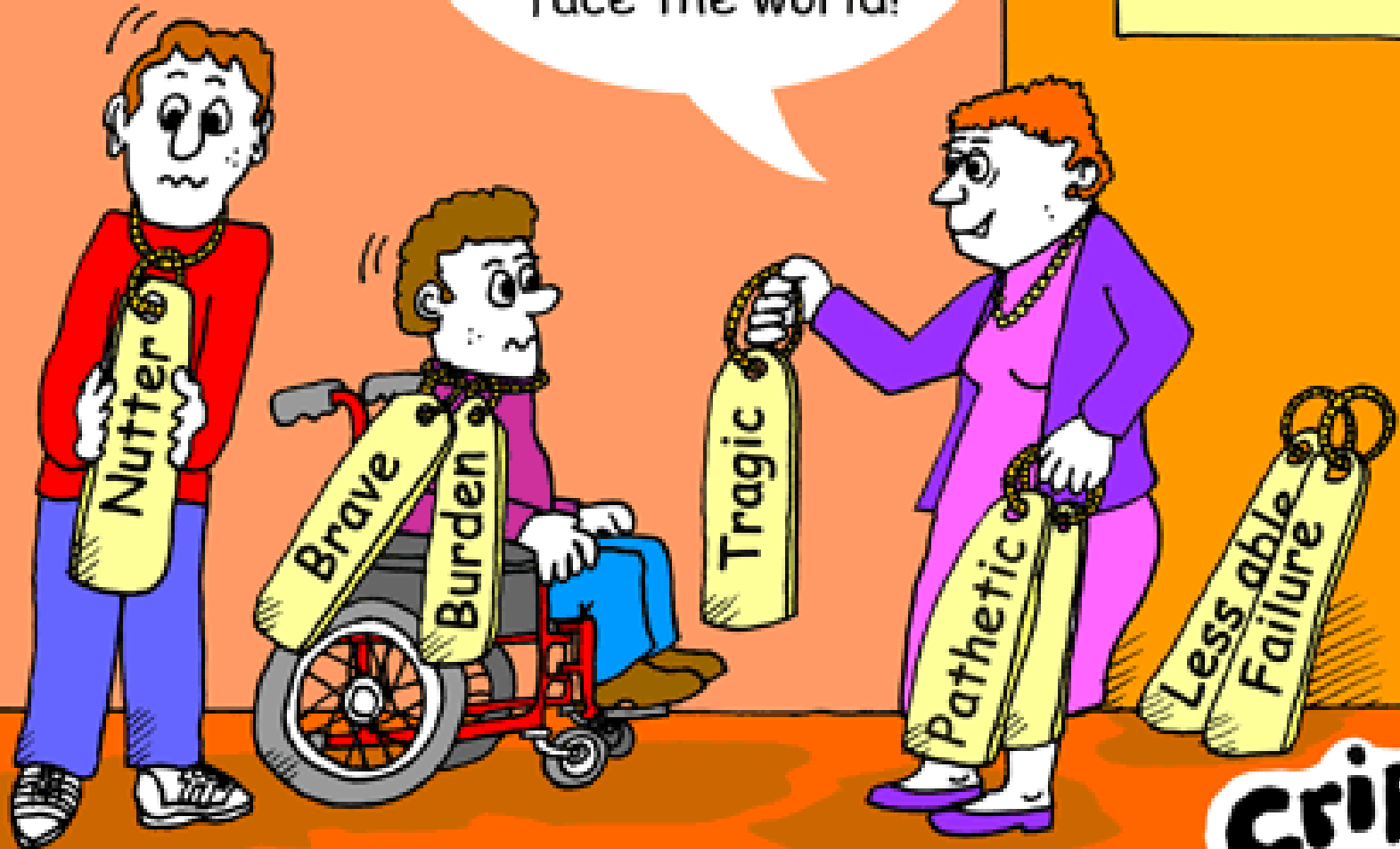


Come along now,
one more label and
you're ready to
face the world!

Department of
Dependency
and Care



Crippen



Right to legal capacity

Oliver Lewis

Today...

1. What does legal capacity mean for people?
2. Theoretical approaches
3. What does CRPD say?
4. What are alternatives?
5. What can judges do?



Judges! How can you...

