BORDEN, J., concurring. I agree with and join the majority opinion. I write separately, however, to highlight several considerations that, in my view, are important to the resolution of this appeal.

First, the issue of this appeal is somewhat broader than the majority frames it. It is not limited to whether the involuntary conservators of the person and the estate of a ward can respond to an action for legal separation filed by their ward's spouse by seeking a dissolution of the marriage; it is, instead, whether such conservators[1] can seek a dissolution[2] of the marriage of the ward, whether by initiating or responding to such an action. That is because the interests of the ward that may require protection are the same irrespective of the procedural posture of the case. Furthermore, this appeal involves only the narrow question of whether, as a matter of law, such conservators have the legal power, in an appropriate case, to bring an action for dissolution of their ward's marriage. It does not involve the separate question of whether, in any given case, they may have violated their fiduciary duty to their ward by doing so.

Second, it goes without saying that the decision to end a marriage is necessarily very personal and, therefore, to be made with great caution even by the person in the marriage, let alone by one acting legally in that person's stead. Thus, for purposes of this analysis, I focus principally on the function of the conservator of the ward's person, as opposed to his estate. As the majority so aptly demonstrates, the conservator of the person has those duties and responsibilities expressly afforded her by the Probate Court, which by statute include the general custody of the ward, the authority to decide where the ward will live, the authority to give consent to medical and other professional care, and the duty to provide for the ward's care, comfort and maintenance. See General Statutes § 45a-656 (a).

Implicit in these explicit duties and responsibilities is the duty to maintain the personal dignity of the ward. And, of course, as the majority demonstrates, the conservator is a fiduciary for the ward and, therefore, must always act in the ward's best interest. Therefore, when the conservator decides, acting in that fiduciary capacity, that her ward's best interest and personal dignity require that his marriage be dissolved, she must have the power to take appropriate legal action to accomplish that end. This implicit power is different only in degree, not in kind, from the general explicit powers over the custody, health care, care, comfort, maintenance and health of the ward that the statutes provide and, therefore, must be considered as implicit in those explicit powers. As the New Mexico Court of Appeals

acknowledged: "[Marital dissolution] is only one of the many personal decisions that can and must be made on behalf of adult incompetent wards by their [conservators]. . . . [Conservators] are empowered to make decisions resulting in the giving or withholding of life-saving medical treatment, the ward's place of domicile, and the ward's rights of association and consortium with other persons." (Citation omitted.) *Nelson* v. *Nelson*, 118 N.M. 17, 20–21, 878 P.2d 335 (App. 1994).

Third, supporting this interpretation of the statutory powers of a conservator of the person is the notion of basic, fundamental fairness, expressed by our constitutional provision regarding equal access to our courts, as the majority points out. If we were to read our conservatorship statutes in the cramped fashion urged by the plaintiff, Gloria Luster, in the present case and hold that a conservator has no power to bring an action to end the marriage of her ward, we would be lodging solely in the competent spouse the power to do so. Indeed, this record demonstrates that, when the plaintiff moved to dismiss the cross complaint filed by the defendants, Donald R. Luster, Jeannine Childree, conservator of the person of Donald R. Luster, and Jennifer Dearborn, conservator of the estate of Donald R. Luster, she represented that she intended to withdraw her action for a legal separation. As it turns out, however, we were informed at oral argument in this court that she never did so, and the plaintiff's action for legal separation has continued apace in the trial court, unadorned, however, by the defendants' cross complaint. Nonetheless, the plaintiff retains the power to withdraw her action at any time, without court approval, before judgment has been rendered; see General Statutes § 52-80; leaving the conservators remediless on their ward's behalf.

