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The Justices And Masterpiece Cakeshop: 18th Time A Charm?

By **Dani Kass**

Law360, New York (June 15, 2017, 10:50 PM EDT) -- The U.S. Supreme Court's justices have been considering whether to take on a case pitting religious freedom against gay rights for an eye-popping 18 conferences, a delay experts say may be tied to dissent within the group, a new justice and the wait for a similar case to play out in Washington state.

It's not abnormal for the justices to relist cases, whether to get more information or simply to sit on the petition longer, but one legal expert placed Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission as having the second-highest number of relists he's seen. Vinson & Elkins LLP's John Elwood, who runs SCOTUSBlog's relist watch, said the only other case he could remember with a higher number had 26 relists.

Masterpiece is looking at whether a Christian business owner had the right to refuse to make a cake for a same-sex couple's wedding. In August 2015, the Colorado Court of Appeals found the business owner was not protected by the First Amendment, and said he violated a state anti-discrimination law. The baker **appealed in July 2016**.

It is worth noting that between Sept. 26 and Feb. 1, records or responses regarding Masterpiece were requested after two conferences and the distribution was twice rescheduled. However, the case has been distributed at every conference since Feb. 21, without any public action.

"Because much of this is cloaked in secrecy, it's hard to know what's going on," University of North Carolina School of Law professor Michael Gerhardt said, adding that any speculation is really "a question of being able to read the tea leaves."

Still, there are a few logical scenarios for what may be going on behind closed doors.

Dissent

The most likely possibility, experts say, is that the petition has been denied and at least one justice is writing a dissent. That could take a few weeks to write, and then other justices need to review it and decide if they want to sign on or even respond, each review adding a bit more time onto the process.

The justices may also change their minds based on that dissent or need to reconsider their positions, which extends the timeline further.

That process could take longer with a new justice jumping in, especially if he wants to write and add something to the case.

The first few relistings haven't been out of the norm, but Seattle University School of Law's Andrew Siegel said the last few weeks have been a surprise.

"It may be that there's a couple of opinions — one dissenting, one commenting, one explaining — and the exchange of those opinions is getting lost in the back and forth right now of the court's substantive business," Siegel said.

Justice Neil Gorsuch

Like nearly every issue before the court this year, this case is likely affected by having only eight justices on the bench, and then having Justice Gorsuch join partway through the year.

"Some of the other justices might have thought that he'd make a difference and worked to 'hold' the case for him. Or that one or more justices were working on a dissent from denial of cert and that that process kept the case in limbo until Gorsuch came on board. He could be a tiebreaker or not," Daniel Ortiz, director of the University of Virginia School of Law's Supreme Court Litigation Clinic, said in an email. "Usually you know what's going to happen when you see so many relists. With a new justice coming on, though, it's less clear."

At least one other case has been relisted 11 times, and that case — *Peruta v. California* — looks into whether the Second Amendment allows guns to be carried outside the home for self-defense.

"No one was surprised in these cases that they made it a couple weeks into the Gorsuch era, but people are surprised that they have not been resolved maybe a month ago," said Siegel, who clerked for Justice John Paul Stevens.

Up until a few years ago, the Supreme Court didn't provide lists of what cases were being considered in each conference, so the public wouldn't know if a petition was being actively discussed or just held, Siegel said. Comparing how many times Masterpiece has been relisted to cases before the Supreme Court made such information available "would be comparing apples to oranges," at least for the public, he said.

Additionally, as the Supreme Court term is coming to an end, opinions are likely higher on each justice's to-do list than cert petitions, Siegel said. If Gorsuch is catching up on any cases, he's most likely going to put ones where he has to decide on the merits first.

Arlene's Flowers

The justices may also be waiting for a cert petition, due in July, from a similar case out of the Washington Supreme Court before taking up the issue.

In February, the **Washington court ruled** a florist violated the state's anti-discrimination law by refusing to serve a same-sex wedding. Like in the instant case, the court ruled he's not protected by the First Amendment.

The justices may be waiting for an appeal in this case, either because the two could be consolidated or because this one is a better vehicle, experts said. It may have a "better fact pattern, or be better situated," Gerhardt said. It also could have a better set of attorneys, but in this case, both couples are being represented by the American Civil Liberties Union and both businessmen by the Alliance Defending Freedom, among other co-counsel.

Justice Anthony Kennedy in April extended the time for the florist to file a petition until July 16. While the justices don't let argued cases carry over into the next term unless they're going to be reargued, the pending petition could carry over.

"It's probably just a perfect storm of all those reasons, but it's all possible that they're waiting for Arlene's Flowers or there's something anomalous that we just don't know about," Siegel said.

Representatives for Masterpiece didn't respond to interview requests. The ACLU declined to talk on behalf of the couple.

Masterpiece and its owner are represented by the Alliance Defending Freedom.

The couple are represented by the American Civil Liberties Union Foundation. The Colorado Civil Rights Commission is represented by Colorado's solicitor general.

The case is *Masterpiece Cakeshop Ltd et al. v. Colorado Civil Rights Commission et al.*, case number 16-111, in the Supreme Court of the United States.

--Editing by Pamela Wilkinson and Philip Shea.

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