1. Maximize autonomy?
2. Prevent and remedy exploitation, violence and abuse?
3. Ensure that supports are in place so as to prevent a deprivation of legal capacity?
4. Create jurisprudence to abolish blanket forms of control?
5. Weave the CRPD in your judgments?
6. Play an active part in moving your country towards law reform?













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

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

- *Stanev v. Bulgaria* (January 2012)
- *DD v. Lithuania* (February 2012)
- *Kedzior v. Poland* (April 2012)

“85. The Court has already held, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6 § 1 of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity (see *Stanev*, cited above, § 245).”

Legal capacity approaches

1. Status approach
2. Outcome approach
3. Functional approach
4. CRPD post-functional approach?

Status-based approach

Diagnosis = guardianship

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

Signed: **Aysh Rinqe MD**
Chief 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!” → I am deemed to have capacity and I take the medication *voluntarily* **or**

“No!” → I am deemed to lack capacity and the medication is forcibly injected

Functional approach

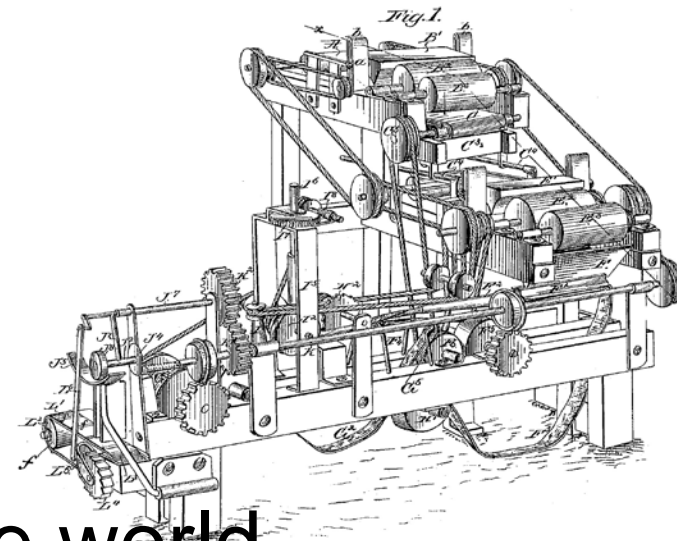
The quality of your decision-making determines whether you have capacity

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

(Classic medical law test)

Can you prove that you are capable of:

- rationally apprehending the world
- processing information
- predicting consequences for yourself and others
- forming your own preferences alone
- clearly expressing preferences, and
- holding an identity that is stable through time?



