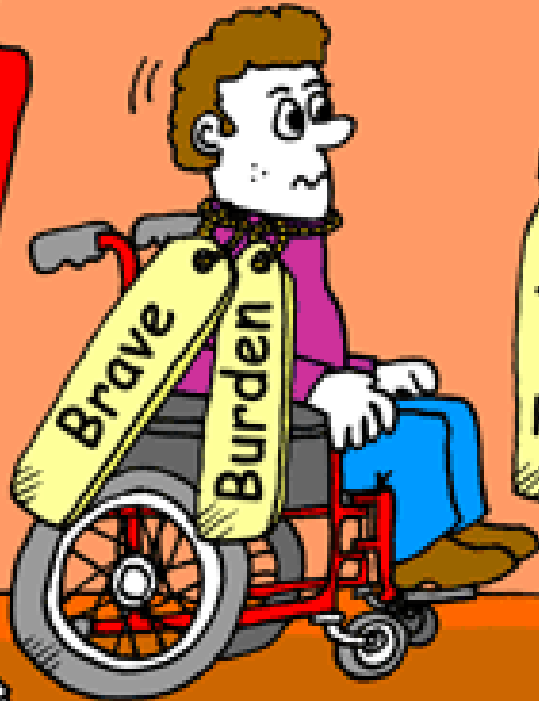
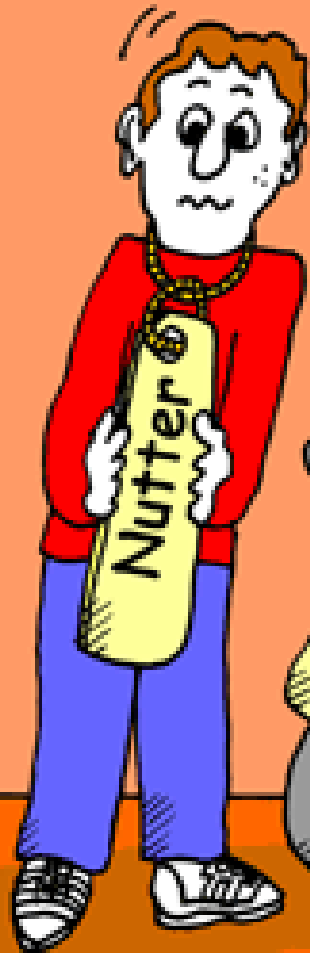


Come along now,
one more label and
you're ready to
face the world!

Department of
Dependency
and Care



Crippen



Legal capacity

Oliver Lewis

MDAC

1. Objectives to:
 - a. Create progressing jurisprudence
 - b. Initiate law reform
 - c. Empower people with disabilities
2. Fight physical and legal segregation
3. Central and eastern Europe, now also 3 African countries and India



1. What is legal capacity?
2. What's wrong with guardianship
3. What does the CRPD demand?
4. A proposal for law reform











Stanev v. Bulgaria (2012)



Legal capacity approaches

1. Status approach
2. Outcome approach
3. Functional approach

Status-based approach

Diagnosis = guardianship

“Oliver has schizophrenia therefore he needs to be put under guardianship”

Signed: A N Psychiatrist

Outcome approach

The result of your decision determines whether you have capacity.

“I’m the doctor and I think you need to take this medication for your illness. Do you agree with me?”

“Yes!”: Result is I have capacity (and I take the medication *voluntarily*)

“No!”: Result is I lack capacity (and the medication is forcibly injected)

Functional approach

The quality of your decision-making determines whether you have capacity

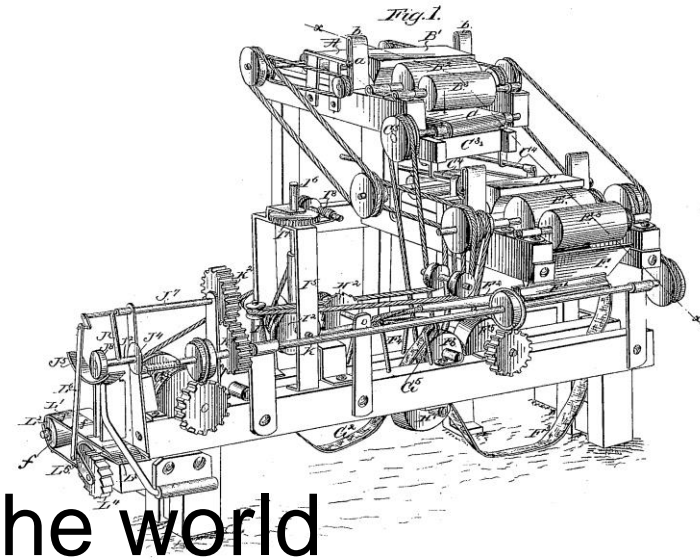
- Understanding relevant information
- Appreciating consequences of a decision
- Acting voluntarily, autonomously
- Communicating decisions

