

### QUESTION 3

Wanda and Mark, who have never been married, had lived together in Vermont when Wanda became pregnant. Wanda gave birth to Colby at a Vermont hospital. After the birth, Wanda and Colby stayed at the hospital for a week.

Wanda, Colby, and Mark then moved in with Mark's father in Vermont for about two months. During this time, Wanda took Colby back to the hospital three times for checkups, arranged for Colby to receive state assistance for medical bills and food, and cared for Colby most of the time. Mark's father also helped out when Wanda needed a break. Mark had been getting Colby ready for bed during Colby's first month, but Mark had to stop when he broke his arm during a drunken brawl that occurred during a lunch break at work.

Wanda and Mark broke up when Colby was a little over two months old. Without notice to Mark, Wanda took Colby to Massachusetts to stay with a friend until she could find a permanent place to live in Massachusetts. While in Massachusetts, Wanda cared for Colby and took Colby to a doctor's visit. Wanda has no relatives in Massachusetts and Colby has not received state benefits in Massachusetts. Feeling regret over her decision to take Colby to Massachusetts without giving notice to Mark, Wanda has since reached out to Mark to arrange visits with Colby but Mark has not returned Wanda's phone calls.

Mark wants custody of Colby and wants to live with Colby in Vermont. Wanda also wants custody of Colby but seeks to remain in Massachusetts. Colby has been in Massachusetts for two weeks and is now two and a half months old. Mark has filed a custody action in Vermont.

1. Which state has jurisdiction to determine the custody of Colby? Discuss and analyze.
2. Under Vermont law what threshold issue must Mark address before a court may consider his claim for custody?
3. Under Vermont law, how would the Vermont court decide parental rights and responsibilities? Discuss and analyze.

#### QUESTION 4

Anna owns two separate properties in Ridgeville, Vermont. The first property is a ten-acre parcel, and the second is a seven-acre parcel. The ten-acre parcel is subject to a written contract which contains a right of first refusal (“ROFR”) in favor of her neighbor, Benicio. The ROFR is signed by both parties and states:

For Ten Dollars and other valuable consideration, the parties agree that:

1. Anna must notify Benicio in writing of any offer to purchase the ten-acre parcel that she finds acceptable; and
2. Benicio has the first right to purchase the property at the highest price offered under the conditions of that offer, provided he notifies Anna of his intention to exercise his option within 30 days of her notice.

Anna recently told Benicio of her plans to sell the ten-acre parcel. Benicio researched land prices in the area and determined that the ten-acre parcel was worth around \$50,000. He called up Anna and offered to purchase the ten-acre parcel for this price. In that phone call, Anna rejected Benicio’s offer on the ten-acre parcel, but she promised to sell him the seven-acre parcel of land for that price. Several days later, Benicio wrote Anna a letter informing her that he wished to purchase her seven-acre parcel for \$50,000, as they had agreed on the phone, but he would need to pay the purchase price over the course of ten months. He also informed her that he had purchased a flock of sheep, which he planned to pasture on the seven-acre parcel. Anna did not respond to this letter.

A week later, Anna notified Benicio that she received an offer of \$100,000 for the ten-acre parcel from Charles, an old friend and business partner of Anna, and she intended to accept. She also told him she had accepted an offer of \$60,000 for the seven-acre parcel from Darlene, who contacted Anna through a realtor. Benicio feels these prices do not reflect market value as indicated by his research; he seeks your counsel on the matter.

1. Does Benicio have any civil remedies against Anna or Charles regarding the proposed sale of the ten-acre parcel? Discuss and analyze.
2. Does Benicio have any civil remedies against Anna regarding the sale of the seven-acre parcel? Discuss and analyze.
3. What are Benicio’s options if he wishes to purchase either property without resorting to court action? Discuss and analyze.

## QUESTION 5

In January of 2014, Alice signs a three-year contract to serve as director of public works for Rutlington, Vermont. The contract states, in part, that during the three-year term Alice may be discharged for cause and that the contract is subject to all provisions of the Town Charter. The contract also gives the Town discretion to terminate employment if Alice miss two consecutive months of work unless Alice provides a written medical opinion stating that she can return to her duties in a reasonable time.

In the summer of 2014, The Town Manager (Bob) and Town Attorney (Cathy) conclude that Alice is a poor fit for the job, but they take no action.

In September of 2014, Alice takes a vacation, is injured in a car accident, and misses two months of work. In November of 2014, Alice is improved but her doctor reports to both Alice and Bob that it is uncertain when Alice will return to work.

Bob wants to get rid of Alice, but he does not have sufficient evidence to discharge Alice for cause. Bob asks Cathy for advice. Cathy advises that the contract allows termination because Alice does not have a medical opinion documenting when she can return to work. Cathy also notes that the contract is subject to the Town charter, which contains a provision that has not been revised since 1895: "Inasmuch as public service is a privilege and not a right, the decision of the Town Manager on any matter related to employment in Rutlington shall be final."