Contemporary guardianship regimes

Right to work



DENIED



Right to consent to or refuse physical/mental health treatment

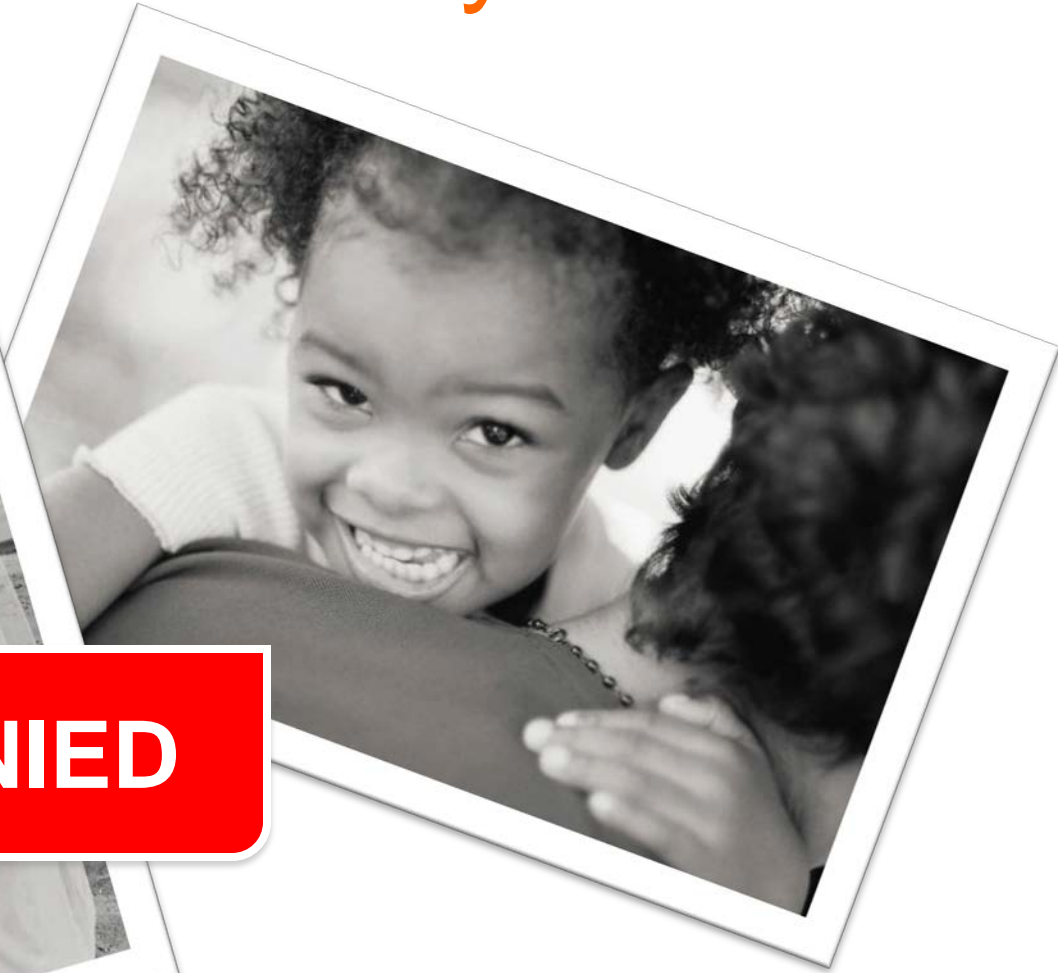


DENIED

Right to have a family



DENIED

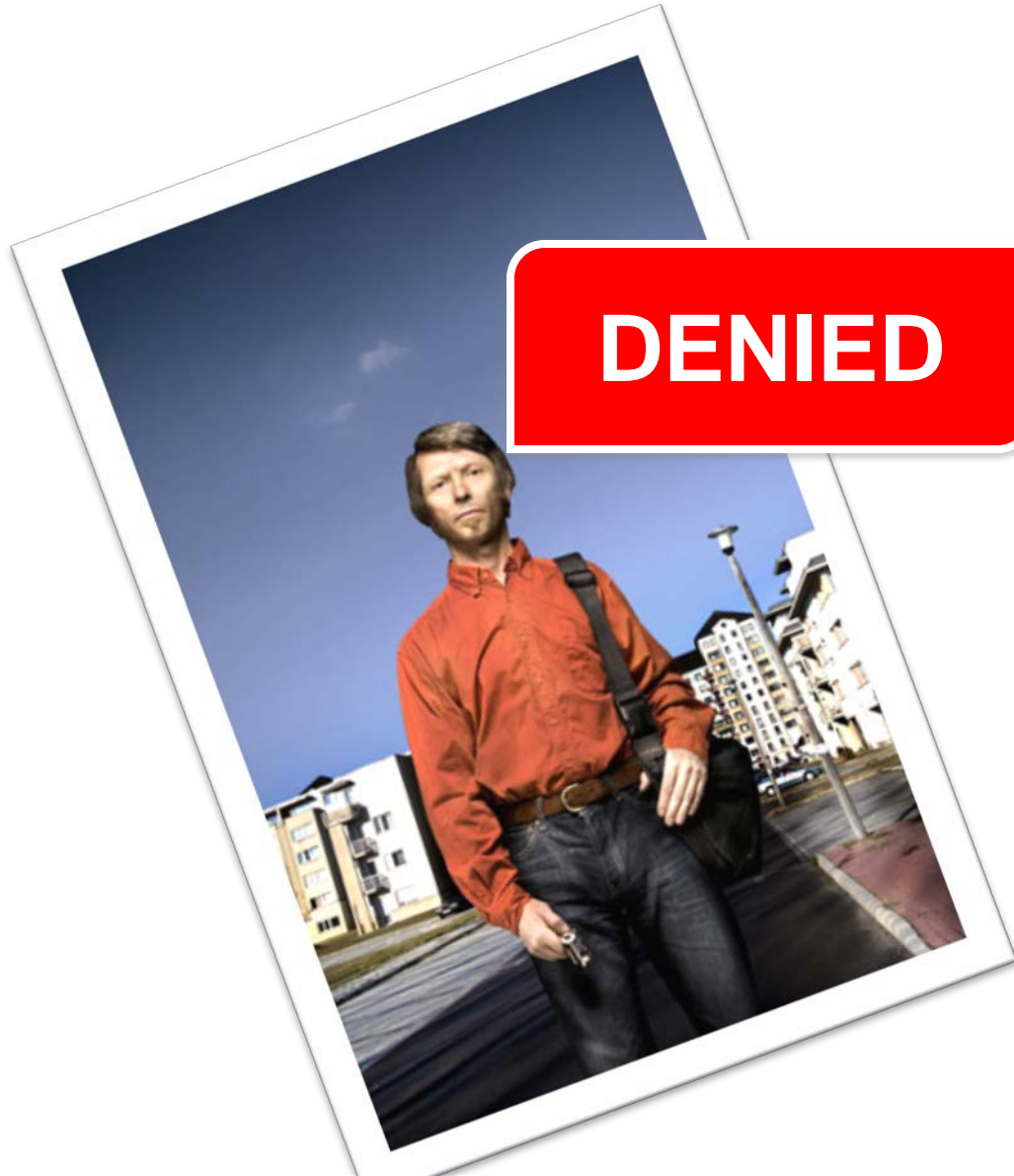


Right to use money and property



DENIED

Right to live in the community



Right to vote



DENIED

Micro level



Mezzo level



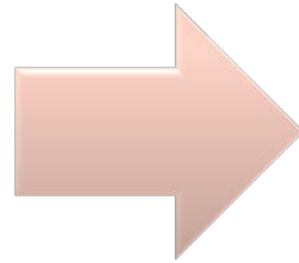
Macro level



Guardianship regimes

- Bluntest edges of medicine and law
- No probing of evidence
- No attention to or participation of the person
- All decision-making removed
- Human rights suspended
- Renders adult incapacitated and invalidated in law, politics, economics and society

object



subject

UN Convention on the Rights of Persons with Disabilities



What are the relevant provisions?

Three normative premises

1

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

– Article 12(2) CRPD

2

States have an **obligation to provide supports** (where needed) to help someone exercise legal capacity.

- Article 12(3) CRPD

And of course...

