiding or precluding long term care arbitration agreements. It may, however, also fuel efforts in Washington to enact federal legislation precluding such agreements.

Ken's Quote of the Month

The ones who are crazy enough to think they can change the world are the ones that do.

— Anonymous

Employee Terminated Before Becoming Eligible for FMLA Leave May Have a Cause of Action under the FMLA

By Laura Russell

Does the Family and Medical Leave Act (FMLA) protect a request for FMLA leave by an employee who is not yet eligible? This question was recently considered and answered in the affirmative by the Court of Appeals for the Eleventh Circuit, which has jurisdiction over federal cases originating in Alabama, Florida, and Georgia. The facts in the case, *Pereda v. Brookdale Senior Living Communities, Inc.*, were quite simple. The plaintiff, Ms. Pereda, requested FMLA leave in June 2009, which was to be taken after the birth of her child in or around late November of 2009. Soon after advising her employer of the pregnancy, Ms. Pereda allegedly experienced offensive and harassing conduct from her employer and, after being put on a performance improvement plan, was terminated in September of 2009. It was undisputed that at the time she requested leave and on the date of her termination, Ms. Pereda was not yet eligible for FMLA protection because she had not worked the requisite time period and had not yet experienced the triggering event of the birth of her child. It was equally undisputed that had she not been terminated, Ms. Pereda would have been entitled to FMLA protection by the time she gave birth and began her requested leave.

Under the FMLA, employees may assert two types of claims — "interference," where an employer allegedly denies or interferes with an employee's rights under the FMLA, and "retaliation," where an employer allegedly discriminates against an employee for engaging in FMLA-protected activity. Ms. Pereda asserted each of these claims against her employer, and the court recognized the legitimacy of both of them in its decision.

Noting that the FMLA requires advance notice to the employer of any foreseeable future leave, the court first found that the FMLA regulatory scheme necessarily protected pre-eligible employees from interference prior to the occurrence of the triggering event, such as the birth of a child. In recognizing that Ms.

Pereda had a legitimate interference claim against her employer, the court stated that "[w]ithout remedy, the advanced notice requirement becomes a trap for newer employees and extends to employers a significant exemption from liability."

In light of its conclusion that the FMLA protects a pre-eligibility request for post-eligibility maternity leave, the court also found that Ms. Pereda had stated a cause of action for FMLA retaliation. In other words, Ms. Pereda was engaged in statutorily protected activity when she discussed the FMLA leave with her employer.

The practical impact of the decision in *Pereda* is this — even if an employee is not eligible at the time he or she requests FMLA leave, the FMLA may still protect the employee from interference with the right to take the leave once he or she is eligible, and from retaliation for having made the request. All employers — whether located in the Eleventh Circuit or elsewhere — should be aware that any employee who announces a future need for FMLA leave prior to becoming eligible for it may be protected by the FMLA if it appears likely the employee will be eligible by the time the leave is scheduled to begin. Further, when assessing an employee's eligibility for FMLA leave, employers should make their decision based on the date the leave is to begin, rather than as of the date of the request.

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Mission Accomplished continued from page 1)

Well, I was wrong to worry. We actually did it. Every place we trained, we had double the crowd we expected. Everyone loved activities and wanted more. Our team of activities professionals turned out to be three of the most creative, talented, delightful, and loving women imaginable. Having picked them from a competition, for which their employers, colleagues, and, in one case, competitors nominated them, not knowing any of them or them not knowing me or Carron; having never met each other until they hit the Raleigh airport, I must say if I had to hand-pick three activities professionals after months of study, I'd have picked these three.

Looking back now, I realize that these ladies did an amazing thing. They conquered the hearts of an entire nation of elders and those who care about elders. They taught me SO many lessons. They showed us all how to do more with less, in a country that only knows "less." They breathed enthusiasm, possibility, and hope. They told me over and over to "just calm down." They laughed at my impatience and made me laugh at myself in the process. In short, they embodied the best of long term care here in NC and they shared it in a country far away, and in doing that, made believers out of all of us who already believed that old age can be the best age and that minds need love and nurture, just like bodies need medicine.

You'll have to forgive me for my Hallmark moment here. But I've just come back from one of the greatest experiences of my life — one that will mark me forever. I also need to thank the many sponsors from NC that have supported our work in Nicaragua for the last five years, many of whom are named in this article. I must especially thank my friend, Carron Suddreth, owner and operator of Wilkes Senior Village in North Wilkesboro, who heard me talk about my work in Nicaragua in 2011 at the NC Healthcare Facilities Association and immediately said, "I want to help."

It was Carron's vision and endless energy that made my fantasy of an activities program for Nicaraguan elders a reality. She has tirelessly borrowed from, asked, and begged of her fellow providers, vendors, banks, insurance companies, and friends for money and supplies for Nicaraguan elders. When we were in Nicaragua, Carron worked like a fiend. No task was too small or too big. Any task we asked our team to do, Carron did first. With Carron's leadership, we took to Nicaragua 18 bags of activities supplies, a new TV, and Wii console for the elders, and over \$90,000 to fund the renovation of one of the hogares de anciones (homes for the elders) in Jinotepe, Nicaragua.

On behalf of our NC volunteers, the elders of Nicaragua, and myself, let me say thank you to every one of you who offered us supplies, mattresses, mattress covers, pillows, baseball caps, activities supplies, money, and prayers.

I once read that of all the things that are cherished, none can surpass the memory of a love between the needy and the fulfiller. Each gift you have given, each dollar you have donated, and each good wish you have offered has changed the lives of Nicaraguan elders who must have wondered, as their families dropped them off alone on a mountain or a dark, hillside street, "Does anyone care about me?" Now they know that we do.

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More On Nicaragua

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