On December 10, 2014, Bob and Cathy meet with Alice. They inform Alice that her employment has been terminated. Alice objects, and asks why she has been terminated and whether she will receive a hearing. Cathy does not give Alice a reason, but tells Alice that this is her opportunity to tell Bob anything she likes. Bob then says: "I will listen, but I intend to sign the termination papers today. Your contract and the charter give me the right to fire you." Alice does not say anything, even though her doctor has just told her that she can return to work in one week. Alice leaves, and Bob then signs the document terminating her employment.

1. Does Alice have a claim under the United States Constitution? Discuss and analyze.
2. Does Alice have a claim under the Vermont Constitution? Discuss and analyze.
3. If Alice makes a claim under either Constitution against Bob and Cathy, do they have an affirmative defense? Discuss and analyze.

In your answers, do not discuss any breach of contract claims; claims under statutes governing the powers of municipal entities; fair employment practices statutes; or family and medical leave statutes.

## QUESTION 6

On a clear day, a car driven by Aldo crashed headlong through a guardrail and into an abandoned granite quarry. Aldo had been driving away from his home following a particularly nasty fight with his wife, Bernice, over her excessive drinking and extramarital affair. Aldo died instantly. An accident reconstructionist would later determine that Aldo's car had been traveling at a normal speed for the road and that there were no signs Aldo had applied the car's brakes before the crash.

Aldo's wife, their adult daughter, Cora, and their minor daughter, Doris, have filed a wrongful death suit against the car's manufacturer, alleging that the model of car Aldo drove on the day of his death had faulty brake lines, and that the brake lines on Aldo's car failed. They alleged that as a result of the faulty brake lines, Aldo's car crashed, without any braking, through the guardrail and into the quarry.

Bernice and Doris had a materially comfortable life with Aldo until his death. Their family relationships, however, were difficult: Bernice was often out late, usually drinking, if she came home at all. Aldo recently came home early from work to discover Bernice in bed with another woman. Bernice had mocked him when he came in and insinuated she would be filing for divorce soon. Cora had long since left the family home. She is a successful businesswoman who rarely speaks with her family.

In its defense case, the car manufacturer intends to introduce evidence of Bernice's drinking and her affair. It also intends to call Larry, a longtime friend of Aldo's, who will testify that Aldo had been distraught recently over the failure of his marriage and family life. Saddened by Bernice's infidelity and being estranged from Cora, Aldo tearfully told Larry that he was at his breaking point. One more awful fight, Larry will testify, and Aldo said he didn't think he could go on. Aldo's family has discovered that Larry has the following criminal record: 1) a 1999 felony conviction for obstruction of justice; 2) a 2001 misdemeanor conviction for petit larceny; and 3) a 2010 felony conviction for grossly negligent operation of a motor vehicle, injury resulting. Aldo's family intends to impeach Larry with the convictions.

1. Discuss which parties could bring a wrongful death suit against the car manufacturer.
2. Discuss what damages may be sought in such a wrongful death suit.
3. May Larry be impeached at trial with his convictions? Discuss and analyze.
4. Would a motion in limine to exclude evidence of Bernice's affair and drinking be successful? Discuss and analyze.

# Model Answer

## FAMILY LAW ANSWER 3

### Short Answer

This question tests three areas of family law: Uniform Child Custody Jurisdiction and Enforcement Act; Parentage action under 15 V.S.A. Section 302; and parental rights and responsibility under 15 V.S.A. Section 665.

1. Vermont
2. Parentage action to determine whether Mark is the father
3. Wanda

### Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

-Answer: The Vermont court, rather than Massachusetts court, would have jurisdiction even though no home state exists. No home state exists because Colby did not live in either state for at least 6 months and given that Colby is only 2 ½ months old, and lived in Vermont for only 2 months and is presently in Massachusetts, a court would not conclude that he has “lived from birth”.

The Vermont court would conclude that it has jurisdiction under the second prong of the analysis: Colby and his parents and/or Colby and Mark have a significant connection with Vermont other than mere physical presence; and substantial evidence is available in Vermont “concerning the child's care, protection, training, and personal circumstances.” Colby was born in Vermont, both parents have recently lived in Vermont, Colby went to 3 doctor appointments in Vermont and thus a Vermont doctor has evidence of the child’s health, Colby had a personal relationship with Mark’s father and Mark’s father has evidence to determine the child’s care having cared for the child, Colby received benefits in Vermont. Mark currently lives in Vermont as does his father who Colby had contact with. Even though Colby is in Massachusetts currently, neither Colby nor any parent has significant connections with Massachusetts. Wanda is simply staying with a friend, has no family in Massachusetts, Colby has not received any state benefits and Colby has gone to the doctor only once. There is little evidence in Massachusetts regarding the child’s health. Thus a Vermont Court is in the best position to determine custody and would conclude that it has jurisdiction.

### Legal support:

-UCCJEA, 15 V.S.A. §§ 1061–1096

- *Does the UCCJEA Apply*: the Vermont UCCJEA is triggered when someone brings an action that requires a child custody determination defined in 15 VSA 1061 as follows: “Child custody determination” means a “judgment, decree, or other order of a court providing for the legal

custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, or modification order. The term does not include an order relating to child support or other monetary obligation of an individual. The term includes ‘parental rights and responsibilities’ and ‘parent child contact’ as those terms are defined in section 664 of this title.