3

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

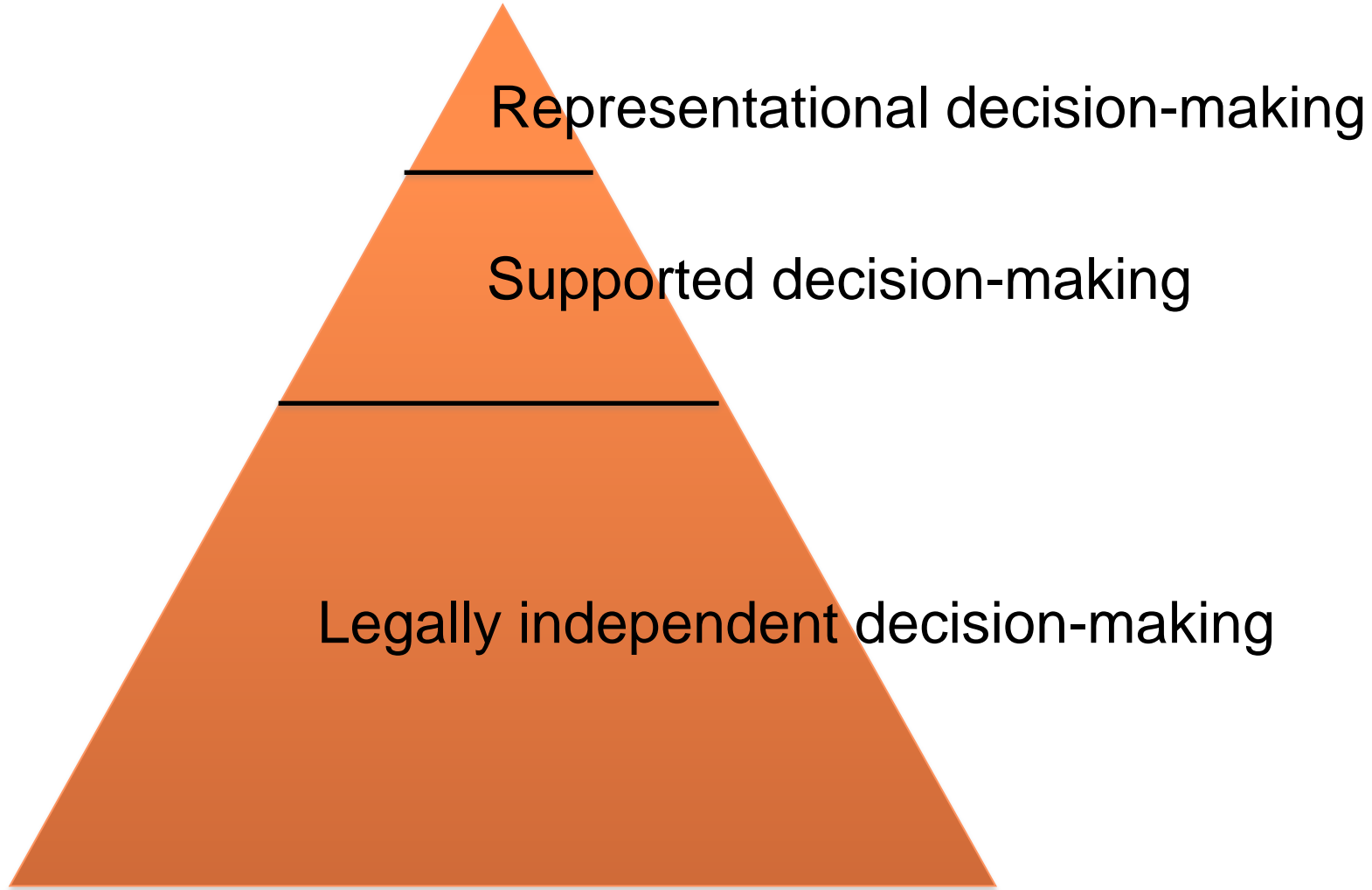
“It further recommends that training be provided on this issue for all relevant public officials and other stakeholders.”

CRPD Committee, re Spain, 2011

Norway's reservation, June 2013

... recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway also recognizes its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

A paradigm
of support



As well as

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

What supported decision-making is not!

- A model
- Something which works in the same way for different people and in different cultures
- Professionally-imposed

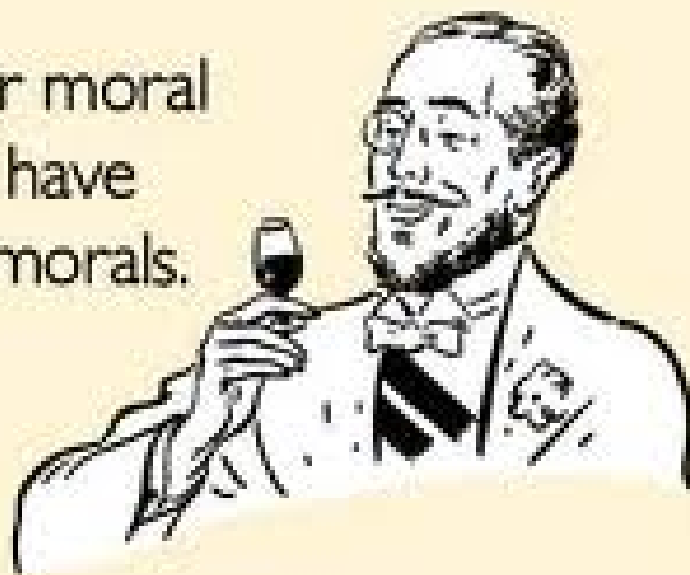
What is supported decision-making?

“Supported 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 for Parliamentarians on the CRPD

I'd like to offer moral support but I have questionable morals.



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?

