# Good Advice is Hard to Find

By Christian Stewart, Managing Director, Family Legacy Asia (HK) Limited, Hong Kong

**This is an article about getting advice.** This advice might be related to drafting a will, establishing a family trust or a charity, or succession planning for the family business.

This is also an article about the private banking industry in Asia. In Asia, a high net-worth individual discusses his affairs primarily with his private banker or with a trust officer or a "wealth planner" working alongside the private banker. High net-worth individuals in other parts of the world, such as the US or the UK, Canada or Australia, would normally deal with a private client lawyer, or a specialised tax advisor or accounting firm. But in Asia, the vast majority of high net-worth individuals do not seem to have a trust or tax or "T&E" lawyer that they use. Indeed, they may not even have a family lawyer.

Asia is a big place made up of many different countries. Every country in Asia has its own culture, its own style when it comes to how people invest, and its own tax, legal and succession issues. Every private bank operating in Asia has a different set up, different goals and objectives, a different culture, and different policies, procedures and service offering. Accordingly, the following comments should be read as being of a general and broad-brush nature.

## Defining the Term "Trusted Advisor"

I attended a wealth management conference in Hong Kong in November 2008, where a succession of senior level managers from private banks in Asia said that the financial crisis meant that now is a time for the private banks in Asia to "go back to basics"; to make sure that they are listening to clients' needs and objectives; to spend more time on client relationships; to move away from selling "products" and move to providing "advice"; and that the private banks in Asia need to take on the role of the "trusted advisor" for their clients.

What does the term "trusted advisor" mean? It is easy for someone to say they are going to act as your trusted advisor but how do you tell if someone is really acting or is capable of acting as such a trusted advisor? Are there definitions of this term that we can helpfully turn to?

First, let us start with the distinction between someone who is selling you a product compared to someone who is purely giving you advice. You need to be careful to make sure that you look to the substance and not to the label. Beware someone who is purporting to provide you with advice, but in substance is there to sell you a product.

Second, there is an excellent book called *The Trusted Advisor* by David H. Maister, Charles H. Green & Robert M. Galford[1] that talks about the trusted advisor role. One of the interesting things about this book is that it contains a simple but powerful formula for working out whether trust exists in an advisory relationship. The Trust Equation is as follows:

$$T = \frac{C + R + I}{S}$$

T = trustworthiness
C = credibility
R = reliability
I = intimacy
S = self-orientation

Regarding the factor of self-orientation, *The Trusted Advisor* says: "There is no greater source of distrust than advisors who appear to be more interested in themselves than in trying to be of service to the client. We must work hard to show that our self orientation is under control. The most egregious form of self orientation is, of course, simple selfishness, being 'in it for the money'…."

Third, James E. Hughes Jr in his book on family governance, *Family: The Compact Among Generations*[2] analyses the role and characteristics of a trusted advisor to a family, what Hughes refers to as the "personne d'confiance", as distinct from a "personne d'affairs". Hughes writes: "Personnes d'confiance almost always begin their careers as personnes d'affairs. … They're [i.e. personnes d'affairs] generally persons providing families with financial products, goods and services, which the family needs for the dynamic stewardship and conservation of its financial capital. Generally, they are not in the business of seeking to grow the family's human and intellectual capital, nor are they personally energised by the family…. Once they have had success in serving the family's financial needs, some personnes d'affairs begin to experience a strong conviction that they could be of more service to the family if they could help with the growth of its human and intellectual capital".[3] So not every advisor is a "trusted advisor". To Hughes, one of the distinguishing features between these two different types of advisors is the question of timeframe. The personne d'affairs is there for the transaction, for the short-term. The personne d'confiance is there to help the family with its transitions, and to help the family think and plan for the long-term. The personne d'affairs has a time frame in mind of a quarter, or one financial year. The personne d'confiance has a time frame in mind of 10 years as a minimum, 25 years or 100 years.