*-If a custody issue is present, the next step is to apply the UCCJEA to determine if Vermont has jurisdiction to make an initial child custody determination, 15 VSA 1071.*

*-The first question is whether a home state exists. Vermont law defines “home state” as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.”*

15 VSA 1071(a)(1) states:

(a) Except as otherwise provided in section 1074 of this title, a Vermont court has jurisdiction to make an initial child custody determination only if:

(1) Vermont is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from Vermont, but a parent or person acting as a parent continues to live in Vermont;

As the Vermont Supreme Court explained in *In re A.W.*, 2014 VT 32, ¶ 14, 94 A.3d 1161, 1166 (Vt. 2014):

Like the former law, the UCCJEA dictates when a court of this state has jurisdiction to decide child custody matters. The jurisdictional criteria “to make an initial child custody determination” are set forth in 15 V.S.A. § 1071, and include, in essence, four circumstances: (1) where “Vermont is the home state of the child on the date of the commencement of the proceeding” or Vermont “was the home state of the child within six months before the commencement of the proceeding and the child is absent from Vermont, but a parent or person acting as a parent continues to live in Vermont,” *id.* § 1071(a)(1) . . .

*In Re A.W.* also further expanded on the meaning of “temporary absence” in the statutory definition of home state :

“Periods of “temporary absence” by any of the mentioned persons are considered to be “part of” this six-month or less-than-six-months period. *Id.* We construed this definition of “home state” in *In re Cifarelli*, 158 Vt. 249, 611 A.2d 394 (1992), which involved a child who was born and lived in Bermuda for one

month, was taken to New York for a brief period, and then moved with her family to Vermont. Because the child was not yet six months old when a guardianship proceeding commenced in Vermont, following the death of her parents, we concluded that the child effectively “ha [d] no home state” since she had neither lived consecutively in one state for six months nor “had she lived in any one state ‘from birth’ to the commencement of the proceeding.” Id. at 253–54, 611 A.2d at 397; see also *In re D.T.*, 170 Vt. 148, 152, 743 A.2d 1077, 1081 (1999) (holding that, with respect to a child less than six months old, “Vermont is not [the child’s] ‘home state’ because he did not live in Vermont ‘from birth’ ”).

*-If the Vermont court determines it is the home state, then it has jurisdiction to enter a child custody order. If the Vermont court determines that some other state is the home state and that it does not have jurisdiction, it must dismiss the custody action. In re Cifarelli, 158 Vt 249 (1992) (based on former version but conclusions to dismiss action applies to current version of UCCJE).*

*-If the Vermont court determines that no state is the “home state” as it did in In re A.W., the court must move onto to assess in general whether the child and the child’s parents or the child and at least one parent has a significant connection with Vermont other than mere physical presence; and substantial evidence is available in Vermont “concerning the child’s care, protection, training, and personal circumstances,” id. § 1071(a)(2); (3).*

-Section 1071(a)(2): states

(2) A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that Vermont is the more appropriate forum under section 1077 or 1078 of this title, and:

(A) the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Vermont other than mere physical presence; and

(B) substantial evidence is available in Vermont concerning the child’s care, protection, training, and personal relationships;

The Vermont Supreme Court had to engage in the significant connection analysis in - *In re A.W.*, because there was no home state and it explained as follows:

When no state meets the definition of the child’s “home state” under the UCCJEA, the court turns to § 1071(a)(2) to determine whether there are sufficient family connections and evidence in Vermont for the courts here to exercise jurisdiction at the time of the custody action.

## Parentage action

-Answer: the examiner should identify that Mark must establish that he is the biological father of Colby through a parentage action before a court will award him custody. No presumption exists that Mark is the father because Wanda and Mark were not married. The parentage action would require Mark and Colby to undergo genetic testing. Mark has standing to bring a parentage action because he is someone claiming to be the father of Colby. Mark can also request the court in the parentage action to determine custody of Colby.

-Legal support:

-15 V.S.A. § 302(a) provides a cause of action for any “person alleged or alleging himself or herself to be the natural parent of a child.” 15 V.S.A. § 302(a). As the Vermont Supreme Court explained in *LeClair v. Reed ex rel. Reed*, 2007 VT 89, ¶ 4, 182 Vt. 594, 595, 939 A.2d 466, 468 (2007), Section 302 provides “broad standing . . . for any person claiming to be the father of a child to pursue a parentage action.”

-15 V.S.A. § 308 addresses presumptions of parenthood which includes the child is born while the alleged parents are legally married and Mark cannot take advantage of this presumption:

A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if:

- (1) the alleged parent fails to submit without good cause to genetic testing as ordered; or
- (2) the alleged parents have voluntarily acknowledged parentage under the laws of this State or any other state, by filling out and signing a Voluntary Acknowledgement of Parentage form and filing the completed and witnessed form with the Department of Health; or
- (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or
- (4) the child is born while the alleged parents are legally married to each other.

