

---

1965

## Refusal to Have Children as a Ground for Divorce or Annulment

Marvin M. Moore

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Family Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

### Recommended Citation

Marvin M. Moore, Refusal to Have Children as a Ground for Divorce or Annulment, 14 Clev.-Marshall L. Rev. 588 (1965)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

## Refusal to Have Children as a Ground for Divorce or Annulment

Marvin M. Moore\*

WHEN A HUSBAND AND WIFE agree to practice birth control no legal problems are normally created. In England and now in all American jurisdictions<sup>1</sup> the use of contraceptive devices and techniques is perfectly lawful,<sup>2</sup> and only three states impose restrictions on voluntary sterilization.<sup>3</sup> In fact, there is considerable evidence that our society not only permits birth control but considers it highly desirable.<sup>4</sup>

However, a different situation is presented when contraception is practiced by one spouse against the will of the other. The offending spouse remains free of criminal liability,<sup>5</sup> but he may be vulnerable to some form of marital legal action by his mate. The purpose of this article is to examine the circumstances under which such marital legal action is available to the aggrieved spouse.

In England, where "wilful refusal of the respondent to consummate the marriage" is a ground for annulment,<sup>6</sup> the courts have been confronted with the question of whether the refusal to have uncontracepted intercourse constitutes a refusal to consummate the marriage. This question first arose in the case of *Cowen v. Cowen*.<sup>7</sup> The parties were married in 1932 and lived in Persia until 1937, when they returned to England for a few months. During their stay in Persia the couple agreed that contraception was necessary since Persia's primitive medical and

\* Associate Professor of Law, University of Akron, College of Law.

<sup>1</sup> *Griswold v. Connecticut*, 33 U. S. Law Week 4587, -- U. S. --, -- S. Ct. --, -- L. Ed. -- (1965).

<sup>2</sup> However, a number of states place restrictions on the sale of contraceptives. See Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 *Law and Contemp. Prob.* 593, 601-02 (1960).

<sup>3</sup> Connecticut, Kansas and Utah. See Ridgeway, *Birth Control by Surgery*, *The New Republic*, p. 9 (Nov. 14, 1964).

<sup>4</sup> Among such evidence is the following: the establishment in most states of private agencies offering family planning services, the inclusion of such services in the public health programs of several jurisdictions, and the position favorable to birth control taken by most periodical and newspaper articles on the subject.

<sup>5</sup> *Supra* n. 1.

<sup>6</sup> *Matrimonial Causes Act* (1950) 14 *Geo.* 6 c. 25.

<sup>7</sup> (1946) P. 36, (1945) 2 *All. E. R.* 197.

sanitary conditions rendered child-bearing very dangerous. However, when the two returned to England the wife asked her husband to abandon his precautionary measures so that she might have a child. He refused. At the end of 1937, the couple returned to Persia, where conditions had recently improved, and the husband continued to practice contraception, notwithstanding his wife's frequently-voiced opposition. In 1944 the latter left her husband, returned to England, and sued for an annulment on the ground quoted above. The Court of Appeals decided that the marriage should be annulled, saying:

We are of the opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of its principal ends, if not the principal end of marriage (the procreation of children), is frustrated.<sup>8</sup>

The position taken by the Court of Appeals in the *Cowen* case merits criticism on at least five different grounds:

First, if a spouse's natural sterility does not preclude consummation of a marriage (a point which the court expressly conceded),<sup>9</sup> it seems strange that artificial sterility (contraception) should do so. True, the latter is deliberate and the former is not, but if the ability to procreate is not essential to the accomplishment of a valid marriage in the first place, it is odd that the deliberate curtailment of this ability should render the marriage voidable.

Secondly, since no method of contraception other than sterilization is foolproof,<sup>10</sup> the consummation test set forth by the court presents an almost insuperable evidence problem. Although the rubber sheath, the diaphragm, and the pessary are all considered reasonably reliable, if the sheath is torn even slightly, if the diaphragm is dislodged or improperly placed, or

<sup>8</sup> 2 *Id.* at 199.

