As technology continues to be intertwined in every aspect of our lives, estate planning and the law have been slow to adapt to technological advances. Wills, one of the most utilized and traditional legal documents in our society, have been especially resistant to modernization. With the increased ability to draft wills on computers, smart phones and tablets, testators (especially young testators) have begun to draft their own “electronic” wills. While a handful of states have enacted electronic wills statutes to specifically address the validity of electronic wills, most states, such as Pennsylvania, have yet to draft electronic wills legislation, thereby creating uncertainty as to the validity and future of electronic wills in the commonwealth.

Will Execution Requirements in Pennsylvania
In Pennsylvania, any person 18 or more years of age who is of sound mind may make a will. To satisfy the formalities of execution, a will need only be in writing and signed by the testator at the end of the will. A testator may sign his or her will “by mark,” so long as he or she makes his or her mark in the presence of two witnesses. Both the Electronic Transaction Act (see 73 P.S. §2260.101 et seq.) and the Electronic Signatures in Global and National Commerce Act (see 15 U.S.C. §7001 et. seq.) provide that, while a record or signature may not be denied legal effect or enforceability solely because it is in electronic form, electronic signatures are not valid in wills, codicils, or testamentary trusts. Thus, an electronically “signed” will in Pennsylvania does not comply with the statutory execution requirements of wills because electronic signatures are statutorily invalid for testamentary documents.

Estate planning practitioners hold will execution formalities sacred because these formalities serve many roles. First, they are designed to remind the testator of the significance of his or her will. By mandating execution formalities, testators must appreciate the magnitude of what they are executing. Next, execution formalities serve to protect the legitimacy of a will. While formalities will not eliminate fraud or undue influence, they may serve as a hurdle for a wrongdoer to overcome. Finally, formalities ensure that a testator’s intent is followed. They protect a testator from creating a “draft” will or an “unfinished” will that does not accurately reflect a testator’s testamentary intent.

Many jurisdictions have enacted a “harmless error” standard in order to validate wills (such as electronic wills) that do not comply with statutory execution requirements. States have enacted their own twists on the harmless error standard, but in general terms in a harmless error jurisdiction, an improperly executed will may be valid if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document to be his or her will. Pennsylvania, unfortunately, has not adopted a harmless error standard.

What is an Electronic Will?
Electronic wills, by their very nature, rarely comply with the execution requirements of “traditional” wills. Thus, electronic wills are an entirely new class of “wills” that will require us to reconsider our traditional views on the disposition of an individual’s probate assets at death. The term “electronic will” generally refers to one of three types of testamentary documents: offline wills, online wills and custodian online wills.

Offline Wills
An offline will is a will that is created on a computer or electronic device and stored locally on the computer, device or a storage device. For example, an offline will could include a document typed by the testator and stored on the testator’s computer, a document written on a tablet or smart phone with a stylus or electronic pen and stored locally on the testator’s device, or an electronic document stored on a USB

Continued on page 8
Electronic Wills
Continued from page 7

drive or external storage device. Unlike online wills discussed below, offline wills are not connected to the internet and are not available in an online medium.

Offline wills are not without their disadvantages. Offline wills are difficult to authenticate. Metadata can provide information such as the date of creation of the offline will, the date(s) of modification of the offline will, the date(s) of access of the offline will, or the identities of the users who accessed the offline will. However, this metadata alone cannot prove the identity of the individual utilizing the user’s profile in creating or modifying the offline will.

The potential for fraud is also great in the case of offline wills because there is currently no way of knowing whether the testator created the offline will or if someone logged in as the testator to create the offline will.

There is also the issue of whether the offline will was simply a draft or if the version found is in its final form. For example, if a testator types up his or her will in a Word document, is the version on the device the “final” version or is it a working draft of the will?

Electronic devices are subject to hardware problems. Documents stored on a computer, tablet or smartphone are only as good as the hardware on the devices. If the device is discarded, crashes, lost or hacked, a testator’s will could be lost or corrupted forever.

In order for the offline will to be found, the testator must tell someone how to access the documents, or the will may never be located.

Depending upon the laws of the state, documents stored on a computer or device may be legally inaccessible (or accessible only after probate). Accessing the computer or device could potentially be a violation of the Computer Fraud and Abuse Act (CFAA). The CFAA criminalizes the unauthorized and intentional access of computers and devices. The CFAA is silent as to its applicability to fiduciaries and whether executors possess the requisite authority to access a decedent’s digital assets and digital accounts. If an individual impersonates the decedent (by using his/her username and password), such impersonation is potentially a violation of the CFAA. Such an action is essentially “hacking” into the decedent’s account. Thus, if a will is stored electronically, how does the named executor lawfully obtain a copy of the will?

Online Wills

An online will is just like an offline will, but instead of being stored locally on an individual’s computer, phone tablet or external storage device, an online will is stored electronically and accessible on the internet through an online medium. For example, an online will could be stored electronically in cloud-based storage or on an individual’s server. These online mediums typically are subject to terms of service agreements and were likely never designed to store estate planning documents.