- the determination of parentage is distinct from determinations of parental rights and responsibilities. *LeClair v. Reed ex rel. Reed*, 2007 VT 89.

-How to bring a parentage action: file in family court and “(a) On motion of a party, the court shall require the child, the defendant or defendants, and any acknowledged parent to submit to appropriate genetic testing for the determination of parentage. A party shall be exempt from genetic testing for good cause.” 15 VSA 304.

-What else can occur in a parentage action: “In an action under this subchapter, the court may determine parentage and may include in its order provisions relating to the obligations of parentage, including future child support, visitation and custody.” 15 VSA 306.

### Parental Rights and Responsibilities

Answer: The court will apply the factors in 15 V.S.A. Section 665 set forth below and award sole custody to one parent because Wanda and Mark cannot agree. Wanda would get awarded custody of Colby under these factors. Wanda has been Colby's primary care giver, including taking Colby to doctor appointments. Wanda sought out state assistance for Colby. Wanda has made an effort to arrange visits with Mark. While Mark's father began developing a relationship with Colby, it was for a brief time when Colby was very young and thus such relationship does not have a significant impact on Colby. Mark has demonstrated a tendency for violence which weights in favor for custody of Wanda. While Wanda took Colby out of state without notice to Mark, she later regretted her decision and tried to reach out to Mark. Mark did put Colby to bed for a period of time, but his involvement with Colby was overall minimal. Note that the financial resources of the parents are not in issue under this analysis. Mark's failure to respond to Wanda's request for a visit weighs strongly against Mark.

*LeClair v. Reed ex rel. Reed*, 2007 VT 89, ¶ 7, 182 Vt. 594, 596, 939 A.2d 466, 469 (2007):  
"Parental rights and responsibilities are to be determined for the benefit of all children, regardless of whether the child is born during marriage or out of wedlock."

- 15 VSA Section 665:

The Court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. When the parents cannot agree to divide or share parental rights and responsibilities, the Court shall award parental rights and responsibilities primarily or solely to one parent.

(b) In making an order under this section, the Court shall be guided by the best interests of the child, and shall consider at least the following factors:

(1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

(2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs, and a safe environment;

(3) the ability and disposition of each parent to meet the child's present and future developmental needs;

(4) the quality of the child's adjustment to the child's present housing, school, and community and the potential effect of any change;

(5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

(6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

(7) the relationship of the child with any other person who may significantly affect the child;

(8) the ability and disposition of the parents to communicate, cooperate with each other, and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and

(9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(c) The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent.

(d) The court may order a parent who is awarded responsibility for a certain matter involving a child's welfare to inform the other parent when a major change in that matter occurs.

(e) The jurisdiction granted by this section shall be limited by the Uniform Child Custody Jurisdiction and Enforcement Act, if another state has jurisdiction as provided in that act. For the purposes of interpreting that act and any other provision of law which refers to a custodial parent, including 13 V.S.A. § 2451, the parent with physical responsibility shall be considered the custodial parent.

# Model Answer

## ANSWER 4

### *Model Answer*

1. *Does Benicio have any civil remedies against Anna or Charles regarding the proposed sale of the ten-acre parcel? Discuss and analyze.*

A right of first refusal is an agreement or contract for the purchase of lands and must comply with the statute of frauds. 12 V.S.A. § 181(5); *Guirk v. Ward*, 115 Vt. 221, 55 A.2d 610 (1947). Here, the ROFR has been reduced to writing as part of a valid contract; however, there is no breach of contract by Anna on the ROFR for the ten-acre parcel. Under the terms of the ROFR, Benicio is not entitled to a “market value” adjustment and may not substitute the court’s valuation for the “highest price” which is required by the terms of the ROFR. *Rappaport v. Estate of Banfield*, 2007 VT 25, 181 Vt. 447. Anna fulfilled her obligation by providing Benicio with notice of the acceptable offer. A right of first refusal is triggered by the appearance of a purchaser “who is ready, willing and able to buy.” *Bricker v. Walker*, 139 Vt. 361, 364 (1981).

To avoid allegations that an offer is not genuine (and thus simply used to defeat the right of first refusal), the offer must be a bona fide offer, made honestly and with the intent to bind. *Rappaport*, 2007 VT 25, ¶ 25. Benicio may be able to argue that Charles’ offer is not bona fide, given he is an “old friend” and “business partner” of Anna, but there is no other indication the offer by Charles is not an honest, arm’s length transaction. If there were evidence that Anna, in collusion with Charles, was manipulating the sales price of the 10-acre parcel to avoid Benicio’s ROFR, this would be a violation of the fundamental element of good faith and fair dealing and could be grounds for a breach of contract action.

If he cannot bring a breach of contract claim against Anna, there is also no ability to sue Charles for interference on the contract. A tortious interference with contractual relations claim is available if one party “intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract.” *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 80 (1984). Benicio does not have evidence to support that Charles has caused Anna not to perform the contract.