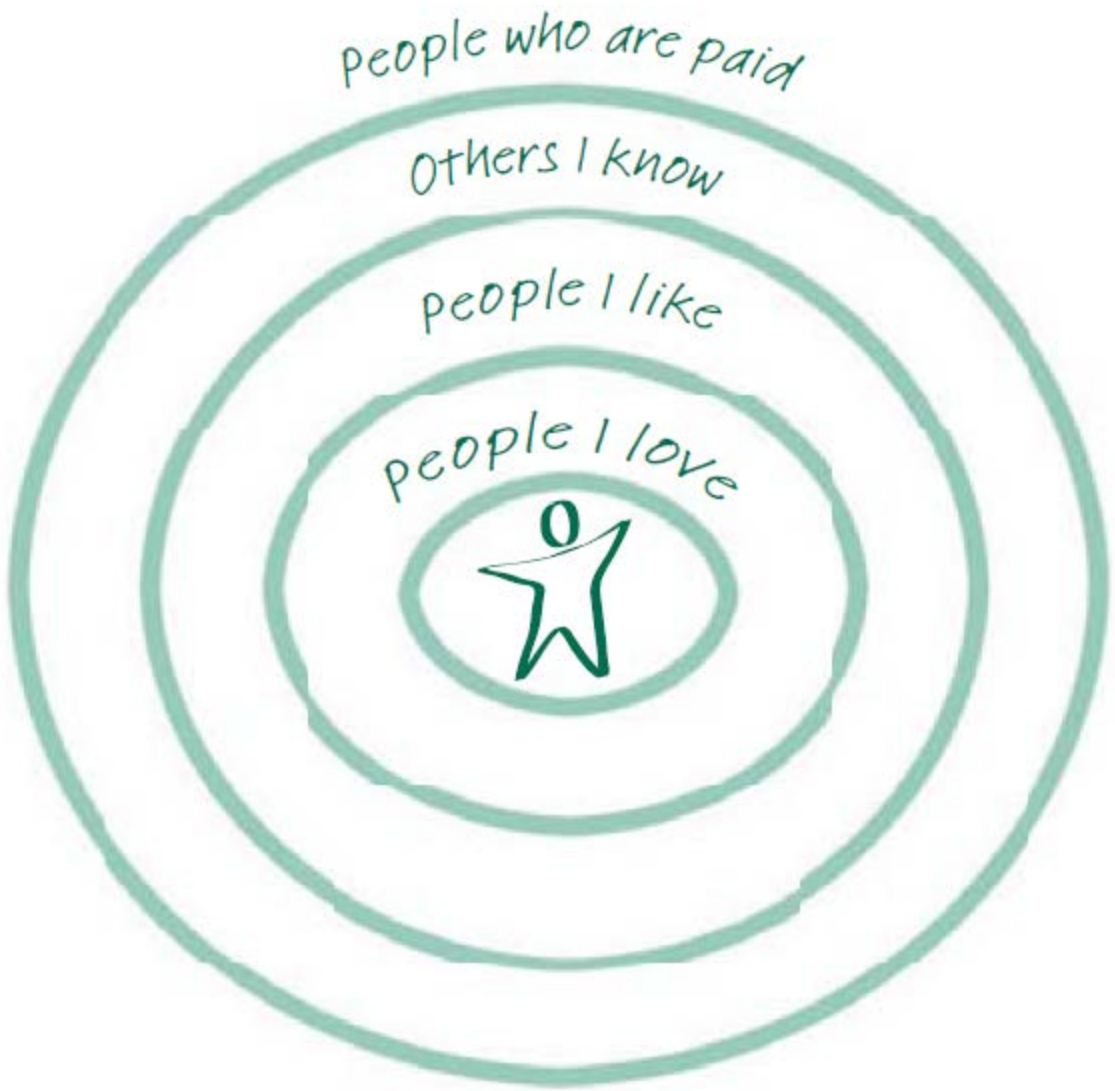
Places that
matter to me

What's
important to me?

Important
people

My story





Relationships of trust

Judges! How can you...

1. Maximize autonomy?
2. Prevent and remedy exploitation, violence and abuse?
3. Ensure that supports are in place so as to prevent a deprivation of legal capacity?
4. Create jurisprudence to abolish blanket forms of control?
5. Weave the CRPD in your judgments?
6. Play an active part in moving your country towards law reform?

“Eventually the folly of this will dawn on people and we shall all joyously realize that we are all abnormal, disabled, impaired, deformed and functionally limited, because, truth be told, that is what it means to be a human being.”

JE Bickenbach, ‘Minority Rights or Universal Participation: The Politics of Disablement’



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