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## **Situation of the Incapacitated in Granting Consent to Medical Treatment. Selected Issues**

**Abstract:** A basic right of each patient is the right to grant consent to medical treatment. A doctor cannot act without the knowledge and will of a patient. Contrary behaviour is treated as illegal. A possibility of using the right of self-determination becomes complicated in the situation of incapacitated patients. The article presents the situation of the incapacitated in the process of granting consent to medical treatment. Particular attention has been paid to the situation of a partially incapacitated patient. The presented reflections lead us to conclude that under Polish legislation, the incapacitated patient is not completely deprived of the possibility of expressing his will. It is also important that the right of self-determination of an incapacitated patient should be respected by the physician throughout the entire treatment. The whole discussion aims at presenting the scope of autonomy of incapacitated patients in the context of substitute and double consent.

**Keywords:** autonomy, patient's consent, incapacitation

### **1. Introduction**

Each patient enjoys a basic right to co-decide about his or her entire treatment. This right is manifested in a possibility of expressing consent to medical surgery by a patient. Thus, a doctor may not undertake any action if the patient has not expressed his or her will<sup>1</sup>. Conditioning the performance of medical surgery on the relevant consent obtained from the patient guarantees respect for his or her autonomy.

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<sup>1</sup> Subject to the exceptions provided for in the legislation on medical law.

Particular attention should be paid to the inexplicitly regulated legal situation of incapacitated persons. Problems connected with a possibility of giving relevantly legal consent by the incapacitated patient appear both in the Act of 5 December 1996 on the Profession of a Physician and Dentist<sup>2</sup> and in the Act of 6 November 2008 on Patient's Rights and Patient Ombudsman<sup>3</sup>.

In both Acts, i.e. on the Profession of a Physician and Dentist (hereinafter referred to as APP) and on Patient's Rights and Patient Ombudsman (hereinafter referred to as APR), the legislator uses the term of the "incapacitated person". Such a solution causes considerable interpretation problems. Under the interpretation of the provisions of Art. 32-34 of APP, the doctrine proposed to interpret the term "incapacitated" that does not specify precisely which incapacity it refers to as the one covering only fully incapacitated persons<sup>4</sup>. Such a statement does not seem right and apparently contains certain contradictions.

The article will analyze selected problems connected with the situation of incapacitated persons in the process of giving consent to medical treatment<sup>5</sup>. It will particularly present the issue of consent given by a statutory representative of the fully incapacitated person, consent or permission of the guardian court, and consent of a statutory representative and the incapacitated person.

## **2. Consent given by a statutory representative of the fully incapacitated person**

Both simple and higher risk surgeries the fully incapacitated person is subject to require substitute consent of a statutory representative (Art. 32 par. 4 and Art. 34 par. 3 of APP). A statutory representative of the fully incapacitated person is his or

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2 Consolidated text Journal of Laws 2017, item 125 as amended.

3 Consolidated text Journal of Laws 2016, item 186 as amended.

4 A. Zoll, Granice legalności zabiegu medycznego, "Prawo i Medycyna" 1999, No. 1, p. 37-38.

5 It should be pointed out that issues related to the nature of consent and to carrying out the legal acts by the legally incapacitated persons require for separate treatment. Compare: M. Pazdan, Komentarz do art. 13 i 16., (in:) System Prawa Prywatnego, t. 1. Prawo cywilne – część ogólna, (ed.) M. Safjan, Warszawa 2012, pp. 1080-1105; K. Mularski, Czynności podobne do czynności prawnych, Warszawa 2011, p. 212 and following; P. Księżak, Komentarz do art. 13 i art. 16, (in:) K. Osajda (ed.), Kodeks cywilny. Komentarz. Przepisy wprowadzające. Część ogólna. Własność i inne prawa rzeczowe, Warszawa 2013, p. 356 and following; J. Strzebinczyk, Komentarz do art. 13 i art. 16, (in:) Kodeks cywilny. Komentarz (eds.) E. Gniewek, P. Machnikowski, Warszawa 2016, p. 42 and following; L. Kociucki, Zdolność do czynności prawnych osób dorosłych i jej ograniczenia, Warszawa 2011, pp. 107-249; A. Olejniczak, Z. Radwański, Prawo cywilne – część ogólna, Warszawa 2013, pp. 260-268; B. Janiszewska, Zgoda na udzielenie świadczenia zdrowotnego. Ujęcie wewnątrzsystemowe, Warszawa 2013, p. 82 and following. M. Tomaszewska, Charakter prawny decyzji o ubezwłasnowolnieniu w sądowym stosowaniu prawa, Toruń 2008, pp. 67-96.