(Classic medical law test)

Functional approach

Can you prove that you are capable of:

- rationally apprehending the world
- rationally processing information
- knowing all consequences for self and others
- rationally forming own preferences
- clearly able to express preferences
- hold an identity that is stable through time



Right to work



DENIED

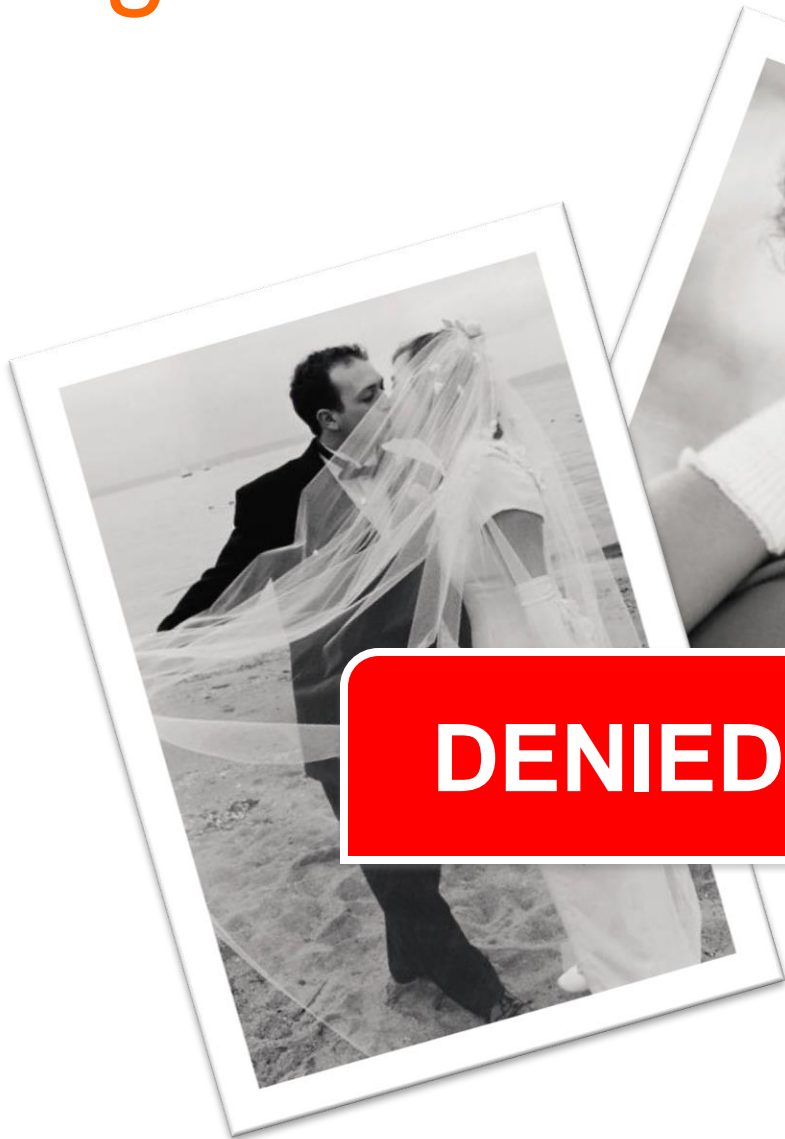


Right to consent to or refuse physical/mental health treatment

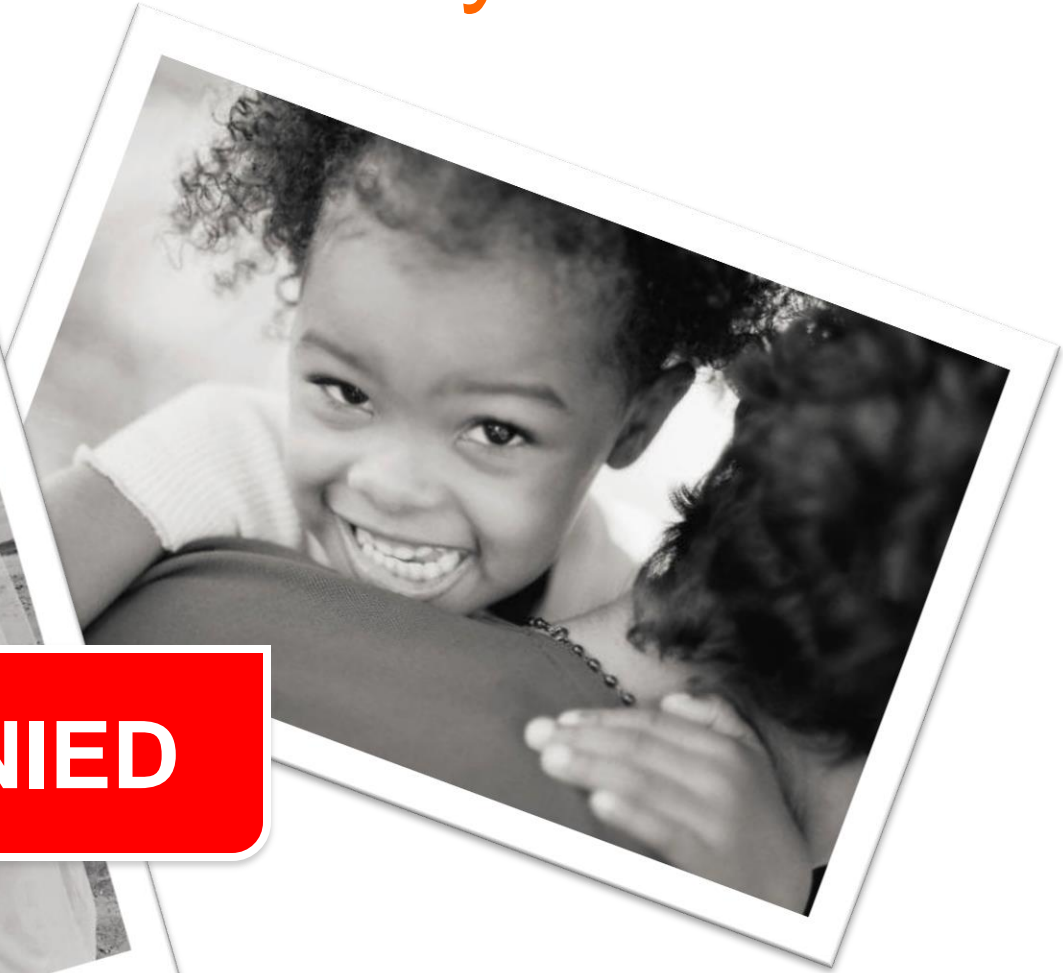


DENIED

Right to have a family



DENIED



Right to use *your* money and property



DENIED

Right to live in the community

DENIED



Right to vote, associate, assemble



DENIED

Proportionality?





Lobsterpot of the law



Many guardianship regimes

- Worst of medicine and law
- No probing of evidence
- No attention to or participation of the person
- All decision-making removed
- Fundamental rights restricted

CRPD



- What are the relevant provisions?

Two normative premises



1

We have the **right to make our own decisions** (autonomous decision-making)

– Article 12(2) CRPD

2

There is an **obligation to provide supports** to where needed to exercise legal capacity.

- Article 12(3) CRPD

And of course...

Safeguards - Article 12(4)