<sup>9</sup> *Ibid.*

<sup>10</sup> "Today there are many medically approved mechanical and chemical methods of limiting family size available. . . . Effective as these birth control methods may be, they are not now one hundred percent certain. . . ." Pamphlet entitled "A Statement of Purpose and Program," published by Human Betterment Association for Voluntary Sterilization, p. 2 (1964).

if the pessary is defectively made, there may be a "passage of the male seed into the body of the woman." If coitus interruptus is employed, the chances that such an unintended result will occur are obviously considerable. In a given annulment action how can the court be certain (even reasonably certain) that the form of contraception used by the parties has always accomplished its purpose?<sup>11</sup>

Thirdly, even at the time of the *Cowen* decision, birth control had become so prevalent a practice in England and other occidental countries that it no longer accorded with common parlance to read into "consummation" the requirement that sperm pass into the woman's body.

Fourthly, the religious authorities responsible for the doctrine that the principal purpose of marriage is procreation—namely the Bible, the Book of Common Prayer, and the Koran—were all written at a time when the death rate was high and the world was thinly populated. During the past forty years the death rate has been greatly reduced in most countries, and the world's population has multiplied so rapidly that the population explosion has become a grave threat to human welfare.<sup>12</sup>

And fifthly, since emission usually is not essential to the crime of rape,<sup>13</sup> the result of the *Cowen* decision is that sexual intercourse for criminal law purposes is not sexual intercourse for marriage law purposes. Although marriage law is not constrained to follow the criminal law, an inconsistency of the kind in question is nevertheless difficult to accept without hesitation.

The first three of the above considerations influenced the decision of the House of Lords in *Baxter v. Baxter*,<sup>14</sup> a case which elicited more newspaper and periodical comment in England than any decision involving religious doctrine since the *Free Church of Scotland* case in 1904.<sup>15</sup> The facts were these: The parties were married in 1934 and lived together

<sup>11</sup> If an oral contraceptive (a device that did not exist in 1946) or a sperm-killing foam were employed, this clearly would not prevent consummation of the marriage, as defined by *Cowen v. Cowen*, even though conception would be prevented.

<sup>12</sup> See Shimm and Everett, *Population Control, The Imminent World Crisis* 1-12 (1961).

<sup>13</sup> Clark and Marshall, *Treatise on the Law of Crimes* 676 (6th ed. 1952).

<sup>14</sup> (1947) 2 All. E. R. 886, 4 A. L. R. 2d 216 (1949).

<sup>15</sup> *Free Church of Scotland v. Overtoun* (1904), A. C. 515.

until 1944, when the husband moved out. Throughout the couple's ten years of cohabitation the wife refused to have coitus unless her husband wore a rubber sheath. The latter persistently implored his wife to engage in uncontracepted sexual relations, but she proved adamant, and he never attempted to employ force. Shortly after leaving his wife the husband petitioned for an annulment on the ground that his mate had wilfully refused to consummate their marriage. The trial court and Court of Appeal decided that the marriage had not been consummated, but dismissed the petition on the ground that plaintiff's conduct suggested acquiescence and therefore produced a waiver of his right to complain. The House of Lords affirmed the dismissal, but stated that the waiver issue was irrelevant, since the marriage had been consummated within the meaning of the annulment statute. The House of Lords added that the decision of the *Cowen* case on this point was overruled.