her guardian. Pursuant to Art. 175 of the Family and Guardianship Code<sup>6</sup>, care/guardianship of the fully incapacitated person is subject to the appropriate provisions on minor persons. What is significant under this regulation is the fact that all comments (entries) on the scope of competence of a guardian and guardianship court supervision that regard consent of a statutory representative of a minor patient under 16 years of age shall be valid therein.

It should be added that no guardianship is appointed for the fully incapacitated person who attained 13 years of age and remains under parental authority<sup>7</sup>. In this case, substitute consent may be given by parents as statutory representatives of the fully incapacitated minor<sup>8</sup>.

We should pay special attention here to the inexplicitly regulated legal situation of partially incapacitated persons. The analysis of Art. 32 par. 104 of APP does not entail any restrictions with regard to the autonomy of their will. Consequently, it should be assumed that a partially incapacitated person may decide himself or herself about undergoing a test or examination provided he or she is fully aware/conscious. This applies solely to simple medical surgeries (as it results from Art. 34 par. 1 and 3 of APP, a doctor may perform a surgery or apply a method of treatment or diagnosis posing a higher risk for the incapacitated person exclusively after obtaining substitute consent)<sup>9</sup>. According to M. Filar, a partially incapacitated patient is entitled to express consent if his or her health condition allows them to make a conscious decision<sup>10</sup>. T. Dukiet-Nagórska also claims that a partially incapacitated person may express their will efficiently if they understand the situation sufficiently<sup>11</sup>. It seems that the opinion presented by the doctrine is right. Taking into account the law-maker's axiological rationality, it should be assumed that if fully incapacitated persons have powers to express their will (Art. 342 par. 4 sent. 2 of APP), persons with greater mental capabilities should also be granted the same right. Doubts may arise when the

6 Consolidated text Journal of Laws 2017, item 683 as amended.

7 See: S. Kalus, (in:) K. Piasecki (ed.), Kodeks rodzinny i opiekuńczy. Komentarz, Warszawa 2011, p. 830.

8 See: M. Świdarska, Zgoda pacjenta na zabieg medyczny, Toruń 2007, p. 52.

9 *Ibidem*, pp. 41-42.

10 M. Filar, Postępowanie lecznicze (świadczenie zdrowotne) w stosunku do pacjenta niezdolnego do wyrażenia zgody, "Prawo i Medycyna" 2003, No. 13, p. 43; M. Safjan, Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny, Warszawa 1998, p. 52; A. Suchocka, Zakres działań lekarskich w fazie sztucznego podtrzymywania życia w prawie polskim i międzynarodowym, Przegląd Prawa Europejskiego 2001, No. 1, p. 51; J. Kulesza, Brak zgody pacjenta na zabieg leczniczy a lekarski obowiązek udzielania pomocy, "Prawo i Medycyna" 2005, No. 19, p. 74 and following.; A. Kołodziej, Stopień autonomii pacjenta na tle ustawy o zawodzie lekarza i ustawy o ochronie zdrowia psychicznego, "Prawo i Medycyna" 2002, No. 11, p. 79; M. Świdarska, Zgoda pacjenta na zabieg medyczny, Toruń 2007, p. 41.

11 T. Dukiet-Nagórska, Świadoma zgoda pacjenta w ustawodawstwie polskim, "Prawo i Medycyna" 2000, No. 6/7, p. 91.

court appoints a guardian for a partially incapacitated person due to irrational actions undertaken by him or her concerning healthcare.