Protection against **exploitation,
violence and abuse** - Article 16
CRPD

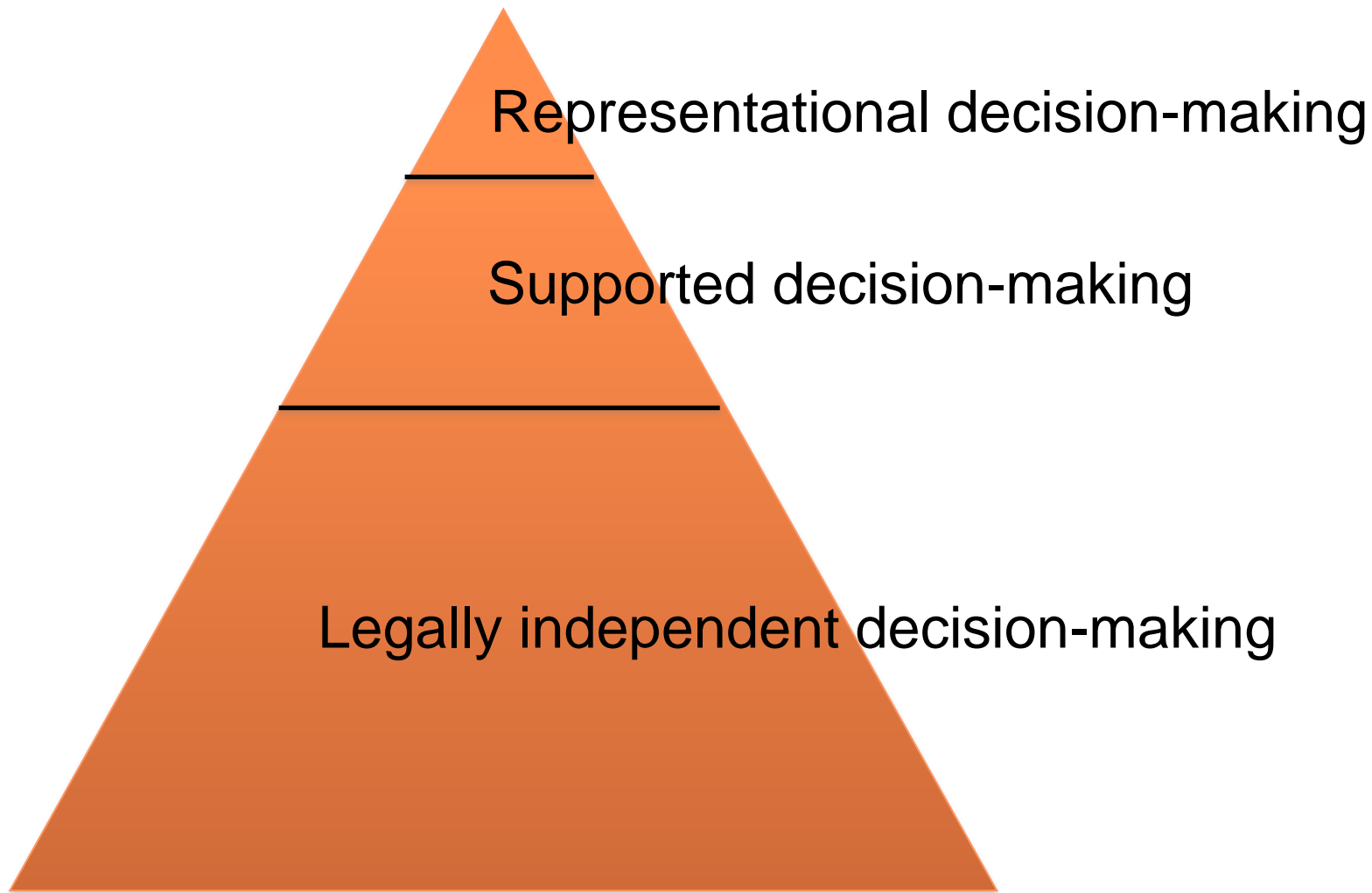
CRPD Committee

“replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences.” (CRPD Committee, re Spain, 2011)

CRPD Committee

“It further recommends that training be provided on this issue for all relevant public officials and other stakeholders.” (CRPD Committee, re Spain, 2011)

A paradigm of support



As well as this

- Advance directives
- Enduring powers-of-attorney
- Adult protection systems

Your to-do list (in a time of austerity)

How can your government:

- 1.Undertake law reform to maximize autonomy?
- 2.Limit protection to exploitation, violence and abuse?
- 3.Ensure access to supports?
- 4.Create an inclusive process of law/policy reform?
- 5.Coordinate policy across government (Art. 33(1))?

What is supported decision-making?

- “[s]upported decision-making can take many forms. Those assisting a person may **communicate** the individual’s intentions to others or help him/her understand the choices at hand. They may **help others to realize** that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.”
- UN Handbook

Principles

- Respect for **autonomy**, irrespective of disability
- **Presumption of capacity** and identity
- Entitlement to decision-making **supports** necessary to exercise capacity and reveal identity:
 - Promote full participation, and
 - Lessen the need for legal intervention
- Identity is revealed, and decisions are made **interdependently** with family, friends, and trusted others chosen by the individual
- These will be **recognised** and legally validated.