When looking to define "trusted advisor", it is also helpful to think about a fiduciary relationship. After all, the term "fiduciary" comes from the Latin *fiducia*, which means "trust".[4] Where there is a fiduciary relationship, at common law, the fiduciary is required to act only in the interests of his principal. The fiduciary is not allowed to put himself in a situation where there could be a conflict between his duty to his principal and his own personal interests; a fiduciary is prohibited from serving two masters at the same time in relation to the same transaction; and a fiduciary is not allowed to personally profit from their position. In addition, any confidential information received by a fiduciary cannot be disclosed without consent. Lawyers of course have a fiduciary relationship with their clients. However it is my understanding that the relationship between a banker and their customer is not automatically presumed to be a fiduciary relationship.[5]

Sadly, it is not that uncommon to open up the newspapers in either Hong Kong or in Singapore or elsewhere in Asia and read a story about some ultra high net-worth individual who died unexpectedly in his mid-50s or early 60s with no will, no life insurance and with no estate planning in place. These news stories appear with such regularity that it would be fair to conclude that there are many, many Asian high net-worth individuals and families that have yet to consider even basic estate planning. Where are their trusted advisors?

Unlike the USA, the wealthy in Asia often do not have their own trust lawyer or general family advisor. If a client in Asia establishes a trust through one of their private banks, it is very likely the trust will be set up in one of the traditional offshore jurisdictions, and will be drafted or vetted by a trust lawyer from that particular jurisdiction. However, it would not be surprising if the client does not receive independent legal advice and relies solely on the bank's wealth planner to help them with the drafting of the trust. Why is this?

- If the client comes from a jurisdiction where, if they are seen to be wealthy, they and their family could be at personal risk of kidnapping or extortion, then that client may, out of fear for their privacy and safety, avoid going to a local lawyer.
- If the client comes from a jurisdiction in Asia with a civil law background, for example Indonesia, Thailand, Taiwan or Japan, then the vast majority of their local lawyers are not going to be familiar with international trust structuring.
- Many of the jurisdictions in Asia don't have estate taxes (though there are some that do) or other complicated tax issues that need to be addressed by high net-worth individuals. Examples of Asian countries that fall into this category include Hong Kong and Singapore, Malaysia and Thailand. In the absence of complicated local tax issues there is not that much need for specialised T&E lawyers.

The conclusion however is clear. Asian clients should get proper independent legal advice when they are drafting trusts and wills and making other estate planning arrangements. The advantage in using a lawyer is that they are a fiduciary – they owe the client an undivided duty of loyalty. And lawyers are accountable. However, even if there is an independent lawyer involved in the process of structuring an offshore trust, not every lawyer will qualify as a "trusted advisor" or a personne d'confiance. A lawyer who is just there to process the transaction is not a trusted advisor. You don't want a lawyer who is just going to respond to questions as they are put to them; you want a lawyer who is going to be proactive rather than simply reactive.

## The Private Banks and Wealth Planners

Most private banks in Asia provide trustee services. Private banking clients in Asia have come to expect these services as part and parcel of the overall private banking service. In many cases, the trust company and the trust administration is located outside of Asia in one of the traditional offshore finance centres. Many private banks will have one or more persons who are responsible for marketing and selling the bank's offshore trustee services (the "wealth planner"). In many cases, such trustee services are there for the clients of the relevant bank; they would not provide trustee services to a person who did not have a banking relationship with them (unless they saw the trustee services as the door opener for establishing a private banking relationship). In many cases, the focus of these trustee services is on the client's financial assets.

Until the financial crisis, the goal of many private banks operating in Asia using this type of model would likely have been to use the trustee services to win new private banking clients, to win new money to invest, and to ensure that the assets with the bank were "stickier" i.e. less likely to leave the bank.