2. *Does Benicio have any civil remedies against Anna regarding the sale of the seven-acre parcel? Discuss and analyze.*

There is no valid contract between Anna and Benicio on the seven-acre parcel because the agreement relates to lands and was not reduced to writing. A contract involving the sale of land or interests in land must be in writing to be enforceable. 12 V.S.A. § 181(5). There is no written agreement regarding the seven-acre parcel, only an oral statement made in a phone call. Benicio’s subsequent letter, though written, will not create a binding contract between the two parties because Anna, as the offeror of the property, was not a signatory to the writing. 12

V.S.A. § 181 (requiring that “promise, contract, or agreement” or “memorandum or note thereof is in writing, signed by the party to be charged”); see *Benya v. Stevens and Thompson Paper Co., Inc.*, 143 Vt. 521, 526 (1983).

Moreover, Benicio’s letter appears to be a counter offer, accepting the basic terms of Anna’s offer – the purchase price for the parcel – but adding an additional term – a delayed payment plan – that Anna did not accept. Thus, the letter does not evince a meeting of the minds or concurrent offer and acceptance, and fails as a contract. See *Benya*, 143 Vt. at 525 (“An acceptance that modifies or includes new terms is not an acceptance of the original offer; it is a counteroffer by the offeree that must be accepted or rejected by the original offeror.”); *Evarts v. Forte*, 135 Vt. 306, 309; 376 A.2d 766, 768 (1977) (“It is, of course, a basic tenet of the law of contracts that in any agreement between a prospective vendor and purchaser the offer and acceptance must be concurrent and there must be mutual manifestations of assent or a “meeting of the minds” on all essential particulars.”).

There is an exception to the required-writing rule where a party demonstrates equitable entitlement justified by the others’ repudiation of the agreement after full or part performance by the first party. *In re Estate of Gorton*, 167 Vt. 357 (1997). A court considering an exception to the Statute of Frauds requires the plaintiff to show that: “(1) there was an oral agreement (2) upon which he reasonably relied (3) by changing his position so that he cannot return to his former position and (4) the other party knew of such reliance.” *Gorton*, 167 Vt. at 362. The main issue in most cases, “is whether appellants have alleged a substantial and irretrievable change in position in reliance on the agreement.” *Id.*

Benicio would have to demonstrate the existence of an oral agreement or a meeting of the minds regarding the purchase of the seven-acre parcel, and his contemporaneous letter supports this position. Assuming the statement in his letter– that he had purchased livestock to raise on the property – is born-out in fact, Benicio would have to demonstrate that these steps substantially and irretrievably changed his position, and that Anna knew he was taking these steps in reliance on the agreement. His letter supports Anna’s knowledge. He may be able to show that his purchase of the sheep constituted an irretrievable change in position; however, it is not likely substantial and would be not provide him with a basis for undoing Anna’s sale of the land to Darlene. Compare *Quenneville v. Buttolph*, 2003 VT 82, ¶ 6, 175 Vt. 444 (specific performance appropriate where party purchasing based on oral contract made substantial improvements to property and enrolled child in local school district). If, however, Benicio fully performs his obligations under the oral agreement, Anna would not be able to use the Statute of Frauds to perpetrate a fraud against Benicio, such as receive his payment while selling the property to Darlene. *Mason v. Anderson*, 146 Vt. 242, 244 (1985).

3. *What are Benicio’s options if he wishes to purchase either property without resorting to court action? Discuss and analyze.*

Benicio should decide if the ten-acre parcel is important enough for him to exercise his ROFR at the \$100,000 price Charles has offered. He has only 30 days from the date of notification by Anna to exercise this option.

If Anna has not yet signed a sales contract with Darlene on the seven-acre parcel, Benicio may be able to negotiate with Anna to purchase it. If Anna has already signed a purchase and sale contract on the seven-acre parcel, Benicio will not be able to exercise a ROFR because that property was not subject to the ROFR. Benicio could be at risk for interfering with the contract between Anna and Darlene under those circumstances.

## MODEL ANSWER 5

1—Alice has a claim under the United States Constitution for violation of her procedural due process rights under the Fourteenth Amendment. 42 U.S.C. § 1983 provides a cause of action to any person who suffers a deprivation of a right secured by the United States Constitution under color of state law. The leading case concerning the due process rights of public employees is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), in which the United States Supreme Court held that a tenured public employee could not be terminated without a due process hearing prior to termination. The Vermont Supreme Court has described the law governing termination of public employment:

To establish a § 1983 claim for violation of his procedural due process rights plaintiff must show that: (1) he had a constitutionally protected property right to continued employment with BED; and (2) he was deprived of this right without notice and an adequate opportunity to be heard. See *Rich v. Montpelier Supervisory Dist.*, 167 Vt. 415, 420, 709 A.2d 501, 504 (1998). A constitutionally protected property interest in continued employment arises when an employee is “entitled to a benefit created and defined by a source independent of the Constitution, such as state law.” *Huang v. Bd. of Governors*, 902 F.2d 1134, 1141 (4th Cir.1990). We have held that state employees whose tenures are governed by a collective bargaining agreement possess a property interest in continued employment, such that due process protections apply to them. See *In re Gregoire*, 166 Vt. 66, 71, 689 A.2d 431, 434 (1996) (citing *In re Towle*, 164 Vt. 145, 153, 665 A.2d 55, 61 (1995)).