Problems connected with a possibility of giving relevantly legal consent by a partially incapacitated patient appear together with the appropriate application of Art. 32 par. 6 of APP. To avoid inaccuracies connected with the legal situation of a partially incapacitated person, Art. 32 par. 6 of APP should be specified more precisely. As rightly proposed by M. Świdorska, it is sufficient to specify in the content of the provision that it refers solely to fully incapacitated persons and not partially incapacitated persons by adding the word “fully”<sup>12</sup>. It seems that the author is right. The solution proposed by her would provide cohesion between the provisions of the Act, and it would lead to clear and consistent regulation of the legal situation of partially incapacitated persons by the legislator.

On the other hand, in the second case analyzed herein, consent of the guardian court shall be absolutely obligatory. It results directly from Art. 32 par. 6 of APP. Under this provision, if a patient refuses to undergo medical services, apart from consent given by his or her statutory representative or factual guardian, or if they do not give consent, it is necessary to obtain permission of the guardian court<sup>13</sup>.

The situation of partially incapacitated persons becomes complicated also in connection with the content of Art. 17 and 18 of APR. Many problems arise in effect of the relation of the above quoted provisions to the Act on the Profession of a Physician and Dentist. According to R. Kubiak, it should be assumed that the Act on the Patient's Rights is *lex generalis* in relation to the Act on the Profession of a Physician and Dentist<sup>14</sup>. This postulate should be approved of because the Act on the Patient's Rights regards all medical services whereas the Act on the Profession of a Physician and Dentist regulates only surgeries performed by doctors. Therefore, in compliance with the principle *lex specialis derogat legi generali*, priority should be given to special provisions, that is the Act on the Profession of a Physician and Dentist<sup>15</sup>.

The adoption of the above principle aims to resolve problems connected with the concurrent application of both Acts, which are not mutually coherent. Pursuant to Art. 17 par. 2 of APR, in the case of a fully incapacitated person, consent of a statutory representative shall be obligatory. This provision complies with Art. 32 par. 4 of APP. However, Art. 18 of APR, which deals with operations, stipulates in par. 1 that Art. 17 par. 2 of APR shall appropriately apply to giving consent to such surgeries.

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12 *Ibidem*, pp. 41-42.

13 See: P. Dzienis, Zgoda pacjenta jako warunek legalności leczenia, “Przegląd Sądowy” 2001, No. 11/12, p. 78; J. Kulesza, Brak zgody pacjenta na zabieg leczniczy a lekarski obowiązek udzielania pomocy, “Prawo i Medycyna” 2005, No. 19, p. 77, M. Safjan, Prawo i medycyna, *op. cit.*, p. 52-53.

14 R. Kubiak, Prawo medyczne, Warszawa 2010, p. 349.

15 *Ibidem*, p. 349.

On the other hand, par. 3 orders to apply Art. 17 par. 2-4 of APR. The structure and mutual relations of the above quoted provisions are incoherent in relation to partially incapacitated persons. As far as simple surgeries are concerned, substitute consent is required solely toward fully incapacitated persons while these provisions also apply to operations, which means that partially incapacitated persons may decide themselves both about simple surgeries and operations. As stressed by R. Kubiak, such assumption contradicts Art. 34 par. 3 of APP, which orders the use of substitute consent regardless of the type of incapacitation/incapacity<sup>16</sup>.

It results from the above that concurrent application of both Acts may lead to serious practical problems. For this reason, we should acknowledge priority of the Act on the Profession of a Physician and Dentist as *lex specialis* towards the Act on the Patient's Rights.

### 3. Consent given by a factual guardian

Considering the issue of substitute consent, it is worth mentioning the powers of the so-called factual guardian. Pursuant to the provisions of the Act, a factual guardian shall be a person who without a statutory obligation takes continuous care of the patient who, due to his or her age, health condition or mental state, requires such care (Art. 3 par. 1 point 1 of APR). The element of continuous care used in the above quoted definition eliminates all cases of temporary care provided to the patient. Therefore, in principle, a circle of entities that may be recognized as factual guardians is relatively narrow. A factual guardian may become, *inter alia*, a guardian of a partially incapacitated person who has not been granted the right of representation by the court.