After observing that the natural sterility of a spouse had never been held to preclude consummation, the House said:

The essence of the matter . . . is that the children, if there be any, should be born into a family as that word is understood in Christendom generally . . . But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage.<sup>16</sup>

Referring to the evidence problem created by the doctrine laid down in *Cowen v. Cowen*, the House observed:

The argument of this appeal exposed the morass of difficulties in which the courts must necessarily become involved in applying the principles laid down in *Cowen v. Cowen* . . . It was admitted that a rupture of a sheath . . . on a single occasion would involve that the marriage had been consummated, though unwillingly and unintentionally . . . I am unable to believe that Parliament . . . intended that the courts should be involved in inquiries of this sort.<sup>17</sup>

Finally, the House noted that it was contrary to modern thought and practice to assert that sexual intercourse with contraceptives does not constitute consummation. Quoting further:

Long before 1937 it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on . . . birth control. It was also a

<sup>16</sup> *Baxter v. Baxter*, *supra* n. 14, at 890.

<sup>17</sup> *Id.* at 891-92.

matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist.<sup>18</sup>

In deciding the *Baxter* case the House of Lords expressly withheld opinion on the question of whether *coitus interruptus* would constitute consummation within the meaning of the annulment statute (Matrimonial Causes Act). This question directly confronted the courts in three subsequent cases: *Crimes v. Crimes*,<sup>19</sup> *White v. White*,<sup>20</sup> and *Cackett v. Cackett*.<sup>21</sup> In the *Crimes* controversy, the Probate Divorce, and Admiralty Division granted an annulment to a wife who testified that her husband always restricted their sexual contact to *coitus interruptus*. The court declared that *coitus interruptus* is not a full and natural intercourse, but rather a partial and incomplete sexual act that cannot reasonably be deemed to constitute "consummation" within the intent of the annulment act.

However, in *White v. White*, which was decided two days later, the same Division (with a different judge) reached the opposite conclusion on similar facts. The court granted the plaintiff-wife a divorce on the ground of cruelty, since the respondent's conduct (including acts unrelated to their sexual relations) had impaired her health, but the court stated that the marriage had been consummated within the meaning of the annulment statute. Said the court:

It is submitted on behalf of the wife that there is no vera copula unless there is not only full entry and penetration but also completion of the act within the body of the woman . . . On the other hand it is contended (by respondent) that there is a complete conjunction of bodies, a vera copula . . . as soon as full entry and penetration has been achieved . . . In my judgment the latter contention must be correct.<sup>22</sup>

In *Cackett v. Cackett*, decided two years later, the court again granted the petitioner-wife a divorce on the ground of

---

<sup>18</sup> *Id.* at 892.

<sup>19</sup> (1948) P. 323.

<sup>20</sup> (1948) P. 330.

<sup>21</sup> (1950) P. 253.

<sup>22</sup> *White v. White*, *supra* n. 20, at 338.

cruelty, because of her showing of acts by the respondent injurious to her health. But the court declared that it accepted the *White* case's view that *coitus interruptus* is sufficient to consummate a marriage.

England recognizes fraud as a ground for annulment, but the fraud must produce a misconception as to the identity of the person with whom the marriage contract is made or as to the nature of the ceremony.<sup>23</sup> Consequently, there are no English decisions granting an annulment to a complainant whose mate falsely promised, expressly or impliedly, to have children following the parties' marriage.

In the United States wilful refusal to consummate the marriage is nowhere an express ground for annulment or divorce, nor is refusal to copulate without contraceptives. Nevertheless, if an American husband or wife, contrary to his partner's wishes, insists upon precautionary measures as a prerequisite to coitus, the latter spouse may not be without a remedy. For he may be able to obtain an annulment for fraud, a divorce for desertion, or possibly a divorce for cruelty.<sup>24</sup>

In most states a consummated marriage can be annulled on the ground of fraud if it "goes to the essentials" of the marriage relationship.<sup>25</sup> A number of cases have held that the requisite fraud exists where one party has expressly and falsely promised before marriage that he would have children afterward. Two such cases are *Coppo v. Coppo*,<sup>26</sup> and *Stegienko v. Stegienko*.<sup>27</sup>

In the *Coppo* case the respondent-wife not only promised before marriage that she would have children by plaintiff, but even showed him baby clothes that she had kept from her former marriage. After the marriage ceremony, however, defendant told plaintiff that she would not have sexual relations with him unless he used means to prevent conception, and a few months later she told him that she did not intend to have children

<sup>23</sup> 12 Halsbury, Laws of England 224 (3rd ed. 1955). An annulment is also obtainable on the fraud-related ground of concealed pregnancy by another man at the time of the marriage. Matrimonial Causes Act, *op. cit. supra* n. 6.