Quinn v. Grimes, 2004 VT 89, ¶ 8, 177 Vt. 181, 185, 861 A.2d 1108, 1111 (2004).

Alice satisfies the first prong of this test: she has a three-year contract, which confers on her a property right to be employed unless there is just cause for her dismissal. While Rutlington may argue that her contract incorporates the 1895 provision of the Town Charter, and that provision makes Alice an employee at will with no property interest, that argument is not likely to succeed. The contract itself provides that termination may only be for just cause. The charter provision is based on an outdated vision of the law protecting public employees (i.e., the idea that such service is a privilege), and is insufficient to overcome the protections specifically granted Alice under her written, three-year contract. The right to employment for three years in the absence of just cause is sufficient to create the property interest required under Quinn v. Grimes.

Similarly, any argument that Alice’s medical condition automatically eliminated her property right under her contract would fail; termination for a medical condition was not automatic under the contract, but discretionary. *Id.* at ¶ 15, 177 Vt. at 188-89, 861 A.2d at 1113-1114.

Alice also satisfies the second prong of this test: she was denied a hearing with proper notice, an explanation of the decision, and an adequate opportunity to be heard. A face-to-face meeting can meet requirements under the federal constitution, but not under these facts.

In *In re Hurlburt*, 2003 VT 2, ¶ 29, 175 Vt. 40, 820 A.2d 186, we explained that “[n]otice under *Loudermill* requires no more than notice of the charges, an explanation of the evidence and an opportunity for the employee to present evidence.” See also *Loudermill*, 470 U.S. at 546, 105 S.Ct. 1487 (“The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.”).

Quinn v. Grimes, 2004 VT 89, ¶ 22, 177 Vt. 181, 190, 861 A.2d 1108, 1114 (2004).

There is nothing in the fact pattern to conclude that Alice had any notice prior to or during the meeting as to the grounds for her potential termination. The Town’s representatives did not answer Alice’s question seeking the grounds of her termination. Moreover, the circumstances establish that the decision had been made; thus, there was not a meaningful hearing. While the Town may argue that its attorney asked Alice to provide relevant information, and Alice chose to withhold that information, the Town is unlikely to prevail on this argument. The Town never disclosed the basis of its decision, so Alice did not have notice that her doctor’s opinion was relevant to the Town’s decision. Moreover, the decision had been made; there is no indication that further discussion would have been meaningful. *Id.* at ¶25, 177 Vt. at 191, 861 A.2d at 1115.

2—Alice also has a claim under the Vermont Constitution. Vermont does not have a statute granting private causes of action to remedy state constitutional deprivations that is analogous to section 1983. The Vermont Supreme Court evaluates claims asserting there is a private cause of action to enforce state constitutional provisions by considering whether the provision is “self-executing,” (meaning a plaintiff can sue to enforce without implementing legislation) and whether there is a judicial remedy for the claimed violation.

The Vermont Supreme Court recently examined the tests for whether a Vermont Constitutional provision is self-executing.

As we articulated in *Shields v. Gerhart*, 163 Vt. 219, 658 A.2d 924 (1995), a Vermont constitutional provision is self-executing “ ‘if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, ... and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given force of law.’ ” *Id.* at 224, 658 A.2d at 928 (quoting *Davis v. Burke*, 179 U.S. 399, 403, 21 S.Ct. 210, 45 L.Ed. 249 (1900)). We further explained that “a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means

for its enjoyment and protection.” *Id.* In *Shields*, we held that Article 1, which states that “all men are born equally free and independent, and have certain natural, inherent, and unalienable rights,” is not self-executing because it does not establish enforceable rights “but merely lists [them] to flesh out philosophical truisms.” *Id.* at 224–25, 658 A.2d at 928.

Nelson v. Town of Johnsbury Selectboard, 2015 VT 5, ¶ 46 (Vt. Jan. 16, 2015).

In Nelson, the Court held that Chapter I, Article 4 of the Vermont Constitution protects procedural due processes rights in the context of municipal employment. The Court also held that Article 4 is self-executing, allowing a private cause of action to enforce its provisions. *Id.* at ¶54. While the Court did not define the remedy that would be available, its reasoning supports at least a remedy of monetary damages. Based on Nelson, Alice has a cause of action under the Vermont Constitution.

3—The individual defendants would be likely to raise the defense of qualified immunity. The Nelson decision describes this defense:

Public officials are entitled to qualified immunity from 42 U.S.C. § 1983 liability when they are: “(1) acting during the course of their employment and acting, or reasonably believing they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial, acts.” *Baptie v. Bruno*, 2013 VT 117, ¶ 11, 195 Vt. 308, 88 A.3d 1212. As we noted in *Baptie*, we are guided by the doctrine's purpose “to protect officials from exposure to personal tort liability that could (1) hamper their ability to effectively discharge their duties and (2) subject their discretionary determinations to review by a judicial system ill-suited to assess the full scope of factors involved in such determinations.” *Id.* ¶ 12.