The powers of a factual guardian are stipulated in Art. 32 par. 2 of APP. Under this provision, tests or examinations of a minor person or the person incapable of expressing consent require only consent of a factual guardian. According to the relevant literature, a factual guardian may give consent only to test or examination but not to further medical services<sup>17</sup>. Consequently, a guardian may give consent solely to routine and safe (not life and health threatening) medical services<sup>18</sup>. Interestingly, in other provisions the legislator envisaged a possibility of expressing consent to

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16 R. Kubiak, *Prawo medyczne*, *op. cit.*, pp. 348-349.

17 See: M. Nesterowicz, *Nowe ustawodawstwo medyczne*, "Państwo i Prawo" 1997, No. 9, p. 6; R. Kubiak, *Prawo medyczne*, *op. cit.*, p. 350; R. Kędziora, *Problematyka zgody pacjenta w świetle polskiego ustawodawstwa medycznego*, "Państwo i Prawo" 2003, No. 7/8, p. 48; B. Janiszewska, *Zgoda na udzielenie świadczenia zdrowotnego. Ujęcie wewnątrzsystemowe*, Warszawa 2013, p. 551.

18 M. Safjan, *Prawo i medycyna...*, *op. cit.*, p. 45. B. Janiszewska rightly points out that the factual carer decide on the medical examination if a minor patient, incapacitated or unable to give the informed consent or does not have a statutory representative or indeed he has such

medical acts (Art. 32 par. 6 of APP) as well as providing medical services (Art. 32 par. 8 and Art. 33 par. 1 of APP)<sup>19</sup> by a factual guardian.

It seems necessary to specify the scope of powers of a factual guardian more precisely. Another problem is the fact that his or her powers are considerably limited. Thus, the question arises here what to do when the parents of a child who has attained maturity definitely lose the right to decide about the child's life even if it is a matter of his or her life and health. According to M. Świdorska, validity and existence of emotional ties that usually ensue from family or partner relations justify *prima facie* granting the so-called factual guardian more extensive powers<sup>20</sup>. At the same time, the postulate of expanding powers of a factual guardian cannot lower the level of protection of autonomy of patient's will enshrined by the Act<sup>21</sup>. For this reason, the extension of powers of a factual guardian must be justified by rational arguments resulting from the patient's situation.

#### 4. Consent or authorization granted by the guardian court

The case shall be settled by the court when there is no entity entitled to express consent, or their will contradicts the patient's interest and may be withdrawn by the court's authorization<sup>22</sup>. Since cases requiring the court's permission have been discussed earlier, I will merely remind and summarize them here.

First of all, pursuant to Art. 32 par. 2 of APP, the guardian court's permission is necessary if a minor person or a person incapable of expressing his will consciously does not have a statutory representative, or if it is impossible to contact him or her. In other words, a lack of possibility to contact a statutory representative or its loss results in the situation when the court takes over a decision-making process. The court acts not only as the patient's surrogate decision maker but also statutory representative.

Moreover, the legislator has not regulated a legal situation of fully incapacitated persons when they do not have a statutory representative, or if it is impossible to contact them while it is necessary to undertake treatment. As it results from Art. 32

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a representative, but it is not possible to communicate with him at the time when there is a need for an examination, B. Janiszewska, *Zgoda na udzielenie...op. cit.*, p. 559.

19 It should be noted that according to the art. 10b par. 1 of Act of 19 August 1994 r. on the protection of the sanity (consolidated text Journal of Laws 2017, item 882 as amended) the factual carer has the legal right to consent to see the medical documentation being reviewed by the Patient's Ombudsman for the Psychiatric Hospital. Interestingly, this provision, although contrary to the Act of 6 November 2008 on Patient's Rights and the Patient's Rights Ombudsman, is still in force.

20 M. Świdorska, *Zgoda pacjenta...*, *op. cit.*, p. 59.

21 *Ibidem*, p. 59.

22 R. Kubiak, *Prawo medyczne...*, *op. cit.*, p. 355; B. Pawelczyk, *Zasady wyrażania zgody oraz prawo do prywatności pacjentki ciężarnej*, referat wygłoszony na konferencji naukowej: *Podmiotowość pacjentki ciężarnej i rodzącej*, Chełmża 10-11.11.2007 r., not published.

par. 4 of APP, a fully incapacitated person does not have a capacity to express consent himself or herself. The literature points out that this is a legal loophole and *legis* analogy should be applied appropriately<sup>23</sup>. In other words, it will be necessary to obtain the court's decision.