The role of the wealth planner is also one that could vary significantly between different private banks. At one end of the spectrum, a wealth planner at a particular bank might simply be responsible for selling the bank's trustee services and offshore company management services, and perhaps also to arrange an introduction to an insurance broker. At the other end of the spectrum, the bank's wealth planner could be to help clients navigate complex tax issues, help them with trust drafting and provide them with holistic estate planning advice.

Many private clients in Asia are not in a position to tell which end of the "wealth planner spectrum" a particular private bank is situated – and the problem is that the bank in question may not tell you! The marketing materials of a particular private bank might talk about the role of the "personne d'confiance". But the substance might be the "personne d'affairs".

Also remember that while many private bank wealth planners may come originally from a professional background, they will caveat that the bank and its wealth planners are not qualified to provide their clients with tax or legal advice that the client can rely on. Nor would a bank wealth planner owe the client any fiduciary duties.

## Are you getting Good Advice?

If you are a wealthy individual in Asia and are thinking about using the wealth planning services from one or more different private banks, what are the important criteria to consider when making this decision? How can you assess the relative strengths in this area of competing private banks given that every private bank is different in its goals, culture, approach, services and policies? Here are some criteria that can be used as a starting point for this due diligence process:

- Confidentiality and privacy is always important for Asian clients. What is the bank's wealth planner going to do with your personal and business information? Are they going to share your personal estate planning information with your private banker? Are they going to pass on details of all of your assets and sources of income to the banker? Would it worry you if they did, or would that be ok?
- Do they provide a Chinese Wall? If you are setting up a trust with one private bank, and you are going to use the same trust to hold accounts with other banks, will there be a (genuine) Chinese Wall in place between the trust company and the same institution's private bankers?
- Will you receive holistic advice? Holistic means comprehensive advice on all your assets, both the financial assets, any real estate investments, as well as the business or operating assets. Many banks have a policy against holding non-financial assets in a trust structure. You should find out if the bank has any such restrictions on holding non-financial assets and if so, what do those restrictions entail? Even if they won't take your operating business or controlling stake in a listed company into a trust structure, will their wealth planners still help you plan for these assets?
- What type of follow up can you expect from the wealth planner? How often can you expect to meet them? In practice, estate planning is frequently an ongoing process. A good way to see if a bank is really, truly providing you with holistic estate planning advice is to see if they keep helping you once the financial assets trust has been set up and funded.
- Will the wealth planner provide you with purely objective advice? Say you want to set up a trust structure to hold the shares in your family company. You are talking to three different banks. One recommends a PTC structure. The second a VISTA trust. The third a Delaware directed trust. When you talk to a wealth planner from any one of these banks, are they going to be able to give you a detailed, specific and technical analysis of the pros and cons of these various structures, in a purely objective fashion, based on what is good for you? Or can they only explain the features and benefits of the structure that has been approved for their bank (which would be a product sale).
- Will you receive advice and solutions that are appropriate and tailor made for your individual circumstances? High net-worth clients need a bank that understands their objectives and issues and can offer relevant solutions. What if you have soft issues to deal with not structural issues? What if your real need is to set up a family council to improve family communication or to formulate a family

employment policy or articulate a "shared dream" for the future of your family business so that you can start a succession planning process? If you are dealing with a wealth planner who thinks a trust or other legal structure will help you solve these kinds of family issues, this criteria is not being met.

- What about "open architecture"? Is the wealth planner agnostic and willing to help you set up a trust with an independent trust company, or set up a private trust company? If you need a foundation or a guarantee company or a limited partnership structure and their bank does not provide such a structure, will they help you to set it up with someone else? If you need family business advice, or advice on a family office, or advice on executing a charitable strategy, will they refer you to an expert in the relevant field?
- If you are setting up a structure with a bank, the proof of the pudding is in the administration. It is important to look at the number of supporting staff, the experience of the supporting staff, where they are located, what type of caseload they are carrying, who and where your point of contact is going to be, how often you will get to see the trust officers or other administrators, and how often will your structure be reviewed.