¶ 64. Plaintiff does not dispute the first and third prongs of the test, but argues that the selectboard members were not acting in good faith. Good faith “exists where an official's acts did not violate clearly established rights of which the official reasonably should have known.” *Id.* ¶ 11 (quotation omitted). We have adopted an objective standard of good faith. *Id.*

¶ 65. A right is clearly established when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Clearly established rights are not limited to federal laws but may also be found in state statutes. *Sabia v. Neville*, 165 Vt. 515, 522, 687 A.2d 469, 474 (1996). “There is no need for a case on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Coollick v. Hughes*, 699

F.3d 211, 220 (2d Cir.2012) (quotation omitted). Thus, a mistake can be one of law or a mixed question of fact and law, *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), and the doctrine “gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, — U.S. —, —, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011). It “protects all but the plainly incompetent or those who knowingly violate the law.” *Id.* (quotation omitted).

Nelson v. Town of Johnsbury Selectboard, 2015 VT 5, ¶¶ 63-65 (Vt. Jan. 16, 2015).

In this case, qualified immunity would turn on whether Alice seeks to enforce “clearly established rights.” It is likely that Alice will prevail against this defense under federal law, as Loudermill and its progeny provide a strong basis for claiming that Alice’s due process rights were well-established. The answer is less clear under the Vermont Constitution. It is likely that the individual defendants’ qualified immunity defense would prevail under the Vermont Constitution, as Nelson was not decided until after the termination of Alice.

# Model Answer

## ANSWER 6

Question 1 Discuss what parties could bring a wrongful death action against Giant Car Co.

In Vermont there is no common law action for wrongful death. Wrongful death claims are governed by the Wrongful Death Act, 14 V.S.A. §§ 1491-1492 (hereinafter “WDA”). Because the WDA was designed to allay the harsh common law rule denying liability due to the death of the victim, it is remedial in nature and must be liberally construed. Thayer v Herdt, 155 Vt. 448 453-54 (1990).

The Administrator of the Estate of Aldo Aceto would prosecute the WDA claim. Pursuant to the WDA there are really two causes of action. One in favor of the decedent for his loss and suffering resulting from the injury during his remaining lifetime. The other cause of action is founded upon the death of the decedent for the pecuniary losses suffered by the widow and next of kin. 21 VSA § 1492

Question 2 Discuss what damages each of those parties could claim in such a wrongful death suit.

The WDA allows compensation for certain damages suffered by the next of kin of a person whose death resulted from the wrongful act of another. While the WDA references those damages as “pecuniary injuries” such terms do not limit the recovery available under the WDA to purely economic losses. Mobbs v Central Vermont Ry., 150 VT. 311, 316 (1988).

The WDA allows the Administrator of the estate of the decedent to collect damages only for those injuries sustained by a decedent prior to their death. Whitechurch v Perry, 137 Vt. 464, 469 (1979). Here as Aldo died instantly in the crash there are no damages payable to the Estate of decedent. Nominal damages are not available under the WDA and pecuniary losses are not presumed. Mobbs v Central Vermont Railroad, 150 Vt. 311 (1988); Woodstock’s Administrator v. Hallock, 98 Vt. 384 (1925).

Bernice would be able to collect damages for the loss of financial support from Aldo including not only his lost income, but also the loss of household services provided by Aldo. 14 V.S.A. § 1492. The threatened divorce may impact the amount of such damages, but would not foreclose such a claim for economic damages. Bernice would also be able to collect non-economic damages for loss of consortium, including sexual relations, love and companionship. Hay v Medical Center Hospital of Vermont, 145 Vt. 533,537 (1985). Again, the pending divorce and the nature of the relationship between Bernice and Aldo may impact the value of these non-economic damages, but would not foreclose them altogether.

As Cora is not financially dependent upon Aldo for support, she would not be able to recover for the loss of any economic damages. Even though Cora is an adult, she should be able to collect damages for loss of companionship for the destruction of the parent child relationship. Mears v Clovin, 171 Vt. 655 (2000)(mem). Again, the nature of that relationship may limit the amount of such non-economic damages.

As a minor child financially dependent upon Aldo, Dora would be able to collect both economic and non-economic damages. Hoadley v. International Paper Co., 72 Vt. 79 (1899).

3. Discuss whether Luca may be impeached at trial with his convictions, including the factors the trial judge is likely to consider.

Rule 609 of the Vermont Rules of Evidence governs impeachment by evidence of conviction of a crime. Rule 609(a) allows admission of evidence that a witness has been convicted of a crime for the purpose of attacking the witness's credibility, but only if the crime either:

1) "[i]nvolved untruthfulness or falsification[,] regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice[;]" or

2) was "a felony conviction under the law of Vermont or was punishable by death or imprisonment in excess of one year under the law of another jurisdiction," and the court "determines that the probative value of this evidence substantially outweighs its prejudicial effect."