This hardly would comport with any reasonable conception of equal access to our courts. As our Supreme Court has stated: "The law does not deprive a person adjudicated incompetent of access to the courts in order to seek redress; rather, provision is made to ensure that such interests are well represented." *Cottrell* v. *Connecticut Bank & Trust Co.*, 175 Conn. 257, 261, 398 A.2d 307 (1978); see also *In re Marriage of Gannon*, 104 Wn. 2d 121, 124, 702 P.2d 465 (1985) (en banc) ("[I]n these days of termination of life support, tax consequences of virtually all economic decisions, no-fault dissolutions and the other vagaries of a vastly changing society, we think an absolute rule denying authority [of a conservator to bring a dissolution action] is not justified nor in the public interest. . . . Unless this course of action is available, the competent party is vested with absolute, final control over the marriage. This is not equitable." [Citation omitted.])

Finally, considerations of sound policy counsel strongly for interpreting a conservator's statutory pow-

ers so as to include the power to bring an action for marital dissolution. The Arizona Court of Appeals has stated that denying a conservator the power to bring a dissolution action "threatens to leave an incompetent spouse without adequate legal recourse against potential physical, emotional or financial abuse by the competent spouse. We believe that to hold an incompetent spouse a prisoner to physical or emotional abuse at the hands of a competent spouse by means of the bands of matrimony is untenable. Thus, the [conservator] may proceed after concluding that this is what the ward would want, basing that conclusion on what is known of the ward's preferences and the ward's general values regarding marriage and [dissolution] and overall manner of living." *Ruvalcaba* v. *Ruvalcaba*, 174 Ariz. 436, 443–44, 850 P.2d 674 (App. 1993).

It is true, as the defendants' arguments suggest, that there is the potential for a conservator to abuse her trust and bring a dissolution action for her own, rather than her ward's, interest, particularly where, as in the present case, the conservators are family members. One can conceive, of course, of two ends of a spectrum: one end, where a conservator does so; and the other end, where the competent spouse is engaging in a course of public conduct that is humiliating to the incompetent spouse, who, because of the degree of his incompetency, may not even be aware of that course of conduct—but his personal dignity nonetheless would demand some redress. This hypothetical spectrum argues strongly for interpreting our statutes to include the power to bring a dissolution action.

In the first case—where the conservator arguably is acting in her own best interest, rather than her ward's—there would be legal remedies available to the competent spouse, both in the Probate Court that appointed the conservator and in the Superior Court where the unjustified dissolution action would be pending. In the second case, however—where the conservator has brought a dissolution action justifiably to vindicate her ward's personal dignity—unless she had the power to do so that personal harm would go unvindicated.

I therefore agree that the judgment of the trial court dismissing the defendants' cross complaint should be reversed, and the case be remanded for further proceedings according to law.

[1] In the present case, both the conservator of the person and of the estate of the ward, Donald R. Luster, are named as defendants, and both brought the cross complaint that is at issue. That is appropriate because an action seeking to end a marriage, whether by judgment of dissolution or legal separation, ordinarily involves, as this case does, both personal and property considerations. I can conceive, however, of a case in which neither the ward nor the spouse has any income or property interests to be determined by the court, in which case only the conservator of the person would likely be the appropriate party on the ward's behalf.

Furthermore, it is important to note that this case involves involuntary conservators appointed for their ward, who suffers from senile dementia. It is conceivable that, in the case of a voluntary conservatorship, the ward might have the personal capacity to make the decision of whether to seek

to end his or her marriage. See R. Folsom & G. Wilhelm, Connecticut Estates Practice: Incapacity and Adoption (2d Ed. 1991) § 2:5 (appointment of voluntary conservator does not involve finding of ward's incapacity); General Statutes § 45a-650 (appointment of involuntary conservator requires finding that ward incapable of managing affairs or caring for himself).

[2] I include in this analysis the power to bring an action for legal separation, as opposed to an action for dissolution. I use the term "dissolution," rather than "dissolution or legal separation," only for the purposes of simplicity because the only difference between the two is that, upon a judgment of legal separation the parties are not free to remarry; see General Statutes § 46b-67 (b); until, of course, one of them petitions the court to convert the legal separation into a dissolution. See General Statutes § 46b-65 (b).