<sup>24</sup> A divorce on the ground of cruelty is not obtainable unless the refusal to engage in uncontracepted sexual relations is coupled with other objectionable conduct. See n. 51, *infra*.

<sup>25</sup> Clark, Domestic Relations § 15 (1954). An unconsummated marriage may be annulled for any fraud which would be sufficient to annul an ordinary contract. 4 Am. Jur. 2d, Annulment of Marriage § 13 (1962).

<sup>26</sup> 163 Misc. 249, 297 N. Y. S. 744 (1937).

<sup>27</sup> 295 Mich. 530, 295 N. W. 252 (1940).

at any time during their marriage and that she never had entertained such as intention. Immediately upon hearing this revelation plaintiff left his wife, and shortly thereafter he sued for an annulment on the ground of fraud. Said the court:

The primary condition which he (plaintiff) placed upon the marriage was that defendant would have children by him. This was in his mind a most important essential of the marriage relationship . . .<sup>28</sup>

(T)he conclusion is inescapable that the misrepresentations and promises of the defendant induced the plaintiff to enter into the marriage relationship with her; that such promises were fraudulent in purpose; and thereby a fraud was perpetrated by the defendant upon the plaintiff at the inception of the marriage relation, which continued until the final declaration and confession by the defendant that she at the time of making such promises had no intention of keeping or fulfilling them.<sup>29</sup>

The significant facts in the *Stegienko* controversy were these: During their courtship plaintiff told defendant that he wanted to have children, and she replied that she "would like to have a little girl and more children if we could afford it."<sup>30</sup> However, when the parties arrived home after the wedding defendant refused to have sexual intercourse with plaintiff unless he used a contraceptive device, explaining that she was afraid to become pregnant because of an operation which she had undergone. Plaintiff immediately left his bride and two days after their marriage filed suit for an annulment. The lower court dismissed the action, but the Supreme Court of Michigan vacated the decree of dismissal and remanded for entry of an annulment decree. Quoting the court:

(T)he evidence and all the circumstances in the case sufficiently prove that defendant misled plaintiff into the marriage by fraudulently pretending that she desired to have children; and that because of her physical condition she did not intend to have normal marital intercourse with plaintiff. Her entering into the marriage upon such misrepresentation and with such intentions entitles plaintiff to a decree of annulment.<sup>31</sup>

---

<sup>28</sup> *Coppo v. Coppo*, *supra* n. 26, at 755 of 297 N. Y. S.

<sup>29</sup> *Id.* at 751.

<sup>30</sup> *Stegienko v. Stegienko*, *supra* n. 27, at 253 of 295 N. W.

<sup>31</sup> *Id.* at 254.

In several cases the courts have carried the reasoning expressed in the *Coppo* and *Stegienko* decisions one step further and have granted an annulment on the ground of fraud where the promise to have children was merely implied. Two illustrative cases are *Lembo v. Lembo*,<sup>32</sup> and *Pisciotta v. Buscino*.<sup>33</sup>

In the *Lembo* case the referee found that the complainant-wife had entered marriage with the expectation of having children although defendant had never expressly represented that he would father children.