We are yet to see whether there will be a widespread change in the investment culture in Asia as a result of the global financial crisis. Prior to the crisis many Asian investors had been in wealth creation mode and liked to make their own investment decisions. But those who have been lucky enough to survive the financial crisis with some wealth still intact must surely now be much more conservative, and they may be more wary of dealing directly with their private bankers.

In Hong Kong we have seen a significant swathe of private wealth wiped out as a result of a product known as a leveraged accumulator (now more popularly called "I'll kill you later").[6] It looks like no one was acting in the "trusted advisor" role to those investors who went into this type of product with no appreciation of the down side exposure involved if the stock market fell.

Because of the global financial crisis maybe there will be a shift towards making more use of independent expert advice to help a private client properly assess the risks, rewards and costs of any products, including trustee and wealth planning services, being offered by the different private banks.

## Family Governance

The focus of this article will now change to look at the topic of "family governance" advice. Over the last few years the topic of family governance has become a popular one for the private banks in Asia. Most Asian wealth is in the first, second or at most third generation, so Asian families in general are very interested to learn the secrets of success from those European or American families that have managed to last beyond three generations.

Family governance is about how a family works together to preserve and grow its human, intellectual, social and financial capital. It is about how a family makes decisions together regarding its jointly owned wealth and develops a shared vision and mission for the future, articulating and passing on the values that are unique to that family. It is also about improving trust and communication and finding ways to manage conflict. This would include clarifying expectations and ensuring there is fair process. It includes finding ways to create balance and encouraging family participation. It is about developing talent and succession planning and making sure that the family wealth is a benefit to the next generation rather than a burden or a curse. This includes training for the next generation on how to manage the financial wealth. It is also about planning for predictable transitions when taking into account the family life cycle and the life cycle of a family-owned business.

One of the key themes involved with family governance work is that where you have jointly owned family wealth you need to deal with the overlap between, on the one hand, a family system, with all of its dynamics, and on the other hand a business, management or commercial system.

Work on family governance might include setting up a family council, drafting the family constitution, preparing a family shareholders agreement and the preparation of a number of different family policies, for example a dividend policy and an employment policy. There seems to be a tendency in Asia for people to use the words "family office" and "family governance" interchangeably. Often the issue of addressing family governance is assumed to be part and parcel of the role of a family office. They can however be discrete topics.

What about the relationship between trust structuring and family governance work? There is overlap in so far as trust structures (for example incentive trusts, education trusts, and charities) are used as the tools by which family values are passed on. Trusts can be used to spell out a detailed succession of control and can be used to protect family assets and keep wealth jointly owned. But trusts and other legal structures are just one tool and their "form should follow their function" as Hughes notes in *Family: The Compact Among Generations*.

There are many aspects of succession planning that do not involve and not require legal structuring (e.g. training and mentoring of heirs). Do not assume that setting up a trust structure to hold the family business will automatically help solve all the family's succession and continuity challenges.[7]

There are a number of ways in which a private bank can help an Asian family in relation to the topics of family governance, family business or charity and philanthropy.

- Some private banks sponsor research into family governance and family business topics, conducted perhaps by a business school or a well known family business expert. A private bank can arrange a survey of its own client base, gathering information on how families have dealt with succession and governance issues. The conclusions from this kind of research can then be written up into a report or publication that can be provided to the private bank's client base.
- In general the private banks can be a good source of literature for their clients on family governance and family business topics, and on charity and philanthropy, including best practices. Many private banks in Asia organise seminars and events for their clients on such topics.
- If you are dealing with a European private bank or a US bank, then such a bank should have the advantage of having exposure to client families who have managed to successfully preserve either a family business or family wealth for beyond three generations. The bank can then bring this European or US know-how and make it available to its Asian clients, many of whom are still in the first, second or third generation of wealth.
- Training members of the next generation, for example through internships, on investment matters is very common.
- A private bank can refer their clients to an external expert in family business, governance or charity and philanthropy, depending on the area of expertise required, (i.e. An open architecture approach) where the client needs more than just education training or reading materials.