My hopes and
dreams

Who am I?

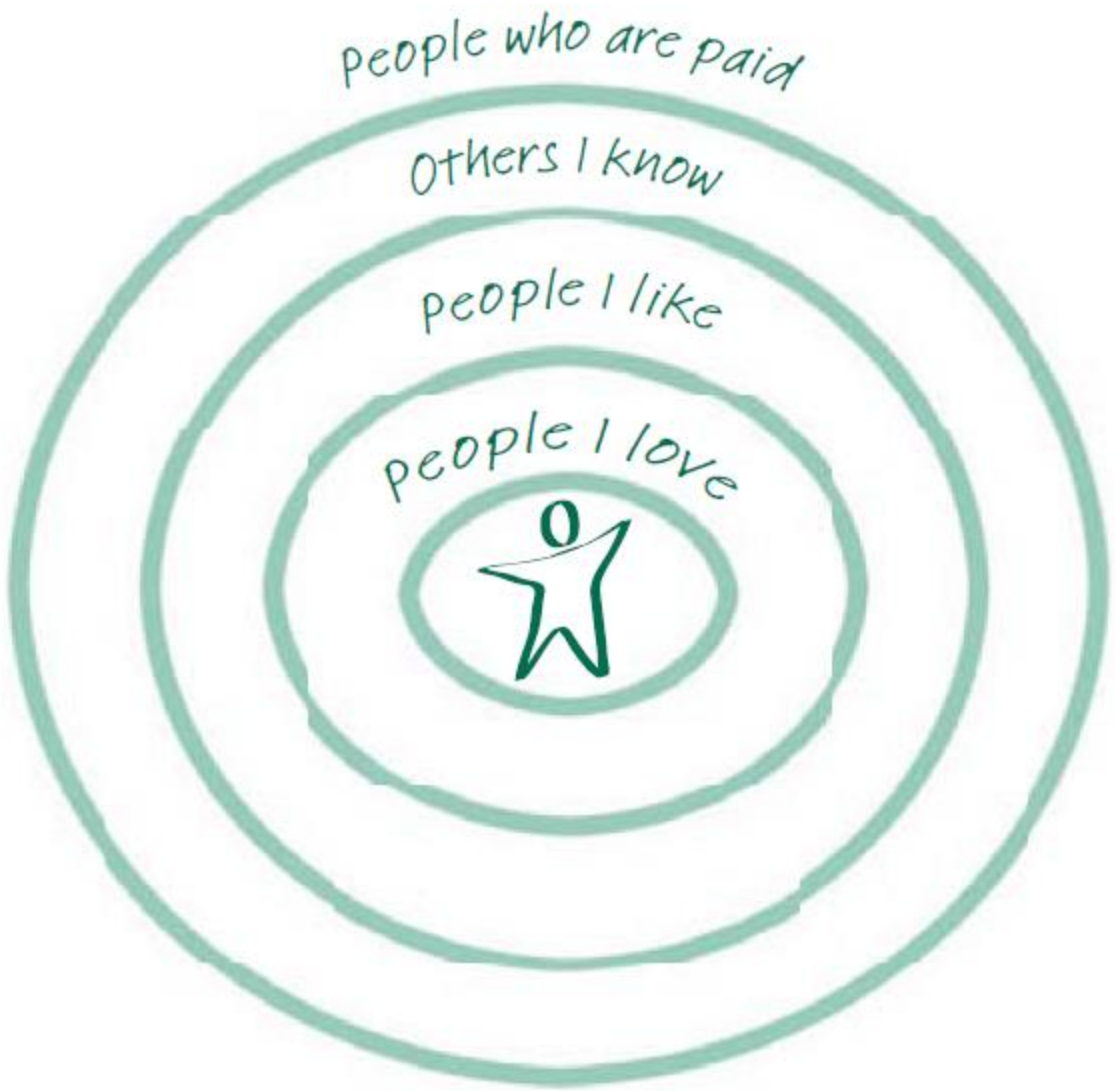
Places that
matter to me

What's
important to me?

Important
people

My story





Relationships of trust



***“I’m not an object,
I’m a person.
I need my
freedom.”***

Rusi Stanev, before
the European Court
of Human Rights,
February 2011

Thank you!

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