In any event, evidence of a conviction is not admissible if a period of more than 15 years has elapsed since the date of the conviction." V.R.E. 609(b). Additionally, the provision for crimes involving untruthfulness or falsification applies "only to those crimes whose statutory elements necessarily involve untruthfulness or falsification." V.R.E. 609(a)(1).

The family cannot impeach Luca with his 1999 conviction for obstruction of justice. Although it is a felony conviction, it is outside the 15-year time limit in Rule 609(b). Further, obstruction of justice in Vermont does not necessarily require untruthfulness or falsification, as it may be accomplished by threats of force or threatening communications. The obstruction of justice conviction may not be used to impeach Luca.

The family may not use the petit larceny conviction either. While inside the time limit, petit larceny is not a crime that has untruthfulness or falsification as an element. V.R.E. 609(a)(1). Petit larceny merely requires stealing property from another where the value not more than \$900. 13 V.S.A. §§ 2501, 2502. It is also not a felony. 13 V.S.A. § 2502, V.R.E. 609(a)(2). This conviction may not be used to impeach Luca.

The family likely cannot impeach Luca with his conviction for grossly-negligent operation, injury resulting. It is a felony conviction, V.R.E. 609(a)(2), and it is within the 15-year time limit, V.R.E. 609(b), so the first two foundational facts are established. The trial judge will next examine whether the conviction's probative value substantially outweighs its prejudicial effect. This is the reverse of the balancing test for convictions involving untruthfulness or falsification. The focus is on the logical relevance of the conviction to be used for impeachment, and factors a court will likely examine are the nature of the crime sought to be used for impeachment, the nature of the proceeding, the age of the conviction, the relative importance of the witness's testimony, and the need for prior convictions to impeach. See generally State v. Setien, 173 Vt. 576, 577-78, 795 a.2d 1135, 1138 (2002) and State v. Brewer, 2010 VT 110, ¶ 7, 189 Vt. 550, 12 A.3d 554.

Here, the conviction for grossly-negligent operation has little logical relevance to the wrongful death proceedings. A person is guilty of grossly-negligent operation when the person grossly deviates from the standard of care a reasonable person would have exercised in a particular situation. 23 V.S.A. § 1091(b); State v. Valyou, 2006 VT 105, ¶ 3, 180 Vt. 627, 910 A.2d 922.

Like a crime of violence, a crime involving deviation from standards of care has little relevance to the credibility of a witness, unlike crimes involving untruthfulness or falsification. State v. Gardiner, 139 Vt. 456, 433 A.2d 249 (1981). Because the conviction has low probative value as to Luca's credibility, and its probative value will not substantially outweigh its prejudicial effect. The family will not be able to use this conviction to impeach Luca

4. Giant Car Co. intends to introduce evidence of Bernice's drinking and her affair with Eloise. Discuss whether a motion in limine to exclude this evidence would be successful and the factors a trial judge is likely to consider.

A motion in limine to exclude evidence of Bernice's drinking and her affair with Eloise will be unsuccessful. The trial court has discretion to admit this evidence, and it will look first to whether the evidence is relevant under V.R.E. 401, as relevant evidence is admissible under V.R.E. 402. The court will then examine whether, even if the evidence is relevant, it should be excluded under Rule 403 on grounds such as unfair prejudice, confusion of issues, waste of time, or the needless presentation of cumulative evidence.

The evidence will be unquestionably relevant if Bernice seeks damages in the wrongful death action for non-economic losses. Relevance is defined broadly as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Wrongful Death Act permits recovery for the loss of companionship of a spouse, and the factfinder may consider the physical, emotional, and psychological relationship of the parties, as well as the harmony of the family relationship. Mears v. Colvin, 171 Vt. 655, 657-78, 768 A.2d 1264, 1267 (2000). Thus, disharmony in the marital relationship, as evidenced by Bernice's extramarital affair, would be relevant to rebut claims that Aldo's death deprived Bernice of a faithful, loving companion. Id. Bernice's drinking similarly tends to show that it is less probable that her marriage to Aldo was a happy one.

That does not end the inquiry, however. The test for relevance is broad, and Rule 403 provides a "necessary counterweight" by permitting exclusion of otherwise-relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," among other considerations. V.R.E. 403, Reporter's Notes to V.R.E. 403. Even if the existence of the affair is admissible, not all aspects of Bernice and Aldo's family life are admissible. The court may prevent admission of details of Bernice's affair if the court concludes that the details are inflammatory, would merely appeal to the jury's sympathies, provoke an instinct to punish, or otherwise cause the jury to base its decision on something other than the propositions in the case. Mears, 171 Vt. at 658, 768 A.2d at 1268 (quotations and citations omitted). Thus, the court may exclude facts, such as the Aldo's discovery of his wife in bed with the neighbor, that Bernice had a same-sex affair, and Bernice's belittlement of Aldo, if the court concludes those facts are deemed too inflammatory.