## Helping Clients to Execute is a Different Matter

Can and should the private banks and their wealth planners get into the business of helping their private clients to execute on family governance? Does it make sense for a private bank to help draft a family shareholders agreement, a family constitution or an employment policy? The reality is that a small number of private banks in Asia will go to this extent, at least for a small select group of special clients.

Every bank is different however and it is suggested that there are a number of reasons why it can be very difficult for a private bank to provide detailed family governance implementation advice to clients:

- If a bank has a culture or goals which are more focused on selling products, rather than giving advice, family governance work is definitely not a product and is not going to fit within that environment.
- If a bank has a short-term focus and its bankers and wealth planners are looking closely at their "KPI" month by month and quarter by quarter, family governance work does not make sense within this

timeframe. This type of timeframe does not permit you to go and spend two years working on a family constitution for one client.

- Is it scalable? Unfortunately it is probably not scalable work. In practice, it can often be very time consuming work requiring a high degree of tailoring and attention for individual families. Every family is different. This type of work can be very difficult because it is very emotional in its nature. Most clients don't like planning for their own retirement or being forced to make a decision as to whether they are going to treat their children equally or not. There is a lot of emotional resistance.
- Family governance work is advisory in nature. As such for a private bank, how do you make a connection between spending time e.g. working on a family constitution and increasing your investment revenue or increasing the amount of assets placed with your bank for investment? In practice, it can be difficult to require Asian clients to pay you for the advisory work by giving the bank additional funds to invest.
- Who would do the family governance work? If a private bank has a wealth planning team, which has been used to selling offshore trusts and companies then such a team may not have the right skill set to provide advice on family governance. Family governance work requires experience. It requires knowledge of many different topics ranging from family owned business theory, to family systems theory and a way to look at family dynamics; it requires knowledge of personal developmental theory, and much, much more! For the private bank that wants to enter the family governance advisory business this means either, going out and recruiting a specific subject-matter expert or committing to substantial re-education and re-training for their existing wealth planners.
- Finally, it is not about selling or setting up trusts or charities. If a private bank tries to use family governance as an excuse for selling a trust structure, the bank runs the risk of doing a disservice to the client family, as well as being recognised by the family as not having the necessary skill or experience to really help them with their issues.

## A High Barrier to Entry

Banks that focus on family governance as a topic for client events and publications have the opportunity to make a positive impact on a reasonably healthy number of client families within a short period of time.

On the other hand if a private bank wants to help clients over the long-term develop and implement family governance practices, to go from talk to execution, this must require a substantial investment and commitment on the part of the bank. It must also require the right culture within the bank.

Those banks that do already have the capability to help a client family implement family governance practices must have an advantage over others that aspire to do so. The complexity and specialised nature of this area means there is a high barrier to entry.

*www.familylegacyasia.com*

**END NOTES:**

1. *Free Press.*
2. *Bloomberg Press.*
3. *And so these persons begin the sometimes difficult transition from being a personne d'affaires to a personne d'confiance.*
4. *Equity, Tina Cockburn and Melinda Shirley, LBC Information Services.*
5. *Where there is a commercial relationship with a profit motive this is incongruent with a fiduciary relationship.*
6. *For a description of accumulator losses see SCMP 6 December 2008 "Fortune gone, but really it was just bad luck."*
7. *"Using Trusts to Safeguard the Family Crown Jewels", Offshore Investment October 2008 (Issue 190).*

Private clients and 21st century wealth management – feast or famine?" *February 2007, Issue 173*
ARCHIVE LINK offshoreinvestment.com/archive

## Family Legacy Asia

The goal of Family Legacy Asia is to help families in Asia preserve their family wealth. But this is not an easy task. Only one in three family controlled businesses successfully pass into the second generation and only about 12% last to the third generation. In Chinese there is a saying that wealth only lasts for three generations.