Beginning immediately after the marriage ceremony, defendant insisted upon the use of preventive measures, and it soon became apparent to plaintiff that defendant never intended to have offspring. She thereupon sued for an annulment, claiming fraud. The court granted plaintiff the relief requested, saying:

Fraud in inducing one to marry in reliance upon an express promise to have children, which promise the party had no intention of keeping, is of course, a ground of annulment. The question presented is whether an annulment of marriage may be decreed where there is no express promise to have children . . . (Where) parties agree to enter into marriage there is, in such consent, an implied representation by each to have children of the union, and no express representation is required, and a continual refusal by one of them to have issue of the marriage, without any adequate excuse, constitutes a fraud affecting the validity of the marriage and entitling the aggrieved spouse to an annulment of the marriage.<sup>34</sup>

The factual situation in the *Pisciotta* controversy was allegedly this: Before their marriage the parties agreed that the wife should continue working afterwards until certain debts of the husband were paid and that contraception should be practiced during this period. However, the plaintiff (wife) assumed that as soon as respondent's debts were discharged the two would have children. After the couple had been married for five months, respondent's obligations were satisfied, and plaintiff suggested dispensing with contraception. This triggered an argument, and in the course of same respondent revealed that he had never intended to have children, that he did not desire

<sup>32</sup> 193 Misc. 1055, 86 N. Y. S. 2d 206 (1949).

<sup>33</sup> 22 N. J. Super. 114, 91 A. 2d 629 (1952).

<sup>34</sup> *Lembo v. Lembo*, *supra* n. 32, at 208-09 of 86 N. Y. S. 2d.

any now, and that he wanted plaintiff to continue working indefinitely. On the morning following the dispute, respondent moved out. The Appellate Division of the New Jersey Superior Court disbelieved much of the testimony presented by plaintiff (as did the Chancery Division) and therefore dismissed the suit. But the court declared:

Undoubtedly if a prospective husband or wife prior to the marriage formed a fixed determination never to have children, did not communicate that fact to the intended spouse, and then refused to engage in marital relations without contraception, fraud of the required character would exist . . . Where nothing is said prior to the marriage on the subject of children, it is presumed that he or she intends to enter the marriage contract with all the implications, including a willingness to have children.<sup>35</sup>

The doctrine that engaged couples impliedly promise to have children (in the absence of statements to the contrary) seems consistent with the generally accepted rule that a promise to marry implies a promise to have sexual intercourse.<sup>36</sup> However, the courts have evidenced a propensity to restrict the use of the former doctrine more severely than they have the latter. The courts have effectuated this restriction by invoking the principle of waiver whenever the facts of the particular case have permitted. Among the cases illustrating the courts' employment of the waiver principle are *Gerwitz v. Gerwitz*<sup>37</sup> and *Schwind v. Schwind*.<sup>38</sup>

In the former case it appeared that shortly before the parties' marriage they had a conversation concerning children and that defendant (husband) at least impliedly promised to have issue. However, for the first few months after their marriage defendant consistently adopted precautionary measures, and after this practice had continued for six months plaintiff reminded defendant of their pre-marital discussion. The latter replied that he was not yet interested in having children. Three months later plaintiff brought up the subject again, and defendant said that

<sup>35</sup> *Pisciotta v. Buscino*, *supra* n. 33, at 631 of 91 A. 2d.

<sup>36</sup> The rule implying a promise to have sexual relations is stated as follows at 4 Am. Jur. 2d, *Annulment of Marriage* § 17 (1962): "An intent on the part of one of the parties existing at the time of the marriage ceremony not to consummate the marriage by sexual intercourse, if persisted in after the marriage, is generally held to justify annulment of the marriage for fraud. . . ."

<sup>37</sup> 66 N. Y. S. 2d 327 (1945).

<sup>38</sup> 99 N. Y. S. 2d 108 (1950).

he did not want children, since they would annoy him. The matter was again discussed on subsequent occasions, but defendant persisted in the use of contraceptives, and finally—after four years of marriage—plaintiff left her husband and sued for an annulment on the ground of fraud. The court dismissed plaintiff's petition and stated:

Plaintiff admitted she discovered the alleged fraud within six months after the marriage . . . Thereafter she continued to live and cohabit with defendant for three and one half years . . . While lapse of time is alone not conclusive . . . in the absence of other circumstances it negatives a claim of fraud. Continued cohabitation with full knowledge of the fraud is a bar.<sup>39</sup>

