

Dealing with a Clerk's Refusal to swear, issue or file Court Documents

Background

Since the introduction of the Family Law Rules in November of 1999, and the subsequent expansion of their application in July 2004 across Ontario, issuing and/or filing of Court documents can be challenging from time to time.

Clerks retain what is known as "discretionary power" to refuse for issuing and filing, any Court documents, based upon their training and interpretation of the Family Law Rules, and the Practice Directions of the particular Court.

There can be enormous inconsistencies between various Courts across the Province and even within any particular Court from Clerk to Clerk. For example, documents not filed under the timelines, can be refused. If a Clerk is of the belief that you are proceeding incorrectly, based upon their training and understanding, they may refuse your documents and order you to proceed per their directions. Clerks do sometimes make mistakes in these rulings.

This is a normal occurrence in Family Court every day in at least 15-25% of all cases. Interpretation of the Rules and Procedures can vary substantially. While it may be frustrating and even costly, it is important to get a clear picture of the reason for the refusal and any directions of the Clerk.

IMPORTANT TIPS/NOTES when filing Court documents

It is imperative to obtain these instructions in writing, so that you have a record of what transpired at the Clerk's wicket, because ultimately without proof of the refusal and directions, you will be held ultimately responsible for what is filed for a Judge's review at any hearing.

Sometimes people find Family Court a very bureaucratic and unfriendly/unhelpful place. It is a busy place, many people are stressed out, and a Clerk can have a difficult day, like any of us. Getting angry with the Clerk will never be helpful. *The following steps are suggested when having any document sworn, issued and/or filed with Family Court.*

Swearing Documents

1. If the clerk insists you go elsewhere to swear your affidavit, such as to see duty counsel, insist in a pleasant way that it is the clerk's job to swear documents, and if necessary remain pleasant and ask for the registrar to come to the counter to swear your document.
2. Remember, it's in your best interests to be respectful and courteous with all Court staff. If you become agitated, and/or threatening you may be removed from the building immediately, and even subject to arrest.

Refusals to issue and/or file Court Documents

3. Documents can be refused for many reasons. These are the difficulties legal professionals face every day. When you have a lawyer, you never come face to face with these aspects of the Legal System. If there is any problem whatsoever, you need to find out what the problem is and in order to properly deal with it.
4. These sorts of difficulties in filing happen everyday to about 15-25% of court filings, because court clerks have discretionary powers as to what can and cannot be filed. The secret is to never lose your composure, find out what the clerk is objecting to, and to even ask if the Court Registrar could review the situation to be certain there is an actual problem, or if it can be corrected easily, right there at the counter.
5. The Court Registrar is the Senior Supervising Clerk of the Court. They have the authority to resolve procedural problems. Always, remain friendly, but do not be afraid to ask for clarification, reasons, and explanations when a document is not accepted for filing. **Record filing difficulties - You may need to prove them to a Judge**
6. **You are absolutely entitled to have the explanation for a refusal. You are absolutely entitled to a record of that explanation in writing,** because it is in effect, a procedural order of the Court, under the Family Law Rules. When a Clerk makes a ruling, you are entitled to a record of that ruling.

Conclusion

Rulings before they are formalized into orders are known as an "endorsement". Judge's routinely record their rulings and orders on this form. However, there is no official form within the Family Law Rules for a "Clerk's ruling or endorsement".

As a result of a number of filing difficulties experienced at Family Court, we have prepared a similar sheet: "*Clerk's Filing Endorsement and/or Advice - Duty Counsel*" for you to request the Clerk's procedural ruling and instructions on filing and/or have Duty Counsel record summary advice. **Be certain in all cases to have the Clerk/Duty Counsel to date, print and sign their name on this document.**

PLEASE NOTE: This document is not an official document under the Family Law Rules. It is being provided to assist parties at Court to record reasons for a refusal to issue or file Court Documents, should they need proof of filing difficulties and/or a summary of advice from Duty Counsel for procedural steps to be followed.

As a result you may have a clerk or duty counsel who refuses to put anything in writing. In the case of a Clerk, ask to speak with the Court Registrar. In the case of duty Counsel, ask to speak with the manager of Court Services. Remember again, that it is imperative to act in a courteous and professional manner. Confrontational tactics will work against you more often than not. All you are asking for is written confirmation of a ruling or advice, so that you have a record.

Proof is what a Court functions upon. You are only asking for that which the Court may require of you at some point. Repeat this phrase to everyone you deal with.

For example, preface comments with: "*With the greatest of respect...I'm only asking for a record proving the direction of the clerk, should the Judge disagree with that ruling, I will need proof that I was under a Clerk's direction (or following the advice of duty counsel...)*".

Remember that clerks have a difficult job; people get upset at their wickets all day long. Most Clerks are helpful and very good at their jobs, but like anyone, they can be having a bad day, being nice, humour and charm go a long way to resolving most filing difficulties in Family Court.

Finally, a Judge can only act on evidence. If are instructed to file documents incorrectly by a Clerk and/or Duty Counsel, and are questioned about it by a Judge, you'll be glad you have a record to prove those procedural & filing instructions, in order to avoid paying a cost order for improperly filing and serving incorrect documents on the other party.