We deal with substitute consent also with regard to individuals having full capacity to perform legal acts but not capable of expressing informed consent. Such subjects do not have a statutory representative. That is why the guardian court should issue a relevant decision thereon.

Furthermore, we deal with the guardian court's intervention in the case of collision between the will of a patient and his or her statutory representative (factual guardian), or when the statutory representatives' refusal has been withdrawn. As rightly noticed by M. Świdorska, the guardian court acts here as a mediator that must duly balance the parties' opinions and give them proper proportions<sup>24</sup>. The literature often postulates the amendment of Art. 36 par. 2 of APP. According to the doctrine representatives, this provision is too liberal and opens a possibility of ignoring both the patient's will and his or her statutory representative<sup>25</sup>.

We do not hold the same opinion. Apparently, it is difficult not to agree that this provision arises considerable reservations; yet a doctor may also decide about the performance of a surgery in urgent cases without asking anyone about consent. That is why we agree with M. Świdorska who rightly claims that it is difficult to refuse similar powers to the judiciary while indicating the rationale to be followed by the court in sentencing.

Pursuant to Art. 32 par. 10 of APP, the guardian court in the jurisdiction of which a medical act is to be performed shall be competent to issue permission. The proceedings to obtain substitute consent are conducted under Art. 579 of the Code of Civil Procedure. In urgent situations, the court may examine the case under a simplified procedure – without a hearing. We deal with an urgent situation when every moment of delay may lead to serious consequences for health and life and a doctor may then act even without the consent of the guardian court (Art. 32 par. 9 of APP and Art. 34 par. 7 of APP)<sup>26</sup>. Issued decisions become immediately enforceable.

23 M. Świdorska, *Zgoda pacjenta...*, *op. cit.*, p. 54.

24 *Ibidem*, p. 55.

25 Zob. A. Kołodziej, *Stopień autonomii woli...*, *op. cit.*, p. 81; A. Liszewska, *Zgoda pacjenta na zabieg leczniczy*, "Państwo i Prawo" 1997, No.1, p. 89; M. Safjan, *Prawo i medycyna...*, *op. cit.*, p. 53.

26 Szerzej: M. Śliwka, *Prawo pacjenta do świadczenia opieki zdrowotnej w stanie nagłym*, "Prawo i Medycyna" 2008, No. 2, p. 44 and following; M. Filar, S. Krześ, E. Marszałkowska-Krześ, P. Zaborowski, *Odpowiedzialność lekarzy i zakładów opieki zdrowotnej*, Warszawa 2004, p. 193; M. Filar, *Postępowanie lecznicze...*, *op. cit.*, p. 44; J. Bujny, *Prawa pacjenta...*, *op. cit.*, p. 248 and following.; J. Kulesza, *Brak zgody pacjenta...*, *op. cit.*, pp. 70-71; A. Zoll, *Stan wyższej konieczności jako okoliczność wyłączająca przestępczość w praktyce lekarskiej*, "Prawo i Medycyna" 2005, No. 19, p. 13; M. Świdorska, *Zgoda pacjenta...*, *op. cit.*, pp. 172-176; T. Dukiet-Nagórska, *Stan wyższej konieczności w działalności lekarskiej*, "Prawo i Medycyna" 2005, No. 2, p. 22; A. Zoll, *Granice*

## 5. Consent given by a statutory representative and incapacitated person

A statutory representative gives consent on behalf of the fully incapacitated person. However, if such a person is able to express his or her opinion consciously (understanding the situation sufficiently) about a medical test or examination, it is also necessary to obtain his or her consent<sup>27</sup>. The Act does not define the notion of the capacity to express consent. According to R. Kędziora, it should be assumed that it is the ability to express logical opinions about one's acts. The author notices that the restriction of this provision only to a test (examination) evokes justified doubts<sup>28</sup>. According to T. Dukiet-Nagórska, such a solution implies that pursuant to the principle of *argumentum a minori ad maius*, consent should be also obtained from the incapacitated person for health services other than a test (examination)<sup>29</sup>. We agree with the author. We believe that a person who is able to express his or her will consciously about a test (examination) is equally capable of deciding about other health services. As underlined by M. Świdorska, such consent given by a person deprived of the capacity to perform legal acts shall maintain a sense of dignity by the awareness of impact on the preservation of one's own body integrity<sup>30</sup>.