Prior to their marriage in 1938 the parties in the *Schwind* case agreed that plaintiff would continue working afterwards until she became pregnant, but there was no understanding that measures would be taken to delay pregnancy. However, after their marriage, defendant persuaded his wife to accept contraception until they could afford to build a home. In 1942 the couple moved into their new home, but shortly thereafter defendant was drafted. He was discharged in 1943 but had difficulty finding employment suitable to him, and this served as an excuse to continue preventive measures. Defendant's employment problem was eventually solved, and in 1950 plaintiff proposed that they raise a family. Defendant replied that he had never intended to have offspring and was not so inclined now. The conversation became heated, and defendant left. Plaintiff initiated an annulment action on the ground of fraud, and the court dismissed the suit, saying:

Nearly twelve years had elapsed since their marriage, and . . . she went along . . . acquiescing in the continuous use of contraceptives. Thus she allowed years of their life to slip by without insisting on . . . a family . . . Had her eagerness for children been as real as she now claims, I do not understand why, in the face of his persistent procrastination, she had to wait for him to put into words what his conduct so loudly proclaimed.<sup>40</sup>

Although the prevailing view is to the contrary,<sup>41</sup> in at least one state a spouse can obtain a divorce on the ground of deser-

<sup>39</sup> Gerwitz v. Gerwitz, *supra* n. 37, at 330.

<sup>40</sup> Schwind v. Schwind, *supra* n. 38, at 109-10.

<sup>41</sup> 17 Am. Jur., Divorce and Separation §§ 125, 126 (1957).

tion if his mate unjustifiably refuses, for the statutory desertion period, to have uncontracepted coitus.<sup>42</sup> This rule represents an extension of the doctrine that a wilful refusal to have any sexual contact constitutes desertion if continued for the statutory period. The latter rule, which is recognized by a substantial minority of jurisdictions,<sup>43</sup> has been justified primarily on the ground that a Platonic marriage cannot accomplish a major purpose of wedlock, namely the procreation of children.<sup>44</sup> Since copulation with contraception is (assuming that the precautions are effective) as incapable of producing offspring as is not copulation at all, it is undoubtedly logical to equate the former with the latter for divorce law purposes.<sup>45</sup> This is what the New Jersey Court of Chancery did in *Kreyling v. Kreyling*,<sup>46</sup> where the facts were these: The parties had sexual relations about twice a week during the three years following the marriage, but defendant (husband) practiced contraception on every occasion. At the end of this period defendant stated for the first time that he did not intend to ever have children. Upon hearing this disclosure, plaintiff moved into a separate bedroom, and the couple lived in a celibate manner for a year and a half. Then defendant moved out. Three months later plaintiff petitioned for a divorce, contending that her husband's act of denying her uncontracepted intercourse for over two years amounted to desertion under the New Jersey statute. The court agreed with plaintiff and granted her a divorce, declaring:

(I)n all of the cases in our State which lay down and follow the rule that unjustified refusal of sexual intercourse for the statutory period is a ground for divorce . . . the decisions rest on the principle that refusal of sexual inter-

<sup>42</sup> The state referred to is New Jersey. *Kreyling v. Kreyling*, 20 N. J. Misc. 52, 23 A. 2d 800 (1942).

<sup>43</sup> 27A C. J. S., Divorce § 36(3) (1959).

<sup>44</sup> This justification was advanced in the leading case of *Raymond v. Raymond*, 79 A. 430 (N. J., 1909), where a woman divorced a mate who had denied her sexual intercourse throughout their six-year marriage:

"The human race was created male and female with the manifest purpose of perpetuating the race. Marriage without sexual intercourse utterly defeats its purpose . . . The controlling purpose of marriage is to enable the sexes to gratify lawfully the natural desire for procreation which has been implanted in them . . ."

<sup>45</sup> Nevertheless, this writer opposes equating the two, for the reason stated in the last paragraph of this article.