In addition to the potential disadvantages with offline wills, the “online” nature of online wills open them up to a number of potential issues. First, accessing an online will is potentially a violation of the Stored Communications Act (SCA). The SCA provides that a user or entity providing electronic communication service shall not knowingly divulge the contents of a communication electronically stored by the service provider (see 18 U.S.C. §2701 et. seq.). Such an unauthorized disclosure will subject the offender to criminal liability. A service provider may disclose the contents of an electronically stored communication without fear of liability if the originator or intended recipient of such communication provides “lawful consent” to the disclosure of such private digital information. The SCA is silent as to whether the “lawful consent” exception applies to fiduciaries who are attempting to gain access to the contents of a decedent’s electronically stored communications. In a jurisdiction that has adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) a decedent may provide lawful consent through his/her will. But if the executor hasn’t been appointed, then the service provider cannot disclose the will so that it may be submitted to probate. The service provider will face criminal liability if it discloses the will.

Next, most custodians have Terms of Service Agreements (TOSAs) that govern the use of their website, app or medium. TOSAs vary from custodian to custodian. Some address the death of a user, and some are silent as to the user’s data. Apple’s TOSA, for example, provides that upon the user’s death, the user’s iCloud account (and all of the contents) are deleted. Thus, if the decedent stored his/her will on an iCloud account, then by the time the named executor navigated through the SCA and the CFAA, the decedent’s will could be gone forever.

Finally, there are greater risks of storing a will online rather than offline. Unlike an offline will in which the storage is controlled by the decedent, the storage of an online will is completely dependent upon the company storing the will. For example, if a testator stores his/her will on his/her Dropbox account on Dropbox’s servers, the storage and access to the testator’s will is dependent upon Dropbox’s financial soundness. If

Continued on page 9
Electronic Wills
Continued from page 8

Dropbox goes out of business, a user may be limited in his/her ability to access his/her will.

Custodian Electronic Wills
A custodian electronic will, unlike an offline will or an online will, is drafted by or with the assistance of a third-party entity (typically a for-profit company) that will also store the document on its online platform. The third-party entity may offer a form of will to the testator, or it may generate the electronic will after the testator answers a series of questions. Once the testator’s will is generated, the testator pays the third-party entity to hold and store the testator’s will.

Just as offline and online wills have their pitfalls, custodian electronic wills pose their own set of potential problems. First, custodian electronic wills share the same potential issues present with online wills with respect to access of a custodian electronic will after the testator has died. Because custodian electronic wills are held by a third-party custodian, they are subject to the SCA and the TOSAs of the custodian. While a third party should create an online tool designed to provide a designated individual with access to the testator’s will at death, each third party’s online tool will likely be different.

With third-party custodians in their infancy, it is unclear how each individual custodian will address a family member’s discovery of a testator’s will at death. For example, if a custodian is holding the will, how does the executor discover the existence and location of the will? Are there procedures in place to notify the named executor, and what steps is the custodian required to undertake to find the executor or successor executor?

There is also the risk of the custodian going out of business. What procedures will be in place for the custodian to return an individual’s will either during the testator’s lifetime or at death when the custodian goes out of business? Without legislation to address these situations, there will be no uniformity amount custodians.

What procedures will be in place when a testator decides to change his or her will? What does the custodian do with the superseded documents — are they destroyed, returned to the testator, or kept on file with the custodian (at an additional cost)?

Finally, what ethical responsibilities does the third-party custodian have? Third-party custodians are not subject to the same professional responsibility requirements that estate planning attorneys adhere to (unless the custodians are in fact attorneys), and although both law firms and third-party providers engage in estate planning for financial gain, online providers may have ulterior motivations to drive revenue that place them at odds with providing their customers with the best possible plans for their needs.

The Future of Electronic Wills
While the legal community is mixed as to whether the advantages of electronic wills outweigh the (many) disadvantages, the reality is that electronic wills are not only coming, but they are here now. Individuals are using electronic wills and, as a result, a handful of states have already drafted or passed electronic wills legislation authorizing the use and validity of electronic wills. Anticipating these issues, the Uniform Law Commission approved and recommended for enactment the Uniform Electronic Wills Act (the E-Wills Act) this past July. The goal of the E-Wills Act was to allow a testator to execute an electronic will, while maintaining protections for the testator that are available to those executing traditional wills. The E-Wills Act also creates execution requirements that, if followed, result in a valid “self-proving” will. The E-Wills Act retains the traditional formalities of writing, signature and attestation, but adapts them to current technological advancements. For example, the E-Wills Act requires that a will exist in the electronic equivalent of text when it is electronically signed, thus precluding audio and video wills, unless transcribed prior to the testator’s signature.

States such as Nevada and Florida have already enacted electronic wills statutes, and, in light of the E-Wills Act, many states are following their lead and putting forth drafts of electronic wills statutes. Only time will tell whether these statutes have adequately addressed electronic wills and the potential pitfalls that face testators and their loved ones. Ultimately, states will need to address this probate revolution. In the meantime, strap on your seat belts…we’re in for a bumpy (electronic) ride!

Justin H. Brown is a partner in the Private Clients Practice Group of the Tax and Estate Department of Pepper Hamilton LLP, where he focuses his practice on estate, tax and asset protection planning and estate and trust administration.

Ross Bruch is a wealth planner in the Philadelphia private banking office of Brown Brothers Harriman & Co. He focuses on advising individuals and business owners on the preservation, growth and transfer of wealth. Ross was previously in private legal practice in Saul Ewing LLP’s Private Client Services group.