As far as the performance of operations or higher risk surgeries is concerned, the legislator has omitted a possibility of expressing consent by the fully incapacitated persons but sufficiently aware to be able to express their will (Art. 34 par. 4 of APP). In our opinion, they should not be deprived of their right of self-determination. The inclusion of the will of incapacitated persons is supported, *inter alia*, by the norm expressed in Art. 6 par. 3 of the Oviedo Convention. Pursuant to this provision, if an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body

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legalności zabiegu medycznego, "Prawo i Medycyna" 1999, No. 1, p. 29; R. Kędziora, Problematyka zgody pacjenta..., *op. cit.*, p. 41 and following.; K. Daszkiewicz, Uchylenie odpowiedzialności lekarza za wykonanie zabiegu leczniczego bez zgody pacjenta, "Palestra" 2002, No. 11/12, p. 37 and following.; K. Sakowski, Komentarz do art. 34 ustawy o zawodach lekarza i lekarza dentystry, System Informacji Prawnej Lex.

27 See: J. Bujny, Prawa pacjenta – między autonomią a paternalizmem, Warszawa 2007, p. 241; K. Sakowski, Komentarz do art. 32 ustawy o zawodach lekarza i lekarza dentystry, System Informacji Prawnej Lex; J. Haberko, B. Pawelczyk, Poszanowanie autonomii pacjentki w zakresie udzielania przez nią zgody na zabiegi medyczne, "Ginekologia i Położnictwo – Medical Project" 2009, No. 1, pp. 42-43.

28 R. Kędziora, Problematyka zgody pacjenta, *op. cit.*, p. 49.

29 T. Dukiet-Nagórska, Świadoma zgoda pacjenta w ustawodawstwie polskim, *op. cit.*, p. 91.

30 M. Świdorska, Zgoda pacjenta..., *op. cit.*, p. 64.



provided for by law. The individual concerned shall as far as possible take part in the authorisation procedure<sup>31</sup>.

For the above reasons, we believe that the Polish legislator should guarantee the extension of the protection of autonomy of the patient who is actually able to express his or her will consciously, and allow him or her to exercise their right to decide about their body at least in the form of cumulative consent.

The introduction of the structure of cumulative consent may cause the collision of wills of the patient and his or her statutory representative or factual guardian as far as consent for a test (examination) is concerned. As it has been mentioned before with regard to the consent of a statutory representative and a minor over 16 years of age, if the opinions of these persons collide, it is obligatory to obtain the consent of the guardian court (Art. 32 oar. 6 and Art. 34 par. 5 of APP).

## 6. Conclusion

The Polish legislator does not treat an incapacitated patient as a person incapable *a priori* of expressing his or her will consciously. Just on the contrary, the legislation enshrines the principle of the need to obtain consent of such a patient – for instance in the case of a test (examination) performed by a doctor. Nevertheless, the scope of autonomy of the patient's will appears to be problematic. It seems that the scope of the patient's autonomy should depend on their ability to perceive and express will. Due to this, it is difficult to explicitly deprive not incapacitated persons suffering from recurring psychological disorders of the possibility to express their will. In the light of the currently binding provisions, such persons have a full capacity to perform legal acts, which entails that they may express consent for medical treatment.

The above considerations on incapacitated persons ensue the conclusion according to which Polish legislation does not fully deprive incapacitated patients of expressing their will. However, the authors believe the relevant restrictions are too far-reaching and undermining the right of self-determination. Essentially, the right of an incapacitated person to decide about themselves should be respected by a doctor throughout the entire treatment.

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31 The convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine adopted on the 4 of April 1997 in Oviedo.

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