<sup>46</sup> *Supra* n. 42.

course prevents the procreation of children and thereby deprives marriage of . . . its most important object . . . Certainly the result of the defendant's conduct in the instant case was the same as the result of . . . refusal to have any intercourse. . .<sup>47</sup>

The *Kreyling* doctrine remains the law in New Jersey<sup>48</sup> and may well achieve acceptance in some of the other jurisdictions which treat a wilful refusal to have sexual relations as desertion if continued for the period specified by the desertion act.

Although a few states deem the prolonged and unjustified refusal of coitus to be cruelty justifying a divorce,<sup>49</sup> there are, to date, no reported decisions granting a complainant a divorce on the ground of cruelty solely because the respondent conditioned coitus upon contraception. It therefore appears that the following quotation is applicable to all American jurisdictions:

The avoidance of procreation of children by one spouse over the objections of the other, or the refusal of one spouse to engage in sexual intercourse unless contraception is practiced does not authorize the granting of a divorce on the ground of cruelty . . .<sup>50</sup>

However, there is good reason to believe that refusal of uncontracepted intercourse will be considered cruelty if coupled with other objectionable acts.<sup>51</sup>

To summarize, in England a spouse no longer can obtain an annulment on the ground of "wilful refusal . . . to consummate the marriage" merely because his mate insists upon the use of contraceptives or the practice of *coitus interruptus*. This ground is not an express cause for annulment or divorce in any American jurisdiction. In England a spouse cannot have his marriage annulled on the ground of fraud because his partner falsely promised—expressly or impliedly—before marriage that the couple would have children afterward; but in most Ameri-

<sup>47</sup> *Id.*, at 803-04 of 23 A. 2d.

<sup>48</sup> The *Kreyling* rule has been restricted slightly by the subsequent case of *Kirk v. Kirk*, 39 N. J. Super. 341, 120 A. 2d 854 (1956), which held that plaintiff must prove by clear and convincing evidence that he strongly objected to defendant's conduct (the latter's insistence upon the taking of preventive measures) throughout the statutory desertion period. In the *Kirk* case the petitioner (a wife) was denied a divorce for failing to meet this requirement.

<sup>49</sup> 17 Am. Jur., Divorce and Separation § 80 (1957).

<sup>50</sup> *Id.* at § 81.

<sup>51</sup> 4 A. L. R. 2d 227 (1949), and the English case of *Cackett v. Cackett*, *supra* n. 21.

can jurisdictions such an annulment is available under these circumstances.<sup>52</sup> In at least one state (New Jersey) a husband or wife can procure a divorce on the ground of desertion if his (her) spouse unjustifiably conditions sexual intercourse upon contraception for the statutory desertion period; however, this is not true in the great majority of states or in England. And finally, the prolonged and unjustified refusal of uncontracepted coitus is, by itself, considered cruelty in neither England nor the United States; but if the refusal is accompanied by other objectionable conduct, a divorce for cruelty may be obtainable.

Notwithstanding our society's wide acceptance of birth control, it seems evident that an annulment for fraud should be available to one whose mate falsely promised to have children following marriage. It also seems apparent that an annulment for fraud is warranted where the promise was merely implied, for most persons assume—in the absence of contrary indications—that their prospective spouse intends to have at least one or two children. However, it does not appear rational to grant a divorce for desertion merely because there has been a long-continuing refusal to bear offspring, since a persistent refusal to have children bears little resemblance to an abandonment of one's spouse. To hold that a prolonged denial of all sexual intercourse constitutes desertion represents a sufficient stretching of the desertion concept. Finally, it does not appear desirable to make a divorce for cruelty available to a husband or wife in this kind of fact situation. If the complainant has been deceived by his mate (with reference to the latter's willingness to have children), then an annulment for fraud is usually procurable, and if he has not been deceived, then his spouse's conduct cannot reasonably be deemed cruel.

---

<sup>52</sup> 4 Am. Jur. 2d, Annulment of Marriage § 17 (1962).