While the above statistics are well known, it would still be the exception rather than the norm to see a family in Asia with a written succession plan, a family shareholders agreement or a formal "Family Council".

While ultra high net worth families in Asia are starting to get more exposure to the concept of "Family Governance" and the advantages of having, for example, a written "Mission Statement" or "Family Constitution" getting help to implement these new concepts is still a challenge.

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| **Family Legacy Asia (HK) Limited** | Family Legacy Asia was established to provide Asian families with an independent alternative that is focused solely on helping ultra high net worth families plan and then implement best family governance practices. |
| **Clients** | We act for families that control a business or listed company, for family offices, and for private trust companies. |
| **Services** | Our services include structuring complex trusts (e.g. "incentive trusts" and "family banks") and family foundations; helping to administer private trust company structures; facilitating family meetings; and providing families with advice on Family Governance. |
| **Models Frameworks and Tools** | The preservation of family wealth requires families to engage in an ongoing strategic planning process. We can provide families with the models frameworks and tools they need to get organized, to facilitate communication, and to plan ahead in an objective impartial manner. |
| **Examples Of Our Experience** | Our experience includes facilitating family meetings, setting up the family council, creating the family foundation, drafting family shareholder agreements, and drafting the family employment policy. |
| **Our Approach** | We believe that ultimate responsibility for long term strategic planning for a family lies with the family itself. Our approach is to advise the family as to the proper process and the key tasks they have to undertake. We play the role of the independent project manager and facilitator. |
| **Our perspective** | We aim to bring a wide perspective that is intended to make families think beyond the trust structuring, the asset management decisions and the business management decisions. |

## Christian Stewart

Christian Stewart founded Family Legacy Asia to help Asian families preserve their family wealth for generations, by providing them with independent and objective advice on good family governance.

He has eighteen years experience in advising high net worth individuals and families on complex trust structuring, estate planning and succession matters, including fourteen years in Asia.

Before founding Family Legacy Asia, he was a Managing Director and the head of the Wealth Advisory Team in Asia for JPMorgan Private Bank for six years. In that capacity, he has worked with some of the leading families and Family Offices in Asia on family governance, private trust companies, and cutting edge wealth structuring techniques.

**Founder & Managing Director**
**Family Legacy Asia (HK) Ltd**

Family Legacy Asia provides advice on family governance and advice to business controlling families. It also specializes in trust and estate planning and private trust company ("PTC") structures.

**Managing Director**
**Head of Wealth Advisory,**
**Asia Pacific**
**JPMorgan Private Bank**

When he first joined JPMorgan Private Bank in 2002, its Asian Wealth Advisory team primarily focused on trust structuring. Christian transformed the services and skill set of his team by helping to bring to Asia JPMorgan's US know how and expertise on charity and philanthropy, family governance and family owned business succession, and applying this expertise for the benefit of JPMorgan's Asian clients. In his six years with JPMorgan, he grew their Wealth Advisory team in Asia from a team of 3, to a team of 8 professional Wealth Advisors.

**Tax Partner**
**Head of Trusts &**
**Private Client Group**
**PricewaterhouseCoopers**
**Hong Kong**

Prior to joining JPMorgan, Christian was a Tax Partner at PricewaterhouseCoopers in Hong Kong. In his eight years at PwC he helped found and lead its Trust and Private Client Group and helped PwC create a reputation as one of Hong Kong's leading firms in the trust planning area.

**Tax & Trust Lawyer**
**Private Practice**
**Adelaide**
**South Australia**

Christian started his career as a Solicitor in private practice in South Australia. During his 4 years as a Solicitor, he helped clients with tax, trusts, wills and estate planning work.

**Professional Qualifications**

He is qualified as a solicitor in the Australian State of South Australia, in England and Wales, and in Hong Kong.

In June 2002, he was named one of the top ten tax advisors in Hong Kong by the International Tax Review in its annual survey of leading tax advisors.